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Introduction to Japanese Law

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This course follows the Prof. Abe's course of the same title and tries to approach the Japanese legal system from a slightly different perspective. Emphasis will be on general subjects such as historical developments, constitutional schemes, judiciary and legal professions, dispute resolution, etc. rather than on specific topics of practical interest, which are to be dealt with in other courses. The instructor was born in 1934. His long personal experiences will be infused in the course hopefully to make the course historically interesting.

A. Historical and Comparative Basis of Japanese Law

It is important to understand the present Japanese law from a historical perspective. Japan experienced a radical legal reform at least twice in its modern history, firstly during Meiji period starting in 1868 under an influence of the European Civil Law and secondly after the defeat in the Pacific War under an influence of the American Common Law. The third wave of reform has visited Japan in the first decade of this century as the justice system reforms dealt with in C below.

(1) Tokugawa Law (1603-1868)

1. JOHN H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1936), VII Japanese Legal System (III) Third Period, pp. 479-525

2. DAN F. HENDERSON, CONCILIATION AND JAPANESE LAW – TOKUGAWA AND MODERN Vol. I (1966) pp. 157-169

(2) Meiji Westernizaion

3. Yoshiyuki NODA, Introduction to Japanese Law (1976, Translation by Anthony Angelo from French) Chapter III, Reception of Western Law pp. 41-62

4. Constitution of the Empire of Japan of 1889 (known as Meiji Constitution) (same as ABE MATERIAL)

(3) Post 1945 Reforms

5. Constitution of Japan of 1946 (known as Post-War Constitution) (same as ABE MATERIAL)

B. Nature of Japanese Law

Is the Japanese law fundamentally different from the Western counterpart? This is a question constantly asked by the students of Japanese law in and outside of Japan. Here is one of the answers.

6. J. C. SMITH, *Ajase and Oedipus: Idea of the Self in Japan and Western Legal Consciousness*, 20 U.B.C. L. REV. 341-377 (1986)

C. Courts and Judges

Japanese courts and judges share common features with European Civil Law countries. But there are some Common Law elements as well. In this area, a significant reform has taken place as a result of the Justice System Reform movement driven by the Prime Minister Koizumi from 2001.

7. Yasuhei TANIGUCHI, *Post-War Court System as an Instrument for Social Changes*, in GEORGE DEVOS ED., INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY (1984) pp. 20-40

8. Setsuo Miyazawa, Successes, Failures and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue, 36 Hastings Int'l & Comp. L. Rev. 313 (2013)

D. Legal Education and Professional Training

The post-War system of university legal education, National Legal Examination and professional training at National Legal Training and Research Institute has undergone a fundamental reform with the creation of "Law Schools".

9. Daniel H. Foote, The Trials and Tribulations of Japan's Legal Education Reforms, 36 Hastings Int'l & Comp. L. Rev. 369 (2013)

10. No material

E. Lawyers, Quasi-Lawyers and Foreign Lawyers

Practicing legal profession in Japan faces a challenge. Demand for a radical increase in number, deregulation, foreign lawyers, etc. are some of the issues.

11. Excerpt from Japan Business Law Guide: Introduction to Japanese Law by Veronica Taylor with Kyoko ishida (2007), pp. 47-60 [7-230 – 7-920]

12 Yasuhei Taniguchi, The Changing Image of Japanese Practicing Lawyers (Bengoshi): Reflections and a Personal Memoir, in Harry N. Scheiber & Laurent Mayali eds., Emerging Concepts of Rights in Japanese Law 223 (2007)

13. Bruce E. Aronson, The Brave New World of Lawyers in Japan Revisited: Proceedings of a Panel Discussion on the Japanese Legal Profession after the 2008 Financial Crisis and the 2011 Tohoku Earthquake, 21 Pac. Rim L. & Pol'y J. 255 (2012)

F. Dispute Resolution

This is a favorite subject in the study of Japanese law because law is but the ultimate means of dispute resolution. Kawashima's article is a classic in this field to be cited first when writing about Japanese law in English.

14. Takeyoshi KAWASHIMA, *Dispute Resolution in Contemporary Japan*, in ARTHUR VON MEHREN, ED., LAW IN JAPAN pp. 39-72 (1963) ABE MATERIAL

15. Tom Ginsburg & Glenn Hoetker, The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation, 35 J. Legal Studies 33 (2006).

15bis Yasuhei Taniguchi,The Development of an Adversary System in Japanese Civil Procedure, in Daniel H. Foote ed., Law in Japan: A Turning Point, p. 80 (2007)

16. Aya Yamada, ADR in Japan: Does the New Law Liberalize ADR from

Historical Shackles or Legalize It? 2 Contemp. Asia Arb. J. 1 (2009)

G. Constitutional Review and Constitutional Issues

Constitutional review system created by the post-War Constitution has enabled the Supreme Court to create a significant body of constitutional case law.

17. David S. Law, Why has Judicial Review Failed in Japan, 88 Wash. U. L. Rev. 1425 (2011)

H. Criminal Process

Criminal process is traditionally characterized by an extremely high rate of conviction and a low rate of incarceration. The whole system is now under fire when "the safe street of Japan" is becoming a myth and the new assessor (*saiban'in*) system has been introduced..

18. Hiroshi Fukurai, A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice system Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation, 36 Hastings Int'l & Comp. L. Rev. 517 (2013)

I. Administration and Business

Relationship between the government and business circle has been changing since the collapse of bubble economy.

19. Tom Ginsburg & Glenn Hoetker, The Effects of Liberalization on Litigation: Notes toward a Theory in the Context of Japan, 8 Wash. U. global Stud. L. Rev. 303-315 (2009)

J. Family Law and Women's Rights

Family law underwent a radical change after the War but the society could change only slowly. Now that the process of adaptation is completed, new issues face the family law. Slow development of women's right in workplace under the Equal Employment Opportunity Act is analyzed by Prof. Ishida, a female law professor.

20. Yasuhei Taniguchi in collaboration with Akiko Taniguchi, Succession Law and Inheritance Disputes in Japanese Family Court Conciliation, in Harry N. Scheiber & Laurent Mayali eds., Japanese Family Law in Comparative Perspective 119 (2009)

21. Kyoko Ishida, Promotion of Workplace Gender Equality and the Impact of Free Market Principles in Japan, Potter & Gibb, eds., Gender Equality and Trade Regimes: Coordinating Compliance (2012, The North-South Institute, University of BC, Canada)

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John Henry Wigmore, A Panorama of the World's Legal Systems (Washington Law Book Company, 1928; 1936 ed.

VII Japanese Legal System

(III) Third Period

7. The first great figure in the third period is that of the victorious Regent, Tokugawa Iyeyasu, in the early 1600's.[1] Under the Tokugawa dynasty of the Regency (A. D. 1603-1868), the nation reached a permanent state of political equilibrium, economic prosperity and social quiet,—comparable to that of France under Louis XIV. Feudal tenures continued, and the military class dominated. But the central federalized government of Tokugawa held unquestioned sway. It now proceeded to close the Japanese islands against all foreign intercourse and the fear of foreign invasion, and provided within its own extensive domains a model of administration for the fiefs of the greater semi-independent barons. The nation henceforth, for nearly three centuries, enjoyed a complete peace, internal and external, unparalleled in any European country.

During that period literature and commerce flourished, and prosperity prevailed. The activities of commerce [480] developed all the expedients and principles of European commercial life. Bills of exchange and banks, the clearing house and the produce-exchange, the promissory note and the check, the insurance-policy and the bill of lading, the chain-store and the trade-guild,—all these features of advanced commercial life are seen reflected in the legal records. Even the clearing-house check, and "future"

sales on the rice-exchange, are found. How many of the germs of these devices had been originally imported from China, cannot be told. But at any rate the technique of commerce had developed far beyond that of Athens, the most advanced commercial state of ancient times, and at least on a par with that of the then contemporary Europe.

8. Naturally, the native legal talent for law and order now also found its opportunity for development. This took place under the control and guidance of the Regent's Supreme Council. Iyeyasu obliged the great barons to spend a part of each year under his sight in Yedo, his new capital (now Tokyo); and their castle-like mansions and parked estates were a notable feature of that city.[11] And though the great barons, when at home in their own provinces, were allowed to retain local jurisdiction in legal matters (for they had their own courts, like the English courts baron), yet they were virtually under central control. The Tokugawa Supreme Court at Yedo was [481] given a federal original jurisdiction, for suits between parties from different provinces; a certain confirmatory jurisdiction was reserved for death sentences imposed on a vassal in the baron's court for political offences;[11] the barons' judges, on cases within their own provinces, often consulted the Tokugawa Court with a view to uniformity of law; and "in all matters" (says an edict of A. D. 1635) "the example set by the laws of Yedo is to be followed in all the provinces".

Under this regime, a copious stream of legislation and decision, during three centuries of a legal-minded dynasty, now built up the nation's legal system. Three or four outstanding features may be noticed.

9. In general, the laws and decisions were not publicly promulgated; they were circulated in manuscript for the use of officials only. "Not to be seen by any but the officials concerned", is the rubric at the end of the Code of A. D. 1790. This was perhaps on the Confucian principle that the responsibility of doing justice rests on the ruler, not on the people. "The way to govern the country is to secure the proper men; if there be capable men in office, the country is sure to flourish; if there be not capable men in office, it will go to ruin"; such is the literal quotation from Confucius that forms the closing article of the feudal Code of A. D. 1615. Another saying of Confucius was often repeated by the Tokugawa rulers: "Let the people abide by the law, but not be instructed in it". The ideal in the framing of a law was to guide the dull magistrate by its provisions, and to permit the wise magistrate to supplement it with his wisdom. And so the written laws were commands addressed to the officials, and not addressed to the people; therefore not needing to be generally circulated.

But the administration of justice was in the hands of a professional class, and to this class the laws were fully made known. There was a large staff of clerks and assistants for the Supreme Court at Yedo, and also for every one of the local magistrates in the counties, who virtually formed a special trained class with permanent tenure and a system of promotions. They were required to be skilled in the keeping of accounts, to have a general knowledge of civil and criminal law, and to be familiar not only with the customs of their own county but with those

of adjacent regions. There were numerous books of instruction for these magistrates—some printed, some copied by hand. They went under various names. "Code of Practice" (Koji-sosho-tori-sabaki-sho) is the name borne by a manuscript code dated A. D. 1791—the well-worn 'vade mecum' of some local judge." And there has survived doubtless many a "Manual for Trials" (Kohan-go-tei-sho) in the record-chests of the old county-families."

[484]

There were no professional advocates or jurisconsults (as in Greece or among the Mohammedans). Each party was supposed in theory to conduct his own case. To obtain payment of a claim on behalf of another, taking a fee, was unlawful. Nevertheless, many made a practice of thus acting for others, on the pretext of relationship with the party or of his illness and inability to attend; much money was made by such attorneys; but the fee was clandestine.

[485]

The trial method was identical with the one already developed in China and in continental Europe,—the inquisitorial method, which gives all responsibility to the trial magistrate. Japan was a country of law and order, for its criminal justice was stern and highly organized." The ideal judge of Oriental romance, endowed with piercing penetration into the hearts of litigants and a sturdy sense of equal justice, was a prominent figure, not only in the government, but also in the popular imagination. Oka Tadasuke, Baron Echizen, in the early 1700's comes down to posterity with a fame like Solomon's; there still circulates among the humbler classes of Tokyo

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next is [488]

a popular book containing the sensational stories of his wonderful insight and shrewd justice." One of the anecdotes handed down about him is almost the exact duplicate of Solomon's judgment between the two women who claimed the same child:

[*A Judgment of Oka Tadasuke.*] "About a century and a half ago, a woman who was acting as a servant in the house of a certain Baron had a little girl born to her. Finding it difficult to attend to the child properly while in service, she put it out to nurse in a neighboring village, and paid a fixed sum per month for its maintenance.

"When the child reached the age of ten, the mother, having finished the term of her service, left the Baron's mansion. Being now her own mistress, and naturally wishing to have the child with her, she informed the woman who had it that she wanted the child. But the woman was reluctant to part with her. The child was very intelligent, and the foster-mother thought that she might get some money by hiring her out. So she refused to give her up to the mother. This of course led to a quarrel. The disputants went to law about it; and the case came up before Oka Tadasuke, then Magistrate of Yedo.

"The woman to whom the child had been intrusted asserted that it was her own offspring, and that the other woman was a pretender. Oka saw that the dispute was a difficult one to decide by ordinary methods. So he commanded the women to place the child between them, one to take hold of its right hand and the other of its left, and each to pull with all her might. 'The one who is victorious,' said the Magistrate, 'shall be declared the true mother.' The real mother did not relish this mode of settling the dispute; and though she did as she was bidden and took hold of [458] the child's hand, she did what she could to prevent the child from being hurt, and slackened her hold as soon as the foster-mother began to pull, thus giving her an easy victory. 'There!' said the foster-mother, 'the child, you see, is mine.'

"But Oka interposed: 'You are a deceiver. The real mother, I perceive, is the one who relaxed her grasp on the child, fearing to hurt her. But you thought only of winning in the struggle, and cared nothing for the feelings of the child. You are not the true

mother;' and he ordered her to be bound. She immediately confessed her attempt to deceive, and begged for pardon. And the people who looked on said, 'The judgment is indeed founded on a knowledge of human nature.'"

Though the governmental codes were compiled in the form of instructions to officials, it must not be supposed that the laws were secret in any sense. The ordinary trial courts were open to the public. New or standard penal laws were posted on public placards at the cross-roads. The laws of land tenure and family succession were founded on notorious custom. And each village had its own written code of rules for local affairs;[11] this was read aloud by the district magistrate on the first day of each year, and then signed by every householder. It corresponded somewhat to the "keuren" of the Netherlands and the "handfest" and "weistum" of Germany at an earlier period.

10. Another fundamental feature of the system was the principle of conciliation,—the principle so prominent in Chinese justice (*ante*, Chap. IV), and here again (if not a general Oriental trait) a result of the Confucian philosophy imported a thousand years before.

The principle of conciliation resulted thus: Every town and village was divided into "kumi", or companies of five neighbors, the members of which (somewhat as in the Saxon frankpledge or frithborg), were mutually responsible for each other's conduct. In case of a disagreement between members of a company, the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as

at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the company would meet and consult over the case. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him socially; this usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or company. A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. If even the company-chief could not settle the matter, it was laid before the higher village officers, the elder and the headman. In fact, the chief village officers might almost be said to

form a board of arbitration for the settlement of disputes; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring
[492] headman. If the headman was unable to settle a case, it was laid before the local magistrate, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity.

When a case finally came before the magistrate for decision, it passed from the region of arbitration, and became a law-suit. From the magistrate it might pass to the higher courts at Yedo. But even when the case finally came to the magistrate's court, it was not always treated in the strictly legalistic style familiar to us; the spirit of Japanese justice dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

A few selections of actual cases will give a better idea of this conciliatory justice than any number of generalizations. The following documents are from public records, not quite a century old, belonging to a village some eighty miles from Tokyo, lent from the family-chest of an old
[493] deputy-magistrate.[8] The first document explains itself:

[*A Conciliation Case.*] "Bond offered to Haikichi and Tsubei. My son Sutegoro, on the occasion of a festival at the Zoko temple on the 28th of last month, wounded you and your son Tsubei in a quarrel. We are distressed at hearing that you are to take the matter into court, for my son's punishment would doubtless be severe. We asked Wahei, representative of the farmers of this village, and Tomoyemon, of Hatta village, to mediate and to ask your pardon. We are grateful to you for having extended it, and now promise not to suffer the said son Sutegoro to live in this village hereafter. He has already fled the village, dreading the consequences of his conduct; but if he ever is found again within the village, he shall be treated according to your pleasure: we shall offer no objection to whatever you may do. We offer this document of apology, sealed by the chief of the company and by the mediator.

"Tempo, 11th yr., 8th mo., 3d day [1841].
Farmer Yobei, the parent.
Farmer Sujibei, his relative.
Farmer Isobei, Chief of company.
Wahei, Mediator.
Tomoyemon, Mediator, Chief Farmer."

The next tale is a longer one; for this case went as far as the magistrate:

[*Another Conciliation Case.*] "*Petition* to Shinomoto Hikojiro, Magistrate of Koma County. The undersigned respectfully represents as follows:—

"Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry

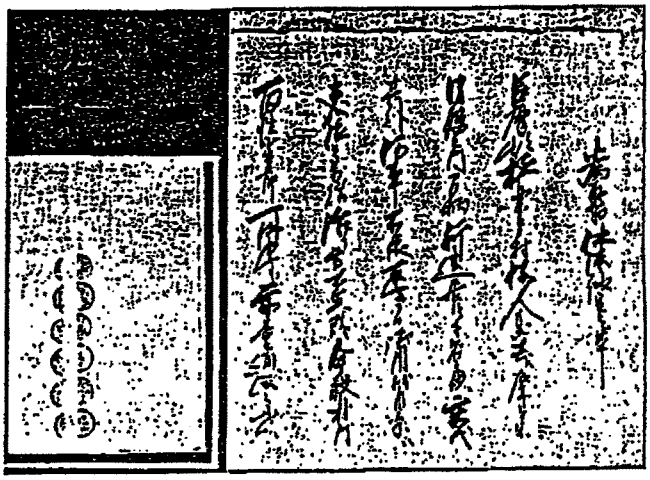
12

her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

"Tempo, 10th yr., 2d mo. [1840].
Farmer Uhei, Complainant.
Warrantor, Asayemon, Headman of Village.
Countersigned, Ichikawa, Deputy-magistrate of County."

"*Petition for Dismissing a Case.* In the matter of Cho, already reported, we beg to file the following petition for dismissing the case:—

"Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you



VIII. 19—PARTIES' SETTLEMENT-RECORD, A. D. 1779

The seals at the left show a mode of authenticating similar to the English indenture. The counterparts of the instrument are placed edge to edge, folded, and half the seal-mark remains on each

province and under the same jurisdiction, alleging that Kurohira Village was located at Ontake Mountain, that its inhabitants had since time immemorial been accustomed to make a good subsistence from the woodbote and other profits à prendre on the mountain-side; that nevertheless the right of taking wood for buckets and for goldsmith charcoal, included in the aforesaid profits, which Kurohira Village was entitled to take for its own use, was seized by inhabitants of Ontake Village, who prevented passage by the road known as Takashiba Road; and that, since a judgment formerly given on this dispute in the Shotoku period [A. D. 1711-1716] Kurohira Village was greatly suffering for lack of the means of livelihood, and now asked for restoration of its rights under the former custom.

will shut your eyes to the case, and not give it any further consideration.

"Tempo, 10th yr., 2d mo, [1840].
Ichikawa, Deputy-magistrate.
Farmer Uhei, Complainant.
Headman Asayemon, Warrantor.
Farmer Jirozayemon, Defendant.
Farmer Hichibei, his relative.
Farmer Masabei, his company-chief.
Headman Shirozayemon, Warrantor."

"*Approved:* Shinomoto Hikojiro, Magistrate of Koma County."

When the controversy was pushed beyond the stage of conciliation and reached the Supreme Court at Yedo, still the principle of conciliation left its marks: for the judicial record was usually completed by the filing of an instrument drafted in the name of the parties, reciting the issues, the facts found, and the terms of the decision, and signed by all the parties in token of their assent to the settlement.[1] The following record, marking the last stage of a long-drawn-out litigation over a rural right of easements and profits, illustrates this method:[2]

[*Record of a Case Appealed.*] "*Lawsuit of Kurohira Village, Kai Province, vs. Ontake Village, same province, over Profits à Prendre.* Anyei, 8th year, 10th month, 21st day [1779].

"Yamamura, Baron Shinano [Exchequer Judge], sitting Judge.

"Kurohira Village in Koma County, Kai Province, under the jurisdiction of Local Magistrate Kubo Heizaburo, brought an action before the said magistrate against Ontake Village, same county and

"This suit was disposed of by Heizaburo under the usual procedure and referred by him to the Supreme Court together with the documents and his report. By the Supreme Court a summons was then caused to be served upon both parties and the case was examined anew. It was found difficult to give a correct decision on the matter without a view of the land in question. For this purpose, Nakai Seidayu, another local magistrate, was sent to the said land, and he made an inspection thereof. Upon the report of Nakai Seidayu stating the result of such view and survey, a hearing was again had. Now, by instruction of Baron Matsudaira of Ukio [chief judge] the judgment is given as follows:

"In the judgment given on this dispute in the Shotoku period, it is stated that 'branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom'. But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along that road bearing any profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever. In testimony of obedience to this judgment by both parties, a certificate will be forwarded to this court.

"This judgment will be notified in writing to Ishii Saichiro, clerk of the magistrate Kubo Heizaburo. This case was referred

here by Kubo Heizaburo through the Exchequer Magistrate; there is therefore no declaration on file in this court.

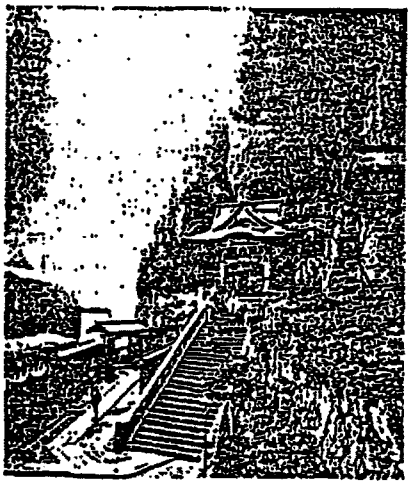
"Attest:

Kamiya Ruhachiro, clerk of the Court".

"Certificate to the Honorable Supreme Court:

"1. Our suit came to this honorable court; but owing to the location of the land in question, it could not, without further inquiry, give a correct decision, and Magistrate Nakai Seidayu was sent to the land, and the land was actually surveyed by him. Upon his return of the results of that survey, a new hearing was had.

"2. Kurohira Village as complainant alleged that since many years ago Kurohira Village had been in possession of the eight sections of land on Ontake Mountain and that certain other hillsides had belonged to it,[39] when they were under the jurisdiction of Matsudaira, Baron Kai; moreover, a hot spring commonly called Tonohira Spring had been in its possession; thus there had been many profits à prendre, such as timber for planks and for charcoal and mushrooms, the use of the hot springs, and the clearing of ground for cultivation. Every year, a quantity of mushrooms and a



VIII. 20—Haruna Mountain and Temple
This is a region similar to the one concerned in the lawsuit,—temple lands in a mountain region

17

tax amounting to 3 Kwar and 500 mon in Yeiraku coinage had been presented and paid in to the then holder of the fief. All the said profits were used to be carried away along the Takashiba Road to Kofu, through the Ontake Temple lane, and sold in the market thereof. In the course of the period Hoyei [A. D. 1704-1710] a dispute took place between Kurohira Village and Ontake Village which was finally adjudged by the honorable Supreme Court, a copy of which was indorsed on the back of the map of the land in question. Later on, in the course of the period Shotoku [A. D. 1711-1716] another suit was brought before the same court with respect to the profits à prendre of the same land, in which judgment was given by the court and again indorsed on the back of a new map of the same land. On that occasion, the map containing the terms of the first judgment given in the period Hoyei, and the old registry of land ownership, was surrendered to the honorable Supreme Court, and the lands of the Ontake Mountain and hot spring above referred to, and other mountain lands individually owned by the farmers, were declared to be temple property. Thus, the old communal rights of Kurohira Village, as well as certain individual titles of its farmers, were lost at one stroke, and the whole community of Kurohira was extremely distressed, so that it was thereafter compelled to seek the profits à prendre of the above description on the land above referred to, for urgent need of want of the means of subsistence, although it did not knowingly act contrary to the judgment given in the period Shōtoku. It was truly forced by its extreme necessities to cut down trees, break off branches, and even scrape together leaves, to make the handles of hoes, mallets, etc. All these articles were carried along the Takashiba Road to Kofu, where they were sold to the public. Pursuant to this custom, a group of men of Kurohira Village were passing along the Takashiba Road with the wood for bucket-handles and charcoal, in October, 4th year of Anyei [A. D. 1775] when the watchman of Ontake Village intercepted their passage and seized all their loads, to their great distress. Often before this, the people of Ontake Village had robbed

the men of Kurohira Village of the fruits of their labors; the foregoing was only one instance. Since the judgment in the period Shotoku, Kurohira Village has become gradually poorer and more distressed. On the other hand, the people of Ontake Village continue to open new sections for cultivation on the land in question, and they cut down standing trees at their pleasure.

"The plaintiff village further alleged that it was unaware of any ground for Ontake Village's conduct, which appeared to be inconsistent with the law. The plaintiff was in the habit of presenting mushrooms and paying a tax to the owner of the fief in conformity with former custom. Moreover, it prayed the honorable Supreme Court to recognize its rights in the section bounded by the Iwana river on the South, the Muroka meadow and the peak of Hiraiwa on the North, Ara river on the East, and the two peaks of the Ko mountain and of Hishi mountain on the West. The hot spring would thus, it was believed, fall within its territory. Further, as to the profits à prendre, the plaintiff asserted that it was entitled to carry its loads along the Takashiba Road without any obstruction by the people of Ontake Village.

"3. On the part of the defendant village, it was alleged that the judgment of the period Shotoku expressly forbade the villagers of the plaintiff Kurohira to take the aforesaid profits, or pass along the Takashiba Road therewith or to occupy the said sections, and that, therefore, the defendant village had posted watchmen there to watch for travellers. In October, 4th year of Anyei [1775] some men of Kurohira Village came along the Takashiba Road with loads of wood, and the watchman thereupon seized and took from them the wood, within the limits of their right. Defendant, Ontake Village, possesses a tract of land, granted by the government, yielding 240 bushels of rice; the product of which is allotted to the temple staff for the public expenses of Ontake Village. The section of land between the Main Temple Gate and the Upper Temple is temple-land, by the judgment of the period Shotoku, whose terms are in-

dorsed on the back of the map. Defendant, Ontake Village, has been duly observing the terms of the judgment. Plaintiff, Kurohira Village, owns one piece of farm-land, 26 bushels yield, located within the limits of the Ontake Mountains. But, in strict point of law, it has no title to any of the forest land therein. It did have, by virtue of the former judgment, the right to enter and take the branches and leaves of trees (as materials for hoes and clubs) and ferns and mushrooms, to be found in the forest lands, and it did so take them. Such forest profits are sufficient for its requirements. Nevertheless, it frequently attempted to exceed these rights contrary to the terms of the former judgment, and proceeded also to take articles not expressly permitted by the former judgment to be taken, and passed with them along the Takashiba Road, along which it was unlawful for Kurohira Village to pass. Thus, in spite of its lack of grounds, Kurohira Village unjustly claims that its people are entitled to use that road.

"As to the plaintiff's further charge that Ontake Village has unlawfully and surreptitiously cleared certain land for cultivation and cut down standing trees, the defendant Ontake denies any unlawful conduct on its part. What happened was merely that, at the repair of the temple, some standing trees were cut down, to be used only for that purpose, and after request made to the Temple Commissioner for instructions. In no respect has the defendant acted unlawfully.

"4. The claims of neither party in this suit are fully sustained by the honorable Supreme Court. We have now been given the following judgment: 'In the judgment given on this dispute in the Shotoku period, it is stated that "branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom". But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is

clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along the road bearing profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever.'

"We respectfully acknowledge these honorable orders. In case of our disobedience, we shall be liable to any punishment. In witness of our obedience, we have the honor to file this certificate with the honorable court.

"21st day, 10th month, 8th year of Anyei [1779]

"Plaintiff: Under the jurisdiction of the Local Magistrate Kubo Heizaburo, Kama County, Kai Province;

[Signed] Kurohira Village, by Tozayemon, headman, general representative,
Rihei, company-chief, general representative,
Taroyemon, Agent of the farmers.

Under the jurisdiction of the same office, same county, same province;

"Defendant:

[Signed] Ontake Village
Naito Iki, Chief Elder and Temple Custodian and general representative,
Kubodera Iyo, general representative."

11. The foregoing two features of Japanese justice were attributable to the borrowed Chinese philosophy of

life. But a third feature was indigenous, and has its nearest analogy in English legal history. From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's. It is by reason of this achievement of the Tokugawa dynasty that the Japanese legal system is entitled to be regarded as an independent one. A national law has been developed through precedents by a few other peoples also,—by the Hebrews, the Romans, and the Mohammedans; but in those three systems this was done by unofficial jurists, while in the English and the Japanese systems it was done by the official judges themselves.

For understanding the purport of two or three illustrations, the judiciary organization must be briefly sketched. The Regency domain (i. e. apart from the few large self-governing baronies) was divided into three jurisdictions,—metropolitan, rural, and ecclesiastical. To the Metropolitan Judge were brought all suits in which the plaintiff was a townsman; to the Exchequer Judge all suits in which the plaintiff was a countryman; and to the Temple Judge, all suits by a resident of the ecclesiastical lands. These three judges, sitting in banc, formed the Supreme Court. But the judges were not always the

same persons; because each of these posts was dual, held by two officials, each one of whom in alternate months sat in the Supreme Court (six days in a month.) At other times he officiated in his own jurisdiction. But even here he was more or less an appellate judge, because many or most cases had already been heard by a lower magistrate in each of these jurisdictions; so that there were two possible stages of revision. Original jurisdiction was taken by the Supreme Court in one class of cases only, viz., in suits between parties from different jurisdictions. Otherwise its jurisdiction was appellate only. But an appeal in the strict sense was allowable only on the ground of a denial of justice in the court below—an extreme and rare issue. Instead, however, the revisory function was supplied by frequent voluntary references of cases by the individual member-judges on doubtful points or on subjects calling for a uniform practice.

Such, in rough outline, was the judiciary scheme by which the law was now professionally developed under the Tokugawa dynasty.

The rules of procedure were thoroughly worked out, as befitted an elaborate judiciary system. The following set of rules for the use of maps and plans in land-title disputes will serve to illustrate; it is taken from the Code of A. D. 1742:

[*Rules of Procedure for Using Maps.*] "Upon the adjudication of boundary disputes the plans prepared by the courts of the boundaries of provinces and of counties shall be certified by the seal of the Council of State and those of the three Judges.

"Other plans embodying the judgment of a court shall be endorsed and certified by the joint seals of all three Judges . . . . . .

"In land disputes, the plans of both parties shall be produced; and whether it be the boundaries of a province that are in controversy or merely the boundary of a county, these shall be compared with the government map of the province; and if it be found that in the main there is no discrepancy between them, it shall not be necessary to send a surveyor before delivering judgment. As a rule surveys are not to be too freely ordered, but only in very complicated cases.

"In cases which cannot be decided without the holding of a survey, if the dispute has reference to the boundary of a province or of a county, the government inspectors and the magistrate shall be sent to make the survey. If the dispute relate merely to the boundaries of villages, the magistrate alone is to be sent. And even in disputes as to county boundaries, when the case is free from complications judgment may be given after a survey held by the local magistrate.

"In disputes about rice fields and dry fields and hills and forests and other private rights, when the maps and documents produced by the parties are not sufficiently clear to allow of a decision being given without a rectification of the boundaries, it shall not be necessary to report the case to the Supreme Court for trial, but a subordinate magistrate of the neighborhood is to be sent to carry out a rectification of the boundary."

Formal appeals were comparatively rare. But when the individual member-judge, acting in his own juris-

diction, was in doubt, he prepared a full statement of the case (much after the manner of an equity judge's findings), and submitted it to the Full Chamber for decision. The following commercial case, readily paralleled in our modern civic life, and raising an interesting question of partnership law, shows the technique of this method of decision:

[*Record of a Decision on a Partnership Claim.*]

"An Action by Kinsuke, of Susaki Village, Musashi province, against Toshichi and another, of Ofune-kuramaye ward, Fukagawa District, Yedo, before Baron Sado.
Dated Kokwa, V (Ape), 2, 4 [March 8, 1848].

"1. *Consultation* by Kusumi, Baron Sado, Exchequer Judge.
Kinsuke, dependent in the household of Sobei, elder of Susaki village, Katsushika county, Bushu province, in the magistracy of Saito Kabei . . . . *Plaintiff.*
Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa District, [Yedo] . . . *Defendant.*
Summoned for examination [as witness], Mosuke, renter of the shop of the five-men company, in Shimo ward, Reiganjima, [Yedo].

"The above action was brought before me, a summons issued for the 7th day, and trial had. The plaintiff Kinsuke had formerly lived in Tokoyama-dōbō ward, [in Yedo], dealing in sandals. The defendant Toshichi was some years ago in the employment of Heibei, Kinsuke's adoptive father. That Kinsuke had lent certain sums to Toshichi was clear; but the case could not be determined without examining the above Mosuke, renter of the shop of the five-men company, of Shimo ward, Reiganjima, [Yedo], and he was summoned and examined.

"The plaintiff Kinsuke pleaded as follows:—

"The alleged loan to Toshichi was made under the following circumstances. Toshichi, in the last Dragon year [1844] joined in the contract, long held by Mosuke, for the cleaning of the canal passing under Kyo Bridge, and undertook half of the length to be cleaned, agreeing to contribute to the expense, the total amount of which was to be about 3,237 'ryo'. But, his available money not being enough, he informed Kinsuke and requested him to make a loan, showing the indenture executed between himself and Mosuke, and agreeing that payment of principal and interest should be made from the Government-money received from time to time in payment during the progress of the cleaning. The plaintiff then from time to time, beginning with the 12th month of that year, lent various sums to the defendant, sometimes taking an instrument of loan, sometimes getting the defendant's seal in an account-book. But as the undertaking went on, the expense increased beyond the estimates, and the work began to go more slowly; and finally Mosuke, who had other undertakings of the sort on his hand and was pressed for money, proposed to the plaintiff and the defendant to take up jointly with him the cleaning-contract for the above place, just as the work stood. The plaintiff was informed of this proposal by the defendant, and agreed to it, the arrangement being that those sums which had been lent up to that time to the defendant should, with their interest, be left as they were; and any moneys which might be received [from the Government] for the undertaking should be divided among them without caring for settlement of the loan-account. In the 10th month of the next Serpent year [1845] a new indenture to this effect was made out by all parties, and Toshichi and Kinsuke entered upon the work. Kinsuke might have taken an active part with the others in watching the work, employing laborers, paying wages, etc.; but as the business was unfamiliar to him, he left all to the others. The cleaning went on; but after a time some spots were found where the difficulty of the work un-

expectedly increased the expense, so that the original estimate of cost was exceeded; and at last the plaintiff and the defendant were obliged to withdraw from the undertaking, and Mosuke proceeded alone with the remainder and ultimately finished it.

"The total amount of the advances made [by Kinsuke] in this undertaking was 1,920 'ryo' 1 'bu' odd, and of this sum 945 'ryo' had been paid, leaving a balance due of 975 'ryo' odd. Toshichi, indeed, had also made some contributions [to the expenses of the joint undertaking before Kinsuke entered], but these were small. It would be unreasonable, were the plaintiff alone to be the sufferer. Toshichi had invariably evaded with profuse apologies his requests for payment, declaring that he was quite willing to pay, but could not until the accounts had been settled with Mosuke; and yet he continually delayed the settlement of that account. The plaintiff himself had borrowed from different quarters the amounts advanced [to Toshichi], and being without excuse for his own creditors, had been obliged to sell even his house and furniture, and had become a dependent in the household of Sobei, a relative, of Susaki village, Musashi, where he now is. The plaintiff therefore demands a detailed account of the payment of all sums due.

"The defendant Toshichi pleaded as follows:—

"He had formerly been employed by Heibei, the adoptive father of Kinsuke. In the preceding Dog year [1838] he had left this position, and had entered the sandal business for himself, hiring the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa. Meanwhile Mosuke, renter of the shop of the five-men company in Shimo ward, Reiganjima, had taken a contract for the cleaning of the canal flowing under Kyo Bridge; but the area to be cleaned was larger than he was able to undertake alone, and in the last Dragon year [1844] he had asked Toshichi to become his partner and undertake half the length to be cleaned. The cost of the whole undertaking was to be 3,237 'ryo' odd. An indenture was drawn up between them, agreeing that whenever the Government-instalments should

be paid, they should be divided between them. Toshichi thereupon advanced 250 'ryo' odd for the work, and then, not having the money himself, he applied to Kinsuke to furnish further capital. The loans began in the 12th month of the same year, sometimes an instrument of debt being given, sometimes the seal being affixed in an account-book. The agreement was that payment should be made, principal and interest, at each time that a Government-instalment was received. The work of cleaning was begun in the 1st month of the ensuing Serpent year [1845], but it progressed slowly, though several advances of money were made. At this juncture Mosuke, who had taken other contracts of the sort and was pressed for money, proposed that the defendant and Kinsuke should take the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for hire of mud-scows, and take up jointly with him the cleaning-contract for the place already undertaken by Toshichi, just as the work stood. Toshichi informed Kinsuke of the proposal, and, a favorable reply being made, Mosuke gave notice to the authorities and obtained their sanction. The sums already borrowed by Toshichi, with the interest, were to be left as they were, the agreement being that whatever money might be obtained from the undertaking should be divided among the plaintiff, the defendant, and Mosuke. The former having thus become the partners of Mosuke, a new indenture was made out on the 20th of the same month, and the work was entered upon by them.

[Rubric.] "The above instrument was ordered to be produced, and read as follows:

'Indenture.

'Whereas the cleaning of the canal under Kyō Bridge has been undertaken by you, and one of us then agreed to undertake the cleaning of one-half the length, advancing his own share of the expense, and since the work has been begun and during its progress the Government-money has not been sufficient and large amounts of money have been spent; now

therefore it is agreed between all parties that we shall receive the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for the hire of mud-scows, and undertake the cleaning of the portion now remaining, and carry it on until completed and officially inspected; that we shall pay the wages of the bargemen, the expense of official inspectors' sheds and laborers' sheds, fees of superintendents, laborers' wages, etc., and shall make every effort to guard against delay; that we shall have no responsibility in regard to the two special places [left to your charge]; that on request we shall deliver to you your share of any extra payments [of the Government-money] which we may obtain for specially difficult portions; and that you shall leave the pumps, scaffolding, and other apparatus just as they now are, the same to be restored to you on completion of the work. Acting under the agreement thus privately made between us, we shall complete the cleaning not later than the last day of the ensuing 11th month, putting on a sufficient number of men and boats; and if this proves impossible we shall endeavor to cause as little inconvenience as may be. In testimony of this we hereby exchange instruments of the above effect.

'Kokwa, II [Serpent], 10, 20 [Nov. 19, 1845].

Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa.

Kinsuke, land-renter of Jutaro, in Tokoyama-dobo ward.
To Mosuke, Esq.'

"The above instrument being drawn up, the plaintiff and the defendant became the partners of Mosuke. But in a short time difficult portions were found in the area to be cleaned, and the cost increased largely, until the amounts paid in by Kinsuke by the 11th month of that year amounted to 1,920 'ryo', 1 'bu'; for the slowness of the work made it difficult to estimate the total cost of any portion

beforehand. Moreover, as the time for completion named in the contract had now expired, the two [Kinsuke and Toshichi] were obliged to give up the undertaking, the remainder of the work being undertaken and ultimately completed by Mosuke. Of the above 1,920 'ryo', 1 'bu', 945 'ryo' in all has since been paid at various times to Kinsuke, and the amount left unpaid is 975 'ryo', 1 'bu'. The above facts are admitted. But [there are reasons why the payment of this remainder should not be enforced]. Now that the plaintiff and defendant, after entering into the above contract and making out a new instrument in which they appeared as partners [of Mosuke] (who appears to have taken advantage of their inexperience in such matters and knowingly included the most difficult places in the portion assigned to them), have given up the undertaking on account of their miscalculation of the expense, it is difficult to see why Kinsuke should make the claim that he does. Of course the defendant occupies the position of a former servant of Kinsuke, and does not wish to appear guilty of a breach of the duty of devotion arising from that relation; but as his account with Mosuke is still unsettled, it is impossible for him yet to settle the claim of the plaintiff.

"Mosuke's statements were as follows: . . . [here his testimony is fully analyzed by the judge.]

"[Findings]: Such were the statements of the parties, [and the court has reached the following conclusions]: It is clear that the plaintiff had lent various sums to Toshichi, taking sometimes an instrument of loan, sometimes the defendant's seal in an account-book. But when the new instrument was drawn up, by which both parties became the partners of Mosuke, and [it was stipulated that] these advances should be left as they were, and that any money which might be received by them from the government for the undertaking should be divided among them on its completion, without caring for any settlement in regard to the above advances, this claim for the advances became merely a partner's contribution sub-

ject to the risk of profit and loss, and was no longer to be regarded as a debt due from one to the other.

"The parties declare that they have no fault to find with the proceedings as related above.

"Trial was held as above related. The parties disagree as to the validity of the claim, but it seems to me that the matter is one of profit and loss, and that the judgment should be that no order of payment should be made. I therefore consult you on the subject.

"Year of the Ape, 2nd month."

"2. *Judgment by the Full Chamber.*

"Kokwa, V (Ape), 2, 4 [March 8, 1848].

Before the Baron Sado, Exchequer Judge.

"An action having been brought by Kinsuke, of Musashi province, Katsushika county, Susaki village, in the district of Magistrate Saito Kabei, for arrears of a money loan of 975 'ryo', 1 'bu' odd, alleged to be due from Toshichi, renter of the shop of Kinjiro, of Fukagawa, Ofune-kuramaye ward, [the defendant, was summoned by a 7-day indorsement and trial was had. The judgment is that no further trial shall be had. It is plain that the plaintiff lent the above sum to the defendant, partly on instruments of loan, partly in the shape of book-debts. But when the new instrument was drawn up and the partnership was formed with Mosuke, renter of the five-men-company's shop in Reiganjima, Shimo ward, for the cleaning of the canal, the loan was left as it was, the parties agreeing that whatever moneys might be received for the cleaning upon its completion shouldbe divided among them, and that no further account should be taken of the loan in question, the advances thus becoming a partnership risk of profit and loss. The parties should be directed to hand up an instrument (of submission).

"Note, that as the case was brought up by the Exchequer Judge, there is no complaint on file."

The development of an independent system by case-law is amply revealed in the records of these two hundred and fifty years of Tokugawa precedents. Throughout that period of records, there is found not a single citation of a Chinese or any other foreign law-book, but only of Japanese laws and precedents,—a feature not true of any European people (except the Keltic) since Roman times. The underlying political philosophy was in origin Chinese; but the Tokugawa technique was Japanese. The system was self-developed.

In the following two typical cases, one judge consults another about a pending case; is answered by an opinion citing precedents, drawing a distinction and reserving the distinguished case for future decision; and then, a few months later, the distinguished case comes up on the calendar and the Full Chamber decides it,—all in the best traditional spirit of English case-law[k]. It will be noted that the search for precedents ranged back nearly a century:

[*Supreme Court Opinions on the Survival of a Money-Claim.*]

"Payment by a Debtor who has suffered Local Exile.

"Dated Bunsei, X, 11, 2 and 18 [December 19, 1826, and January 4, 1828].

"1. *Consultation by Sakakibara, Metropolitan Judge of Yedo.*

"Ought not the successor, if any, of a person who has suffered local exile, to undertake the debts of his predecessor; provided no

forfeiture of cultivated and residence land and of other property was made?"

"2. *Answer by Ishikawa, Exchequer Judge.*

"We acknowledge the receipt of your inquiry. We understand you to refer to the case where the defendant suffers local banishment, and we searched for precedents on that point, but found none. We discovered, however, a case where this court was asked, in Gembun, IV, 10 [November, 1739], whether a claim for money lent by one who was afterward sentenced to local exile was subject to extinguishment, in which a negative answer was given, although the contrary rule would apply if a confiscation of patrimony had accompanied the sentence, for this would include the money loan. A sentence of local exile has nothing to do with wife or son, so that the wife or the son may take the cultivated and residence land and other property, or, if there be none, the exile may be given the proceeds of a sale of the property. Now, as even the claim of an exiled creditor is not extinguished, much less should the liability of such a debtor. In the latter case, the name of the debtor's successor, if any, should be substituted by the court in the order for payment; and even if there is no successor, the court should revise the instrument (if confiscation has not occurred), as soon as the debtor has fixed his residence, and deliver it to him, ordering payment without fail. But in Kwansei, VI [1794], the defendant in a suit pending before your predecessor, Ikeda, Baron Chikugo, absconded, and the Full Chamber decided (there being no precedent in which the wife or son had under those circumstances been ordered to be substituted in the order for payment) that in the future in such cases no substitution should be ordered, but the order for payment should be annulled. According to this it would seem proper in the present case to annul the order for payment. Yet if such a rule be established, it would not be just, in our opinion. In ordinary actions on money loans, we have customarily allowed the plaintiff to name the successor as defendant, where [the debtor has died and] a successor is in

existence; and so in case of a pending action, when the absconder's successor is determined, it is but just to have his name substituted, and deliver it to him and order payment.

"If you agree with these views, we trust that you will lay the matter before the Full Chamber, so that our practice for the future may be determined.

"11th month"

"3. *Letter from Ishikawa to Sakakibara.*

Bunsei, XI, 1, 28 [March 13, 1828].

"You consulted us in the 11th month of last year as to the case of a debtor who has suffered local exile. We answered that we hoped to see a rule fixed for the future, not for that case only, but also for that of a debtor absconding pending action brought, and requested you to lay the matter before the Full Chamber, if agreeable. We shall be glad to hear your views on this subject, and beg to ask your advice."

"4. *Answer by Sakakibara.*

Bunsei, XI, 2.

"I consulted you, as you say, in regard to local exiles' debts, and your answer suggested that payment should be ordered, which in fact accorded with my own view, and I made order accordingly. You also noted the case of a debtor absconding pending an action before my predecessor, Ikeda, Lord of Chikugo, in which the Full Chamber decided not to order a substitution of wife or son, which seemed to require me in this case to annul the order of payment; and suggested that such a general rule would be productive of injustice, and that where a successor has been determined, we should order him to pay; and proposed a reference to the Full Chamber. But what I consulted you about was not the case of a debtor absconding pending action brought, but a first-seal case [that is, a case where the defendant is out of the jurisdiction of the Lower Court (in this

case by banishment), and the case must be sent to the Full Chamber for trial]; and we were both agreed, as to this case, that payment should be ordered, and I did so order. So that as to this point no reference to the Chamber seems to be required. As to the other case you spoke of, I am myself not yet decided, and I think it more suitable to consult the Full Chamber when the occasion calls for it."

This particular question, here left undecided, came up a few months thereafter; as the next precedent shows:

[*Supreme Court Opinion on a Successor's Liability.*]

"Dated Bunsei, XI, 4, 2 [May 15, 1828].

"1. *Inquiry by Saga, Baron Bugo, and Ishikawa, Imperial Steward, Exchequer Judges.*

"In cases where the defendant in an action for money lent or unpaid purchase-money has absconded, we have hitherto thought that we should not entertain the complaint, where the creditor sues the successor, because the whereabouts of the debtor may eventually be discovered and he may then be sued. This practice of refusing in such cases originated perhaps in the idea that, even though a so-called successor exists, either there has been no determination that he has in fact become the successor, or else, as sometimes happens, his house is extinct and one of his relatives assumes his estate. Moreover, the disappearance has taken place because of the debtor's adverse circumstances; so it seems doubtful whether a suit against the successor, supposing there were one, would be of any avail. In those cases where a debtor has died [pending suit], and his widow has succeeded him, we have been accustomed to order the suit to be reinstituted against her, describing her in the complaint as 'Haru, widow of Taro,' and alleging that a sum of money lent to the husband in his lifetime is due and unpaid. We have also made some investigations as to proceedings in similar actions against villagers.

In the last year of the Hare [1819], when Ishikawa, Imperial Steward, and Toyama, Palace Warden, were Lawsuit Judges in the Exchequer Department, there were a number of actions on money loans in which the creditor, because the debtor had died or was otherwise unavailable and had left no estate, was suing the surety. It was thought by the court that the clause of the instrument 'If the principal shall be in arrears, etc.,' signified only the case where the principal, in his lifetime, utterly fails to pay the debt; so that where the principal had merely absconded, and no successor exists, the creditor should wait until the whereabouts of the debtor was discovered [and then sue him]; and that therefore suits against the surety should thenceforth be entertained, the principal having absconded, only when the clause read 'If payment by the principal is in any way hindered, payment shall be made by the surety,' and not otherwise, even where the principal had died. The matter was referred to the Full Chamber, and they came to the following conclusion: 'Generally, when a debt is secured by the addition of a surety's name, the purpose of having a surety is that he shall attend to the debt if payment is not made; so that the addition of a surety is to no purpose if the court declines to order payment merely because there is no clause expressing the undertaking of the surety. The obligation of a surety, of course, lasts only during his lifetime [and does not descend to his successor], while that of a principal debtor who dies or absconds survives against his son, grandson, etc., if there be any patrimony inherited. But when a debtor leaves no such successor, the court should order payment by the surety, if, after examining the circumstances under which he became surety, it considers that he ought to be regarded as liable,—and this in spite of the absence of any clause expressly undertaking liability. In answer to the argument that we ought not to hold him liable without such a clause, it may be said that, if we should refuse [creditors would be loath to lend], the money circulation would diminish, and undesirable results would follow. It appears better to order payment by the surety without distinguishing between the clauses "If

the prificipal shall be in arrears, etc.," and "If the principal's payment is in any way hindered."'

"Such was the decision of the Full Chamber. In the present case, too, we think that it would be unjust if the creditor could not sue the successor, even though the debtor's non-payment is owing merely to his having absconded. However, if on this principle we decided that a relative who assumes charge of the estate and acts on behalf of the debtor in his business or in his cultivation is liable for all the debts of the fugitive as 'undertaker of the estate', then nobody would ever be found to perform such offices, and the result would be many waste estates. In such a case, therefore, the rule should be as hitherto, that the mere undertaker is not to be charged with debts. But henceforth, when a suit is brought by the creditor against the son or other alleged successor to the estate of the fugitive, the plaintiff should consult with the officers of the defendant's village, and obtain from them a certificate of identity of the defendant, bearing the names and seals of the village officers and certifying that the defendant has succeeded to the estate of the fugitive; and if the plaintiff can show such a document, he may go on with his suit.

"We think that the rule should be thus, and [we have the less hesitation in coming to this conclusion because] there can be no objection, since the order of the last year of the Horse [1822] respecting money loans, unpaid purchase-money, etc., on the part of village officers, to forwarding the necessary certificate of identity.

"We therefore make the above proposal. 4th month.

2. *Decision of the Supreme Court Full Chamber.*

"Decided in accordance with the proposal, Bunsei, XI, 4, 2, [May 15, 1828]."

The Tokugawa legal system, thus developed by native genius, might in the local course of events have produced

more distinctive fruits of independence. But at this juncture international history diverted its destiny.

(IV) Fourth Period

12. In 1853 the long international seclusion of Japan was broken. Commodore Perry came with his American fleet, and demanded rights of trading. Other nations followed. In these treaties the Japanese gladly conceded to the foreign nations the power and duty of extra-territoriality, i. e. jurisdiction over the foreign nationals, as the price for refusing general rights of settlement throughout the land. Meanwhile the powerful semi-independent barons seized the opportunity to rebel, denouncing the Regency for its subservience to the foreign nations. By the revolution of 1868, the political government shifted back, after seven centuries, from the Regency to the Emperor.

Japan now realized that the time had come for it to absorb all the science and arts of the Occident, from which it had been secluding itself. To this task the nation's talent devoted itself for the next thirty years.

This task accomplished, the national pride now became restive under the concession of extra-territoriality. In demonstration of its right to resume complete sovereignty over national justice, the Government undertook to re-

make the form of its law on Occidental models. In 1889 came the written constitution; Count Ito,[11] its inspirer and draftsman, ranks as Japan's greatest statesman of the last generation. The most able younger minds were sent abroad to master the Occidental systems of government and law. During the 1880's and 1890's, in Tokyo, thousands of aspirants in Tokyo schools studied the laws of France, Germany, and Anglo-America,—at first under imported law teachers, afterwards under the returned Japanese jurists bearing Occidental degrees.[12] Meanwhile, five new codes were prepared,—first drafted by jurists imported from France and Germany: then re-cast, in contents better adapted to Japanese institutions, by the new generation of Japanese jurists trained in the Occidental laws. These went into force in the last decade of the century. In the next decade, foreign extra-territoriality was relinquished.

VIII. 22—Count Ito Hirobumi
Framer of the Imperial Constitution of 1889

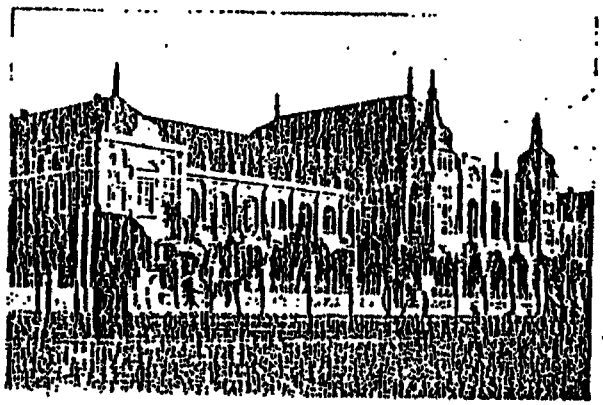
Tomii Masaakira
Dean of the Law Department
Imperial University

Hatoyama Kazuo
President of the Semmon
Law School

Kikuchi Takko
President of the Law Institute

Kaneko Kentaro
President of the Japan Law School

VIII. 23—Modern Law Professors



VIII. 24—Modern Supreme Court Building

From what has been sketched of the Tokugawa institutions of the third period, it is easy to see that the task, in these new codes, was not to create a legal system, but to revise an existing one. But the officials of the old Regency had politically disappeared; and there existed no body of professional juristic literature available for educating the new generation and for supplying the technical legal phraseology. Moreover, foreign expectations had to be satisfied. Hence, in framing the new codes, resort was had to the compact scientific materials of the Romanesque system from the continent of Europe.

39

The law was re-stated on the classification of the Romanesque law; the new legal language being constructed from the Chinese etymology; for Chinese literature had been to Japan what Latin had been to Germanic Europe.

The Supreme Court," for example, was now called "Tai-shin-in", Supreme Judicial Office, instead of "Hyo-jo-sho", or Chamber of Decisions; and the Code of Civil Procedure was termed "Minji Soshoho Seikai", instead of "Kori-sosho-tori-sabaki-sho". Criminal trials were conducted in court-rooms furnished on the Occidental model; and the bailiffs and police, though gentry ("samurai") by descent, everyone of them, now wore Occidental uniforms." The external modes of the West have been adapted by the native spirit of Japan to form a new composite whole.

VIII. 25—Modern Criminal Court-Room

This reorganization of the ancient native institutions to suit the times, welding together

West and East, signified hardly a new legal system, but the re-making of an old one, by a process with which Northern Europe was already long familiar, when Roman law was welded with Germanic law (*post*, Chap. XV). Japan was the first Oriental country to undertake it voluntarily. But it is this same process that is being repeated, in a later generation, in Siam, in China, in Turkey, in Persia; and in those also it has come as a 'quid pro quo' for the relinquishment of extra-territoriality and as a symbol of external assimilation between Orient and Occident.

To future historians must be left the analysis of the future result. The old Japanese artists, in their masterly woodcuts, were fond of depicting the celebrated mountain Fuji, one of the nation's (and the world's) scenic gems. The art of the modern photographer, too, may present it to us in another guise. The impressions are different. But the mountain is the same."

VIII. 26—Fuji Mountain

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Dan Fenno HENDERSON,

Conciliation and Japanese Law
-Tokugawa and Modern -, Vol. I

(University of Washington Press &
University of Tokyo Press, ca. 1966)

SUIT INNS

Throughout the proceeding in Nuinosuke's case we have made passing comments on the role of the innkeeper in the conduct of litigation in the Edo courts, and perhaps now with the case as background, we should consider more fully what the innkeeper's position and function really were. For he was indeed the only person connected with Edo litigation who might be regarded as a predecessor of the modern Japanese lawyer.[101] The inns at Edo and Osaka differed considerably in origin and functions, and we will confine ourselves to the Edo inns.

Initially the innkeepers situated in the vicinity of the Edo courts developed their legal expertise from the fact that they were regarded by the Shogunate as the houseowner for the itinerant litigants whom they might be housing, and in that status the innkeeper was required to sign documents and appear at the commissions with his tenant. Having observed the role of Chūbē's houseowner in the foregoing proceeding, we can appreciate that an innkeeper who catered to litigants and who was treated as their houseowner would go to court often and become quite knowledgeable in the procedures and practices at the courts.

It is next important to note that this quite ordinary Tokugawa status of houseowner, implying certain authority over any litigant tenant who might be lodging at the inn, grew into a specialized vocational status recognized by the Shogunate at least after the Temmei period (1781–88). Eventually the innkeepers of Edo organized into three guilds comprised collectively of about two hundred member inns located in Bakurō-chō and Kodemma-chō. Also apparently some from the Eighty-Two-Inn Group were scattered about what is now the Marunouchi district. They were granted a monopoly franchise for all of the suit inn business, and it seems that their inns catered rather exclusively to litigants at least from the Genroku period (1688–1704) until they were dissolved at the time of

[101] Besides the materials in Nakada Kaoru, "Tokugawa jidai no minji saiban jitsuroku," 3 *Hōseishi ronshū* 753–904 (1943), this account of the Edo inns is based on Takigawa, *Kujiyado no kenkyū* (1959); and Hiramatsu Yoshirō's review thereof in 12 *Hōseishi kenkyū* 242–43 (1961). Compare Okudaira Masahiro 奥平昌洪 *Nihon bengoshishi* 日本辯護士史 (History of the Japanese lawyers) (1914) and the following works which seem to be based on Okudaira: Ōsaka bengoshikai (ed.), *Ōsaka bengoshi shikō* 大阪辯護士史稿 (Draft history of the Osaka lawyers) (1937); Tōkyō bengoshikai (ed.) *Bengoshishi* 辯護士史 (History of lawyers) (1939); Nihon bengoshi rengōkai (ed.), *Nihon bengoshi enkakushi* 日本辯護士沿革史 (History of the development of the Japanese lawyers) (1959).

the Tempō reform (1842). Thereafter the individual inns operated separately and apparently catered to regular travelers as well as litigants.

In exchange for its monopoly protection granted by the Shogunate from roughly 1781 to 1842, the Edo inns performed the following four services for the Shogunate: (1) they delivered the summons issued by the courts; (2) they were responsible for the custody of persons Entrusted to the Inns *(yado azuke)* by the court; (3) they were required to supply food to persons entrusted to them; (4) they had the duty of providing fire protection to the various court buildings. The services the innkeeper supplied to his tenant-client were many and varied, and a review of them indicates that the innkeeper was a busy man. Apparently, however, the inn's legal services were concerned almost exclusively with civil litigation, and the tenant-clients were usually rural litigants. We can suppose that Edo townsmen and other urban litigants relied heavily on their town officials and the expert underlings in the town office to handle their litigation, since these officers were required to accompany the litigant to court anyway, as we saw in Chūbē's case. In Osaka the inns were apparently sometimes consulted even by litigants not lodging in the inn, but we have found no evidence to date that such a practice had developed in Edo.

A rather concrete idea of the nature and extent of the innkeeper's legal services can be obtained by surveying Buzaemon's activities on behalf of Nuinosuke. Buzaemon or Kōsuke, his assistant, personally drafted all of the legal documents in the course of the litigation—including petitions, receipts, notices, reports of failure of conciliation, and the final conciliation agreement—as well as all corrections required by the court. All of these documents were handwritten in brush in several copies, and sometimes this drafting was done under considerable pressure at the commission. The actual documents show a certain skill in anticipating and avoiding legal problems (e.g., the receipt of the summon). The innkeeper instructed Nuinosuke on the procedures that had to be followed to file a suit, get the endorsement, and serve the summon. He also led the tenant by the hand to the various offices and then accompanied him personally to the numerous hearings. Just to get the endorsement of each of the eight commissions in the rice case took two full days of trudging through the busy streets of Edo afoot. It took six days of scurrying about to get the approval of Nuinosuke's daimyō. For these reasons it has been aptly suggested that the innkeepers really ate with their feet.

At the hearings, the innkeeper went into court with Nuinosuke and sat on the gravel just back of him, where he could carefully watch the course of testimony and request a continuance if his client got himself into difficulty. Likewise, the innkeeper participated in the negotiation of twelve continuances and numerous conciliation sessions and did the paper work

involved, including five notices of failure of negotiations. In addition, Buzaemon was indeed an innkeeper and in that capacity during the course of the proceedings he furnished Nuinosuke with his room and meals, which were the chief source of income for the suit inns, although it can be surmised that they also received a success fee and clerical fee besides. The Edo inns were rather plain compared with those in Osaka, which also carried on a profitable business as fiscal agents for farmers. These farmers brought in their rice to be sold by the inn, which paid the farmer's tax for him to the lord in cash. The daily rate of an Edo inn was said to have been 240 *mon*, which was roughly equivalent to the rate of a low-class inn catering to the general public (not a suit inn) in Osaka of the same period.

One final point needs to be emphasized. Including both his legal and hostelry services, the innkeeper was an important part of the workings of civil justice in Edo, and it can be fairly concluded that without his services, the complexities of jurisdiction, procedure, and documentation in the Edo courts would have effectively barred the assertion of many claims, otherwise valuable under Shogunate law. In evaluating these officially authorized innkeepers and their role in the judicial process, it is important to distinguish them from the unauthorized Suit Solicitors *(kujishi)*, who were prohibited to operate and who conducted a marginal practice with frequent cases of bribery and swindling.[102] Indeed, confusion of the suit inn and the suit solicitor has tended to obscure the fact that the authorized suit inns, even if they had not acquired the attributes of modern professional ethics and sense of mission, were nevertheless hard working, skilled, and resourceful legal experts, whose services were quite necessary to the Edo courts and litigants, especially rural petitioners. Indeed, the Shogunate seems to have ordinarily referred to the inns as "Edo yado" in its regulation, thus avoiding adverse inferences associated with the "kujishi," which had been banned from the Genroku period (1688–1704) onward. The Tokugawa public, however, used the term *kujiyado* and modern Japanese historians have failed to distinguish between them and *kujishi*, and therefore they have tended to overlook this legitimate element of the modern lawyer's forebears in Japan.

CONCLUSIONS

In conclusion, several features of the Tokugawa civil trials deserve to be re-emphasized. Dispute-settlement powers were decentralized in the family, village, or fief. Such decentralization meant that, for litigants, the first hearing before the official or lord in charge of the territory was usually the last hearing; what "appeals" there were existed largely for officials.

[102] Takigawa, *Kujiyado no kenkyū* 8–10 (1959).

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Noda, Introduction to Japanese Law (1976),
Chapter III Reception of Western Law (part), pp. 41

CHAPTER III

RECEPTION OF WESTERN LAW

THE PROCESS OF RECEPTION

In 1853 Commodore Matthew Calbraith Perry of the United States Navy arrived in Japan to present to the Tokugawa government a letter from President Fillmore to the Japanese emperor, asking Japan to open its doors freely to foreigners once more. Perry was escorted by four warships. Though the tone of the letter was courteous, it left no doubt of the real intention of the United States, and the Bakufu was thrown into great confusion. Already a small number of Japanese had seen the reopening of Japan to the outside world as a necessity and had launched an impassioned campaign to propagate their ideas at the risk of losing their lives.[1]

The Bakufu finally took account of the fact that it was no longer possible to maintain its policy of *sakoku* and decided to reestablish relations with foreign countries. In 1858, the fifth year of the era of Ansei, Japan concluded commercial treaties with the United States, England, France, Russia, and the Netherlands, but in its ignorance of international law it accepted unfavorable conditions. These treaties, concluded as they were on the basis of an inequality of bargaining power, could not but hurt the pride of the Japanese people, and the Meiji government which succeeded the Bakufu was obliged to try to do away with them.

The Bakufu had, even before the arrival of Perry, begun to become unsettled, and the change it then made in its policy was decisive for its fall. In the end, after violent political and military campaigns between the partisans of the imperial court, who sought to strike down the Bakufu by means of the imperial authority,

[1] E.g., Yoshida Shoin.

and those who sustained the Bakufu, the imperialists won. They were a group made up mostly of *bushi* of the lower class of the four great *han* of the southwest: Satsuma, Choshu, Tosa, and Hizen. In 1867 the last shogun handed back his political powers to the emperor, and the system of military government that had lasted for seven hundred years came to an end. A new page in Japanese history began with the era of Meiji.

This revolution is called Meiji Ishin, and *ishin* means literally "here are new things."[1] From the beginning the new government had to grapple with a critical problem—what could be done to maintain the independence of the state against the imperialistic forces of the West? Were there other ways besides adopting capitalism? No better means could be found for preserving its independence, so the new government set to modernizing the social and political organization of the country on the principles of modern capitalism. This of course called for a restructuring of the legal system, but the reform of the law was an urgent necessity anyway, as the Meiji government wanted to obtain the revision of the treaties of Ansei and the other parties to the treaties demanded the modernization of the Japanese legal system as a condition precedent to that revision. The Japanese government did not have time to allow the law to be created spontaneously in response to the needs arising from the gradual transformation of the social structure to a capitalist society. The pressure was to concentrate on providing a new legal system whatever the social state of Japan might be.

The best way to obtain this result as quickly as possible was of course to follow the example of the advanced capitalist countries, which at that time were France and England. Japan chose the legislation of France as its guide because the Common Law

[1] It is a matter of dispute whether this historical event can be called a revolution. It all depends on the definition of revolution. According to the *Vocabulaire juridique* of Henri Capitant a revolution is "a popular movement of reasonable size which aims at overthrowing the rulers of a state by force and changing the organization of that state without observing the legal requirements previously laid down." The Japanese political reform had all the elements required by this definition with the exception of "popular movement." Since the Meiji Ishin brought about a change of the subjects of political power only within the same privileged class, it could not be qualified as a revolution. It is perhaps better to speak of restoration rather than revolution, though this movement, which was not in itself a popular one, did constitute an anticipation of the will of the people.

system appeared too complicated, whereas France had the five Napoleonic codes. Moreover the French codes had already been the inspiration for many countries that were modernizing their societies. From 1869 the Japanese government showed a great interest in the translation of the French codes. One of the members of the first imperial government, Soejima Taneomi, in that very year ordered Mitsukuri Rinsho, an intellectual with a good knowledge of French, to translate the Penal Code. Mitsukuri finished a section of his translation before the end of the year and the minister of justice, Eto Shimpei, who read the translation, was greatly impressed. So impressed in fact that he rather hastily conceived the idea of also having the French Civil Code translated and applied as Japanese law, and he thereupon ordered Mitsukuri to translate the Civil Code and all the other Napoleonic codes as quickly as possible. When he gave the order to Mitsukuri, Eto is reported to have said: "Translate those codes as quickly as you can and don't worry too much about any errors you may make." Mitsukuri worked diligently and accomplished his task in less than five years.

At the end of the period the Bakufu realized the necessity of having information on things foreign and created an institute for the study and teaching of European culture (*yogaku*). The main topic for study in this institute was European languages; among them Dutch was originally considered the most important because the Netherlands was the only European country which had permission to trade with Japan through the period of the *sakoku* policy. Mitsukuri had begun by studying Dutch. He learned quickly and was soon an assistant teacher at the institute. It did not take him very long to see how important French was, and he busied himself with learning it too. He had no particular knowledge of law, but all the learned men of the *yogaku* were encyclopaedists, and were regarded as omniscient. With this background Mitsukuri undertook the task of translating the French codes. It is easy to imagine the difficulties that he must have encountered in completing his task—he did not have the use of a good French-Japanese dictionary or the assistance or advice of any French lawyer. It is therefore surprising to know that the greater part of the current Japanese legal terminology

was invented, or at least suggested, by him. Even the two basic words "right" (*kenri*) and "obligation" (*gimu*) are attributed to Mitsukuri.[3] He was like an architect who had to begin by making his own bricks. One result is that his translations are highly defective to the eyes of modern jurists, though they were of invaluable assistance to the legal men of the time. As a judge of the Japanese Supreme Court said much later, "these translated codes were like a light shining suddenly through the dark night," and the judges of the time found in them the only legal bases on which they could properly base their decisions.[4] Although none of the translated codes was applied in Japan as Eto had wished, these translations were the first step to the reception of Western law. Eto gave up the idea of applying the civil code in a translated form, but he did not give up the idea of having a Japanese civil code as soon as possible. He immediately undertook to draw up a Japanese civil code and set up a committee for the purpose, with himself as president, and proceeded with zeal on a draft based on the French Civil Code.

[3] A biography of Mitsukuri gives us some idea of his extraordinary efforts: "At the time of his translation legal science was still in its formative stages and Rinsho had no knowledge of it anyway. He had no commentary, no dictionary, and no lawyer with whom to consult. He had great difficulty in understanding difficult passages in the French texts, and as he found many ideas in them which did not exist in the traditional Japanese conception of law, he was greatly embarrassed by the lack of words with which to translate the French. He sought advice from Sinological experts, but they were unable to advise him on adequate terms. He therefore had to invent the terminology himself, but his words were not readily accepted because they were not Japanese. Words such as *kenri* and *gimu* were borrowed from Chinese words which he found in the Chinese translation of an English text of International Law! Almost all the other legal terms, such as *dosan* (moveables), *fudosan* (immoveables), *sosai* (compensation), and *mishitajoken* (condition subsequent), were invented by Rinsho after much difficult research." Fumihiko Otsuki, *Mitsukuri Rinsho Kun den* [Biography of Mitsukuri Rinsho] (Tokyo: Maruzen, 1907), pp. 88–100 passim.

[4] Although it cannot be conclusively proved that the judicial decisions of the first years of the Meiji era were based on the Japanese translations of the French codes, there is good reason to presume that this was the case. The following expressions are found in the reasoning of numerous decisions: "It is obvious according to the general principles of law . . ."; "According to the nature of things . . ."; "For the reason that . . ."; "Equity requires that . . ." There is little doubt that the judges of the time in fact relied on the rules applicable in the French codes under the guise of general principles. Boissonade said: "The civil law judges of Japan, deprived of the sources of their ancient law, are most of the time unable to rely on fixed and certain customs, and are obliged to resolve their difficulties according to the principles of natural law which they find formulated in foreign codes which form a sort of common law of the West." Gustave Boissonade, *Projet de code civil de l'Empire du Japon* (Tokyo, 1882–1889), Vol. I, p. XXIV.

After the dramatic death of Eto in 1874 by capital punishment for a political crime, the drafting work was continued under the direction of the new minister of justice, Oki Takato. In 1878 a draft civil code in three books and 1,820 articles was completed, but it was not adopted because of its too faithful imitation of the French code.

The need to modernize the law was not limited to the field of civil law, but it was in the drafting work related to the civil code that the difficulties inherent in Europeanization of the law were most felt by the draftsmen. The government therefore decided to call in French jurists to help. In 1872 Georges Bousquet, advocate at the Paris Court of Appeal, came to Japan as legal adviser to the imperial government. He stayed four years and spent his time principally in educating Japanese lawyers at a special school of French law which was established on his advice in the Ministry of Justice.[5] In 1873 Gustave Boissonade, professor at the Faculty of Law in Paris, was invited by the Japanese government to take on the task of improving the legal system,[6] and he stayed in Japan for twenty years at the wish of the Japanese. He performed a great service, not only for the law and in the education of lawyers, but also in the political field.

Boissonade began his legislative work by drafting a penal code and a criminal procedure code. He finished both in 1877 in their French form, and they were then translated into Japanese for discussion and modification by the legislature.[7] The codes were adopted and promulgated in 1880 and came into force in 1882. They were the first modern codes to be applied in Japan. Until

[5] The Japanese translation of the course that he gave at this school of law is still extant. Bousquet participated in the drafting work for the civil code project and also suggested a section of the project which he drafted himself. After his return to France, he published a very interesting in-depth study on Japan, (*Le Japon de nos jours*, 2 vols.), which is essential reading for all those who are interested in Japanese history of the period.

[6] Concerning Boissonade, see Yosiyuki Noda, "Gustave Boissonade, comparatiste ignoré," published in *Problèmes contemporains de droit comparé*, ed. Naoʃiro Sugiyama, a collection of comparative law studies commemorating the tenth anniversary of the foundation of the Japanese Institute of Comparative Law (1962), Vol. II, p. 235f.

[7] The legislature was not as yet the Imperial Diet. The most important legislative organ before the creation of the Diet was the *Genrin* (Senate). Legislative bills were in principle discussed by this body, but the government could promulgate law without prior discussion in the *Genrin*..

then the Meiji government had formulated some rules relating to crimes, but it had publicized them only in the Chinese manner as directives to public officials.[8] The Japanese people as a whole had no knowledge of the principle of legality in crime and punishment until the codes drawn up by Boissonade were promulgated. The penal code remained in force until 1908, and the criminal procedure code until 1890.

In 1879 Boissonade proceeded with the task of drafting a civil code. He took charge of drafting the bill only insofar as it related to property law. Family and succession law were to be left to Japanese draftsmen because these subjects were closely related to the traditional mores of the country, though the influence of Boissonade was very great on those parts of the draft also. Boissonade based his draft on the French Civil Code, but he used comparative methods in its elaboration. He worked tirelessly, studying the case law and theory of French civil law, trying as far as possible to harmonize it with legislative, judicial, and doctrinal developments in other countries. Of his method of work, Boissonade said: "Doubtless what Japan adopts should not be French law purely and simply. I want your government to adopt our laws only to the extent that they have been proved good by the experience of three-quarters of a century. I will use every effort to incorporate in the draft the improvements that time has shown necessary and particularly those improvements that other Western jurisdictions have adopted in their wisdom and justified by their experience."[9] Thus inspired, he drew up the text and a commentary[10] on the draft civil code in French. "The drafting of the civil code was finished in April, 1889. It has thus taken us ten years although we had the temerity to

[8] More precisely, the government promulgated three penal codes between 1868 and 1873. The first code was officially known as the Provisional Criminal Code. The last two were applied concurrently until the promulgation of the Criminal Code of Boissonade. The third code amended and complemented the second without abrogating it. The influence of the French code, though slight, can already be seen in the third code. Though the last two codes were published by the government, the preamble to them declared: "All public officers are commanded to observe the rules of this code."

[9] Gustave Boissonade, "Ecole de droit de Jedo," *Revue de Législation* (1874), p. 511.

[10] The text and commentary have come down to us in Boissonade's monumental work, "*Projet de code civil de l'Empire du Japon*, 5 vols.

believe that five years would be sufficient."[11] The draft was translated into Japanese as it was drawn up. Then the translated portions were discussed and modified by the legislature.[12]

In 1889 part of the draft drawn up by Boissonade was adopted. It contained the book on "Property," the greater part of the book on "Methods of Acquiring Property," the book on "Securities Guaranteeing Obligations," and the book on "Modes of Proof." In 1891 the other part, that was entrusted to the Japanese draftsmen, was completed. It included a book on "Persons" and a part of the book on "Methods of Acquiring Property" dealing with "Succession." Together the two parts formed a single code which was promulgated in 1891, to come into force on 1 January, 1894. The code was not just a copy of the French code but followed a plan very similar to that of the Napoleonic Code, even though it was composed of five books instead of three. Unfortunately it did not come into force as envisaged. From 1889 there were indications of a movement hostile to the future application of the code. Lawyers divided into two camps and a violent debate, which has been compared with that which arose in Germany between Savigny and Thibaut concerning the need there for a code, arose between the partisans of the immediate enforcement of the code and those who favored a postponement. Articles, monographs, and manifestoes were published and distributed for and against the Boissonade code. Postponement was demanded because the Boissonade code did not sufficiently take account of the traditional customs and morality of the Japanese people. One of the most conservative of the jurists, Hozumi Yatsuka, professor of constitutional law at the Imperial University in Tokyo, went so far as to state that once the civil code came into force, loyalty to the emperor and filial piety would be at an end. The reasoning of the partisans of postponement was ill-founded, because the part of the code strictly relating to moral traditions had been drawn up by Japanese and took account of those traditions. Furthermore, it had been modified to a great extent by the committee and by the senate in order to adapt it even more to Japanese

[11] Ibid., Vol. I, p. VIII.

[12] The drafts were first discussed by the civil code drafting committee, then by the *Genrōin*, and finally were debated in the Privy Council.

tradition.[13] The political situation, however, favored the adversaries of the Boissonade code, and in 1892 the Imperial Diet, which had begun to function as a legislative body in 1890, voted for the postponement of the civil code.

This failure of the Boissonade code is usually explained as the result of opposition between the school of French law and the school of English law.[14] Outwardly this would appear to be so, but there is possibly a more important reason, a political rather than a legal one.[15] The postponement of the code was only a manifestation of the general decline in influence of French culture.

The 1868 Restoration was brought about by *bushi* of the lower class. They had occupied a lowly place in the feudal hierarchy, though they had nevertheless belonged to the privileged class. Their ideology had never been bourgeois, but they wanted a capitalist society. For this reason the government born

[13] For example, the first draft provided that a minor, man or woman, could not marry without the consent of the parents, but the Senate changed this provision to provide that every man and woman of no matter what age had to obtain the consent of parents to marry. The new civil code of 1898, which purported to be in conformity with the wishes of the partisans of postponement, demanded parental consent only for a man under 30 and a woman under 25. Boissonade himself said: "He [the French lawyer with responsibility for drawing up the draft of the civil code, i.e., Boissonade] submitted his work [text and commentary], bit by bit to the Japanese committee. The latter, having had it translated by those members who knew French and French law, sought to reconcile the new law with the old and often sought amendments for this reason, or else they made the changes themselves when the author was unable to accept them. This is to say that in spite of his reluctance, plurality of heirs was abandoned in favor of the maintenance of rights of seniority of the kind known under the former regime, with an absolute character as regards both moveable and immoveable goods and a generality of persons, such as had never existed in any European country." Boissonade, "Les anciennes coutumes du Japon et le nouveau code civil, à l'occasion d'une double publication de M. John Henry Wigmore," *Revue française du Japon* (1894), p. 12.

[14] English law was taught along with French law from the beginning of the Meiji era. The center of instruction was the Law Faculty of Tokyo University for English law, and the school of French law in the Ministry of Justice for French law. Besides these two schools there were several others which specialized either in French law or in English law. The students of the two different systems naturally formed groups of differing legal outlooks.

[15] It is worth recalling what P. Koschaker said: "Foreign law is not received because it is considered the best. What makes a legal system suitable for reception is rather a question of force [*eine Machtfrage*]. Reception relates on the intellectual and cultural plane, at least, to the extent to which the law benefits from a position of strength: Whether this strength still exists at the time in question, or whether there is a vivid recollection of it and the civilization it represents at the time in question, is an important political question." *Europa und das römische Recht* (München: Verlag C.H. Beck, 1947), p. 138.

of the Restoration, which was made up largely of these *bushi* of the lower rank, did not want the development of a bourgeois society. Instead they favored the formation of an absolutist state, but at the beginning the government was extremely weak. This government had succeeded somehow or other in bringing the *han* under the imperial power, but it was by no means certain that it could take strength from this situation in the immediate future. It was therefore obliged to seek the voluntary collaboration of the former *han* until it had consolidated its position. It was forced to appear democratic and even appeared to respect public opinion and to encourage discussions in public. One of the five articles of the imperial declaration promulgated at the beginning of 1868 says: "It is desirable to convoke public gatherings as often as possible for the purpose of discussing all important problems." And in the same year it proclaimed the fundamental principles of government in which the principle of the separation of powers was announced. In this milieu liberal ideas from the West quickly spread among the Japanese. In the first years of the Meiji era the works of Mill, Bentham, Montesquieu, de Tocqueville, and even Rousseau, to mention only the leading names, were well known.[16] People even discussed French and English philosophy.[17] Consequently it was quite natural that the legal ideas of France and England should also be received and that French law along with English law should have exercised a considerable influence on Japanese law.[18]

Inspired by liberal ideas, a political movement called the *Jiyu Minken Undo* (the liberal movement for human rights) started about 1880. It was supported by a large part of the populace, and it succeeded in getting the government to agree to the creation

[16] From 1871 to 1877 translations of Mill's essay, *On Liberty*, *Representative Government*, *Political Economy*, and *Utilitarianism* appeared; in 1873, *Theory of Legislation* by Bentham was translated into Japanese; a complete translation of *L'esprit des lois* was made in 1875; Rousseau was well known by the partisans of the *Jiyu Minken*, and his *Social Contract* had been translated into Japanese by 1882.

[17] "... the first two decades of the Emperor Meiji's reign saw a Japan to all appearances intoxicated with the strong wine of Western thought, techniques, and customs." Richard Storry, *A History of Modern Japan* (Penguin, 1960), p. 107.

[18] Numerous French legal texts were translated in the first years of the Meiji era. From 1870 to 1889 there appeared translations of the works of Laferrière, Demolombe, Bathie, Accolas, Faustin-Hélie, Mourlon, Ortolan, Bélime, Boistel, and Baudry-Lacantinerie among others.

of a national assembly. The movement was liberal in appearance only, for most of its supporters were discontented former *bushi* who had been excluded from political power. The government took steps against the movement both by oppressing it and by corrupting its leaders. The oppression was extremely violent and the leaders were easily corrupted, so the liberal camp did not last long.

Also about this time the government was beginning to feel strong enough to show its hand. Even in 1881, when it had submitted to the pressure of the liberal movement, it had secretly decided to draw up a constitution following the Prussian model to prepare for the opening of the national assembly which had been promised to the liberals. According to its idea the new constitution was to be granted by the emperor to his subjects, and for this reason the absolutist character of the Prussian Empire was more attractive to the Japanese statesmen than was the French Republic.

From 1881 on the absolutist character of government policy became more accentuated, and this political tendency was reflected at the legal level too. The decline in the influence of French law was only one of its aspects. Another aspect was the increasingly important role that German law was playing in the Japanese legal world.[19] Seen in this context the failure of the Boissonade code becomes more comprehensible, and it is significant that the year in which the first attack was made against the code was also the year of the promulgation of the absolutist constitution.

In 1893 a council for codification studies was set up, and within the framework of this council a law-drafting commission was appointed for the civil code. It consisted of three persons, Hozumi Nobushige, Tomi Masaakira, and Ume Kenkiro, all of whom were professors in the Faculty of Law at the Imperial University of Tokyo. Tomi and Ume had done their legal studies in the Law Faculty of Lyons and both had obtained their doctorates in law there. The commission was formally charged with the revision of the Boissonade code, but basically its job was to draw up a new code. The three commissioners proceeded to their work by dividing the labor. All the topics of the code were

[19] It is no accident that the translation of German works began about 1888.

shared among them, each choosing those topics in which he believed himself most knowledgeable.

Many foreign systems were consulted in this work, but particular reference was made to the two drafts of the B.G.B. (the German Civil Code). The commission had decided to give up the scheme of the French Civil Code and substitute it with that of the B.G.B. The code was divided into five books. The first three, the general part, the book on real rights and the book on obligations, were completed in 1895, and voted by the Diet and promulgated in 1896. The other two books, on family law and succession, were then drawn up with great prudence because the draftsmen had to avoid being in a position where they would be subject to criticism for not having taken proper account of traditional morality. The last two books were finished in 1898 and approved by the Diet, and the complete new Civil Code came into force on 16 July 1898.

How much did the new code differ from the Boissonade code? Those who had favored postponement of the Boissonade code wanted to believe that it differed substantially, and looking at form alone it could indeed be thought to be entirely different, for the method followed in its construction was German; but when the content is considered the story is different. The three draftsmen adopted many of the solutions given in the drafts of the German Civil Code, but they also retained many of the provisions drafted by Boissonade. What is more they sometimes accepted solutions other than those found in either the German or Boissonade codes. The new code was therefore somewhat eclectic. Articles 415–422, relating to damages for the non-performance of obligations, may be taken by way of example. Of these eight articles six were drafted on the basis of the articles of the code drafted by Boissonade supplemented by a study of the solutions provided in other European codes, such as the German, Swiss, Austrian, and Dutch. Sometimes the draftsmen of the new code were more faithful to the Code Napoleon than Boissonade himself. Article 420, relating to penal clauses, does not allow the court to increase or diminish the sum agreed upon between the parties. This is what the French Civil Code provides in article 1,152. Yet, in his code, Boissonade had admitted the possibility

of the sum being reduced. This example in itself is insufficient to give a total view of the new Civil Code, but it does serve to show that it was not a faithful imitation of the B.G.B.

The tendencies of the three draftsmen were as follows: Hozumi, *primus inter pares*, had been educated in English law but had also studied at the University of Berlin.[39] Ume and Tomi had been trained in French law. Tomi, who had not studied in Germany, thought that the German Civil Code was better than the French. Ume represented the French law school in Japan, although he too had studied in Berlin; he had been the most ardent of those supporting the immediate implementation of the Boissonade code. At the French Civil Code centenary celebrations in 1904 at the Faculty of Law at the Imperial University of Tokyo, Ume, who was presiding, stressed the influence of French law on the new Japanese Civil Code:

> Professor Boissonade, who was invited to come to Japan, finished his drafts of the Penal Code and Criminal Procedure Code first. Then he began drawing up a civil code. This code was completed and promulgated in 1890. It was in form a little different from the French Civil Code but its content was based entirely on the French Civil Code, with account having been taken of the modifications made to it by legal theory and case law. This code never came into force. The code that replaces it and that resembles the German Civil Code in form has often wrongly been believed to follow exclusively the pattern of the German code. In truth, however, it does not. The new code is based on the French code and other codes of French origin at least as much as it is on the German code.

The legislator devoted his main efforts to the drafting of the Civil Code, but other laws were produced too.

The drafting of the Commercial Code was carried out along with that of the Civil Code. The person in charge was a German jurist, H. Roesler. He began his work in 1881 with a study of the commercial laws of all civilized countries. Although he was

[39] He was therefore familiar with German law. Hozumi was very interested in legal philosophy, and his legal ideas took an evolutionist tendency under Spencer's influence. His thinking on the civil code can be found in his English work: *Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence*, 2nd ed., (Tokyo: Maruzen, 1912).

German his draft is based principally on the French Commercial Code. Roesler ended his work in 1884. His draft was discussed in the legislative commission created under the minister of justice in 1887, and in 1890 the Commercial Code was promulgated to come into force from 1 January, 1891. However, apart from the articles on companies and bankruptcy, for which there was a great economic need, its coming into force was postponed just as was that of the Civil Code. In 1893, in the interim period, a commission to revise the Commercial Code was appointed to the council for codification studies. This body drew up a new draft in two and a half years. The Diet voted the new Commercial Code in 1899 and it came into force on 16 June of the same year. This new code followed the German system with the subject matter allocated as follows: Book I, General Part; Book II, Commercial Companies; Book III, Commercial Acts; Book IV, Bills of Exchange; and Book V, Maritime Commerce. Book IV was abrogated in 1933 and replaced by two special laws relating to bills of exchange and cheques, which were necessitated by the accession of Japan to the Geneva Conventions on those topics; Books I and II were entirely redrafted in 1938.

In the field of judicial organization and civil procedure the influence of French law was at first very great. From the early Meiji era, Eto Shimpei was much concerned with the improvement of the judicial system and followed the French model, though in his time the separation of powers had not been implemented because the Ministry of Justice was also the Supreme Court. In 1875 a Supreme Court of an autonomous nature, called the *Daishinin* (court of superior hearings), was constituted, and beneath it were structured inferior tribunals of various types. The special school of French law created in the Ministry of Justice in 1872 was training judges; English law was being taught in the Tokyo University Law Faculty; and the special school of French law where Bousquet and Boissonade taught was annexed as a French law section to the Faculty of Law of Tokyo University in 1885. In the first years of the Meiji era a very large number of the judges were trained according to French law, and prior to the coming into force of the Japanese codes the judges decided most cases according to French or English law.

In 1904 sixteen of the twenty-nine judges of the Supreme Court were law graduates who had specialized in French law. After the promulgation of the Constitution, however, the influence of German law gradually extended to the field of judicial organization.

In 1887 the government entrusted Otto Rudolph, a German jurist, with the task of drawing up the law on the organization of the courts. Rudolph drafted a bill on the model of the German law of 1877 but he also collaborated with other foreign jurists, notably Roesler, Albert Mosse, also Germans, Boissonade, and Kirkwood, an Englishman. The bill was discussed by a commission, became law in 1890, and governed the judicial and court system until the radical reform of the judicial organization after World War II. The statute was called the Law on Court Organization, but it also dealt with the ministère public.

The evolution of the law of civil procedure was almost the same as that on judicial organization. At the beginning of the Meiji era many civil procedure laws were established on the French model,[21] but it is very doubtful whether the judicial officers of the time completely understood them. A Ministry of Justice memorandum addressed to judges in 1872 places on record that "Since the judicial service aims at protecting the rights of the people . . . , judges must handle litigants with care. However, it is said that there are some judges who confuse civil and criminal cases and submit civil litigants to birching or whipping. This is absurd, and judges are required henceforth to avoid any repetition of this sort of thing." It should also be pointed out that at this time conciliation in the manner of the preceding era was greatly encouraged, with the result that the judges had the conciliation of litigants as their main task. There was no desire to give a definitive solution to cases according to the law.[22]

The modernization of the legal system demanded the perfect-

[21] In the law of 17 July, 1873, relating to civil procedural forms, many provisions are reminiscent of those in the French code. For instance, a plaintiff had to go to a scrivener to have procedural documents drawn up. The function of this scrivener was incompatible with that of the *daigenin* (barrister), and the office was therefore perhaps created on the model of that of the *avoué*. Moreover, the number of words which may appear on each line of a page of a deed drawn up by the scrivener is laid down in the law. No such tradition had previously existed in Japan, so once again the limitation seems to have been imported from France.

[22] This is still a very strong tendency today.

ing of procedural law as well. So, in 1884 a German jurist, Techow, was asked to draw up a draft civil procedure code based on the German law of 1877. This Code of Civil Procedure was promulgated in 1890 and came into force the following year.[23] In contrast to the Civil Code, which is an eclectic work combining the French and German principles, the Code of Civil Procedure follows the German system almost exactly. There was a failure, however, to harmonize it with the Civil Code, so that in many cases there is a significant gap between the solution given in each.[24]

At the time when the movement of *Jiyu Minken* was flourishing, a great desire for a constitution was expressed among the Japanese. Numerous private projects for a constitution with varying political standpoints were published, and the greater number of the draftsmen saw that the constitution should be, if not an agreement emanating from the social will of the people, at least an agreement between the emperor and the people, and that a constituent assembly was required for this purpose. The government had other ideas; it had no intention of taking the wishes of the nation into account. After the repression of the liberal movement it secretly began the drafting of a constitution of its own. In 1882 Ito Hirobumi, one of the highest officials in the imperial government, left for Europe to study European constitutions. He concentrated his studies on constitutions of the German type and was strongly influenced by German constitutionalists such as Gneist and Stein. Ito returned to Japan in 1883, and the drafting of the constitution probably started in 1886. Three high officials faithful to Ito were chosen as his assistants, and one of them, Inoue Kowashi, was given prime responsibility for the drafting of the text. He worked with the assistance of advice from the two Germans, Roesler and Mosse, who were both known to be great admirers of the Prussian Constitution of 1850. It is natural, therefore, that the draft drawn up by Inoue bears the visible

[23] Since the date for coming into force of the Civil Code was 1898, the procedural rules were applied earlier than those of substance!

[24] For instance, the equivalent of the French *contrainte* is employed in differing senses in the two codes: article 414, paragraph 2, of the Civil Code uses it to mean *contrainte directe*, while article 734 of the Civil Procedure Code uses it in the sense of *contrainte indirecte*.

imprint of the Prussian Constitution. In 1888 the draft was completed and submitted to a specially set up private council for consideration. Ito thought that the draft of the constitution should be discussed not in any constituent assembly representing the nation but before a body composed of the great men of the state.[25] On 11 February, 1889 (legend has it that the emperor Jimmu ascended the throne on 11 February), the Constitution was solemnly granted by the emperor to his subjects. On that day the emperor informed his ancestors of the Constitution, and deigned to issue an imperial rescript in imposing style to impress upon his subjects the grandeur of the constitutional empire. He said in the rescript that he proclaimed this great charter as an intangible and everlasting gift to all his present and future subjects.

The Constitution was a work of compromise between the idea of divine law and constitutionalism, but the powers of the emperor were nevertheless undeniably great under it. Article 4 provided that the emperor was the head of the state and that he combined in his person all the governmental powers. The Imperial Diet was only an organ for collaboration with the emperor. The laws were made with its consent (article 37), but the legislative power was exercised by the emperor (article 5). The powers of the Diet were extremely limited. For example, the government could bring back the budget of the preceding year if the new year's budget was not voted on in the required time (article 71). This measure in itself considerably weakened the power of the Diet to control the government. What is more a very extensive controlling power was reserved to the emperor. He could promulgate several types of regulatory measures, such as urgent measures and independent measures (articles 8 and 9), without the intervention of the Diet. Urgent measures were issued during the period when the Diet was not sitting and could be abrogated if disapproved of by the Diet. Independent measures were those that sought to maintain public security or to increase national well-being. Neither could derogate from statutes, but they nevertheless limited the legislative power of the

[25] This privy council, which was never a constitutional organ, continued to play an important role in the absolutist government even after the promulgation of the Constitution.

Diet. Another point to note is the independence of the military. It was not the Constitution itself which formally provided for this, but under the constitutional regime the former practices continued. It consisted in placing the military power beyond the control of the civil ministers and in permitting the army and navy chiefs to deal directly with the emperor. This absurd custom favored military despotism and finally led Japan to catastrophe.

In spite of its absolutist character, the 1889 Constitution did permit the democratization of government, and a democratic political tendency did develop during this period of evolution of constitutional life in Japan. After World War I a liberal democratic movement grew in all sectors of national life. In the field of legal theory this tendency was represented by Minobe Tatsukichi, professor of constitutional law at the Faculty of Law of the Imperial University of Tokyo, and Yoshino Sakuzo, professor of political science of the same faculty. Unfortunately the democrats were forced to retract under the pressures of the military. In sum, what was assured by the Constitution was, as Professor Oka, one of the most eminent historians of Japanese politics, points out, only apparent constitutionalism.

In the field of administrative law the evolution was very complicated. In the first years of the Meiji era the political and administrative organization was modified frequently. Initially the *ritsu-ryo* system was reinstated, but slowly the influences of French and English law were felt in this field too. In 1871 the *han* regime was suppressed and the country was divided into *ken* (prefectures). The reform reverted to an old model, but even at this time some European influence could be traced in the law. About 1885 the central and local administration was perfected along Prussian lines. In 1885 the cabinet (*naikaku*) system of government was established, and in 1888 a law on *communes* and in 1890 a law on *departements* was promulgated. The operation of the Japanese administration before World War I was characterized by its bureaucratic, centralized, and police-state tendencies.

Japan made great efforts to modernize its legal system on the model of the advanced countries, and it is not an exaggeration to say that the modernization can be analyzed as a Europeanization or Westernization of Japan. It has been shown that the basic

structure of the Japanese legal system was formed mainly by German and French law, but, as has also been shown, the rules of these Western laws were not always properly understood by the Japanese draftsmen. In one piece of legislation rules borrowed from both French and German law could be found. The draftsmen were short of time and often combined rules superficially without harmonizing them at a conceptual level. The reception was not a direct one. It was the result of a complex process of referring from one body of law to the other.

REAL SIGNIFICANCE OF THE RECEPTION

Although Japan succeeded in faithfully and skillfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received. The rapid Europeanization was limited to the field of state law, which dealt with only a very small section of Japanese society. Further, it must not be forgotten that the modernized law was put into operation by men whose outlook was determined by a peculiar set of geographical and historical factors. As Koschaker said, "No legislator could avoid leaving some area for the application of indigenous law, and even if he envisaged an en bloc reception it is doubtful that he could even then completely exclude indigenous law. For though the law can be changed from one day to the next, the men to whom it is applied and those who have to apply it in the future cannot be changed this way."[28] Japan was destined to remain a long time subject to social rules that were quite foreign to the received law.

The modern codes predicated a bourgeois society in which every individual is presumed free and equal with everyone else, in which all legal relationships constitutive of rights and obligations are formed by the individuals themselves, and where legal relationships are created by the exercise of the individual's free will. This is of course an ideal which no real society fully attains, though it is true that any modern society worthy of the name does attain the ideal to a greater or lesser degree. There was no

[28] Koschaker, *Europa und das römische Recht*, p. 145.

important difference between the archetypal society on which the French Civil Code was based and the society to which it applied, which is why the school of exegesis was able to dominate French legal thought till the end of the nineteenth century. Japanese society, on the other hand, retained an essentially archaic morality from the preceding period after the reception of Western law. There was a great gap between the society presumed by the modern-style codes and that which existed almost independently of them. Japanese society had no knowledge of ideas of right and duty before the reception, and so the school of *Begriffs-jurisprudenz* prospered in Japan after the promulgation of the codes. Japanese jurists did not concern themselves with the actual life of the people because this life followed rules of quite a different kind from those of state law. Even the people did not want the state law to be interpreted for their benefit, so that judges contented themselves with giving logical coherence to their decisions without trying to convince the parties. A former professor commenting on the judicial practice of the prewar judges said, "A good judge was considered to be the one who disposed of contrary arguments by saying that they were ill-founded in as few words as possible. The judge's merit was in his being able to formulate his decisions in an extremely laconic manner and in his having some knowledge of the German language."

Why was Japanese society able to continue in this way for such a long time in spite of the rapid progress of modern capitalism? The development of capitalism in Japan was dominated from the beginning by political rather than economic considerations. The Meiji Restoration of 1868 was not brought about by the bourgeoisie. The lower ranking samurai, who were the main engineers of the political reform, had absolutely no intention of abandoning the feudal principles which they considered constituted a morality far superior to the European. They understood that they could not preserve Japan's independence without recourse to the material means that the Western powers controlled, but they believed that it was possible to adopt the material civilization of Europe and to harmonize it with Oriental morality. Even the most progressive intellectuals toward the end of

the Edo period expressed this idea, and their motto was "Western techniques, Oriental morality." As a consequence the Meiji government intended to modernize Japan only to the extent necessary to make it an equal of the great powers of the world. It was necessary to be wealthy and strong; thus the basic principle of government was embodied in the motto *fukoku kyohei* (rich country and strong military).

The adoption of capitalism proceeded not just from the economic point of view but also from the political and military points of view. From its inception Japanese capitalism was encircled by a martial halo, but being in its infancy it was weak both bodily and spiritually. It did not have enough energy to grow healthily. The initial accumulation of capital was insufficient, there was no spirit of liberalism, and free competition was unknown. All the modern industrial enterprises were promoted by the government and then given by way of concession to individuals subject to the diligent protection of the state. The Japanese bourgeoisie was nurtured by the government, and was, in a sense, the favorite daughter of absolutism. There was neither liberalism nor individualism in its spirit. What a difference between that and the *Geist des Kapitalismus* of which Max Weber speaks. The Japanese never thought that the state could be a necessary evil. They did not even realize that the state could be founded on social contract, and it is perhaps in this that their chauvinism lies.

The historical conditions were obviously favorable to the survival of the former morality, but there is yet another factor that prevented the breakdown of the previous structuring of Japanese society. Japanese capitalism was unable to make use of sophisticated machines in its early stages, so it had to resort to the labor of women and children. The rural population was therefore partially absorbed by industry, but even when the great industrial enterprises needed workers, those who had originally come from the country returned to the country in periods of unemployment. The result was that the rural areas were an asylum for the unemployed and sheltered a very large number of inhabitants living in conditions little better than those of the preceding era. Agricultural exploitation was maintained usually

by the labor of the members of each peasant family, and the mechanization of agriculture was retarded by this abundance of manpower. Naturally, the tempo of life remained static and society changed little.[27] As a result Japanese capitalism, prospering as it did at the expense of the peasants and workers, was unable to find any worthwhile internal market and was obliged to seek an outlet for its goods in external markets, which helped to accentuate its militaristic character.

The government for its part profited one hundred percent from the situation and tried to reinforce the outlook of the people through the national education system. In 1890 an imperial rescript was issued defining the fundamental principles of public education. These principles rested on Confucianism and emphasized loyalty to the emperor and filial piety as cardinal virtues. The state was conceived as a large family in which a hierarchical order was operative. At the top of the hierarchy was the emperor, the compassionate father of the nation. He was a divine man, literally an incarnate divinity. Not only was he omnipotent but he was himself the source of morality. On all national festivals a solemn ceremony took place in all schools for the cult of the emperor. All those present had to give adoration to the imperial image and then in an impressive voice the principal of the school would read the Imperial Rescript on Education. Thus the whole nation was indoctrinated from childhood with the idea that Japan was a holy country guarded by godly ancestors and the emperor himself and could never be conquered by its enemies. This sacred and mystical character of the Japanese state was called *kokutai* (the form of the state) and the slightest fault committed against *kokutai* was severely punished as a crime of *lèse-majesté*. The old customs were linked to *kokutai* and criticism of them, even of a purely scientific nature, was severely repressed as a dangerous idea.[28]

[27] This state of affairs continues today in the backward areas of Japan. R. Guillain, Tokyo correspondent of *Le Monde*, published very interesting articles on this subject in *Le Monde*, 27–30 December, 1962.

[28] This is the sole reason why scientific historical studies ran into almost insurmountable difficulties in the prewar period. All critical research incompatible with the traditional myths was severely repressed. Many excellent historians were put out of jobs because they studied Japanese history from a critical viewpoint. It is only since the war that the history of ancient Japan is being clearly established.

After World War I jurists had begun a critical and sociological study of law, and also a very lively movement toward democracy was growing among a large section of the populace. This tendency coincided with the movement for social rights in Europe, but in Japan it was nothing more than the beginning of true liberalism and democracy. The dominant class feared this development, and in 1925 it had a law, which is well known in Japan for its severity, voted by the Diet. This was the *chian-iji-ho*, the law on the maintenance of the public security. The first article provided: "Those who have associated to reform the *kokutai* or to deny the private property regime as well as those who have knowingly cooperated with them, will be punished by imprisonment with or without hard labor for a term not exceeding ten years." This law was used, with the assistance of the police and the special secret police, *tokubetsu koto keisatsu*,[29] to repress progressive ideas.[30] Originally it was used to repress communist activities, but in the end it was used to stifle any idea that could, in the eyes of the ruling class, constitute the slightest danger to the existing political regime.

Such was the cultural milieu in which the reception of Western laws was undertaken. It is easy to see what a great gulf existed between the social structure presupposed by the received legal system and that which operated in Japan. Rationalism, which is the soul of modern law, was for the Japanese only a beautiful borrowed garment which hid a traditional psychology imbued with mystic sentimentalism. The *homo juridicus* on which modern law was based was a man who thought mathematically and logically and had no concern for the delicacy of the subtle nuances of concrete life. Those who were not used to the abstraction of objective things were embarrased by a fashion of thought which admitted only two colors, black and white. The Japanese, a man of poetry, had great difficulty adapting to legal rationalism, but eventually he began to understand this law which guaranteed him his liberty and personal dignity.

[29] Also called *tokko*.

[30] A very large number of intellectuals were victims of the *tokko* because of their progressive ideas.

4

4

From; Hideo TANAKA, The Japanese Legal System
(University of Tokyo Press, 1976)

CONSTITUTION OF THE EMPIRE OF JAPAN, 1889
[Meiji Constitution]*

Promulgated on February 11, 1889; Put into effect on November 29, 1890 (based upon the 4th paragraph of the Edict); Superseded by the Constitution of Japan on May 3, 1947.

Imperial Oath Sworn in the Sanctuary in the Imperial Palace (*Tsuge-bumi*)

We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will thereby to give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors. That we have been so fortunate in Our reign, in keeping with the tendency of the times, as to accomplish this work, We owe to the glorious Spirits of the Imperial Founder of Our House and of Our other Imperial Ancestors.

We now reverently make Our prayer to Them and to Our Illustrious Father, and implore the help of Their Sacred Spirits, and make to Them solemn oath never at this time nor in the future to fail to be an example to Our subjects in the observance of the Laws hereby established.

May the heavenly Spirits witness this Our solemn Oath.

Imperial Rescript on the Promulgation of the Constitution

Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants.

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* The following is the semi-official translation, which appeared in Count H. Itô, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Itô transl. 1889).

The Imperial Founder of Our House and Our other Imperial Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis, which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavours, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, and of securing forever the stability of the work bequeathed to Us by Our Imperial Ancestors.

Preamble [or Edict] (*jōyu*)

Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in the future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the 23rd year of Meiji and the time of its opening shall be the date, when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no otherwise shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.

CHAPTER I. THE EMPEROR

Article 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article 2. The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.

Article 3. The Emperor is sacred and inviolable.

Article 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitutions.

Article 5. The Emperor exercises the legislative power with the consent of the Imperial Diet.

Article 6. The Emperor gives sanction to laws, and orders them to be promulgated and executed.

Article 7. The Emperor convokes the Imperial Diet, opens, closes, and prorogues it, and dissolves the House of Representatives.

Article 8. The Emperor, in consequence of an urgent neccessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law.

(2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

Article 9. The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Article 10. The Emperor determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws, shall be in accordance with the respective provisions (bearing thereon).

Article 11. The Emperor has the supreme command of the Army and Navy.

Article 12. The Emperor determines the organization and peace standing of the Army and Navy.

Article 13. The Emperor declares war, makes peace, and concludes treaties.

Article 14. The Emperor declares a state of siege.

(2) The conditions and effects of a state of siege shall be determined by law.

Article 15. The Emperor confers titles of nobility, rank, orders and other marks of honor.

Article 16. The Emperor orders amnesty, pardon, commutation of punishments and rehabilitation.

Article 17. A Regency shall be instituted in conformity with the provisions of the Imperial House Law.

(2) The Regent shall exercise the powers appertaining to the Emperor in His name.

CHAPTER II. RIGHTS AND DUTIES OF SUBJECTS

Article 18. The conditions necessary for being a Japanese subject shall be determined by law.

Article 19. Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any other public offices equally.

Article 20. Japanese subjects are amenable to service in the Army or Navy, according to the provisions of law.

Article 21. Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

Article 22. Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law.

Article 23. No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

Article 24. No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

Article 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

Article 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

Article 27. The right of property of every Japanese subject shall remain inviolate.

(2) Measures necessary to be taken for the public benefit shall be provided for by law.

Article 28. Japanese subjects shall, ~~within limits not prejudicial to peace and order~~, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Article 29. Japanese subjects shall, ~~within the limits of law~~, enjoy the liberty of speech, writing, publication, public meetings and associations.

Article 30. Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.

Article 31. The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.

Article 32. Each and every one of the provisions contained in the preceding Articles of the present Chapter, that are not in conflict

Debs. v. US (1919 ~~1930~~) limiting anti-war party speech.

Schenck v. US (1919) (Holmes, Fire in movie theater)

with the laws or the rules and discipline of the Army and Navy, shall apply to the officers and men of the Army and of the Navy.

CHAPTER III. THE IMPERIAL DIET

Article 33. The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.

Article 34. The House of Peers shall, in accordance with the Ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those who have been nominated thereto by the Emperor.

Article 35. The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election.

Article 36. No one can at one and the same time be a Member of both Houses.

Article 37. Every law requires the consent of the Imperial Diet.

Article 38. Both Houses shall vote upon projects of law submitted to it by the Government, and may respectively initiate projects of law.

Article 39. A Bill, which has been rejected by either the one or the other of the two Houses, shall not be brought in again during the same session.

Article 40. Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

Article 41. The Imperial Diet shall be convoked every year.

Article 42. A session of the Imperial Diet shall last during three months. In case of necessity, the duration of a session may be prolonged by the Imperial Order.

Article 43. When urgent necessity arises, an extraordinary session may be convoked in addition to the ordinary one.

(2) The duration of an extraordinary session shall be determined by Imperial Order.

Article 44. The opening, closing, prolongation of session and prorogation of the Imperial Diet, shall be effected simultaneously for both Houses.

(2) In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

Article 45. When the House of Representatives has been ordered to dissolve, Members shall be caused by Imperial Order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

Article 46. No debate can be opened and no vote can be taken in either House of the Imperial Diet, unless not less than one-third of the whole number of Members thereof is present.

Article 47. Votes shall be taken in both Houses by absolute majority. In the case of a tie vote, the President shall have the casting vote.

Article 48. The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.

Article 49. Both Houses of the Imperial Diet may respectively present addresses to the Emperor.

Article 50. Both Houses may receive petitions presented by subjects.

Article 51. Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

Article 52. No Member of either House shall be held responsible outside the respective Houses, for any opinion uttered or for any vote given in the House. When, however, a Member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

Article 53. The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offenses connected with a state of internal commotion or with a foreign trouble.

Article 54. The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

CHAPTER IV. THE MINISTERS OF STATE AND THE PRIVY COUNCIL

Article 55. The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

(2) All Laws, Imperial Ordinances, and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State.

Article 56. The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

CHAPTER V. THE JUDICATURE

Article 57. The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

(2) The organization of the Courts of Law shall be determined by law.

Article 58. The judges shall be appointed from among those, who possess proper qualifications according to law.

(2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

(3) Rules for disciplinary punishment shall be determined by law.

Article 59. Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear, that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provisions of law or by the decision of the Court of Law.

Article 60. All matters, that fall within the competency of a special Court, shall be specially provided for by law.

Article 61. No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

CHAPTER VI. FINANCE

Article 62. The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

(2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

(3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

Article 63. The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

Article 64. The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.

(2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

Article 65. The Budget shall be first laid before the House of Representatives.

Article 66. The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

Article 67. Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such

expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

Article 68. In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.

Article 69. In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.

Article 70. When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.

(2) In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

Article 71. When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

Article 72. The final account of the expenditures and revenues of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.

(2) The organization and competency of the Board of Audit shall be determined by law separately.

CHAPTER VII. SUPPLEMENTARY RULES

Article 73. When it has become necessary in future to amend the provisions of the present Constitution, a project to the effect shall be submitted to the Imperial Diet by Imperial Order.

(2) In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

Article 74. No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

(2) No provision of the present Constitution can be modified by the Imperial House Law.

Article 75. No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

Article 76. Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

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THE CONSTITUTION OF JAPAN, 1946*

Promulgated on November 3, 1946; Put into effect on May 3, 1947.

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution.

Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

CHAPTER I. THE EMPEROR

Article 1. The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.

Article 2. The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.

Article 3. The advice and approval of the Cabinet shall be re-

* The following is the official translation.

quired for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.

Article 4. The Emperor shall perform only such acts in matters of state as are provided for in this Consitution and he shall not have powers related to government.

(2) The Emperor may delegate the performance of his acts in matters of state as may be provided by law.

Article 5. When, in accordance with the Imperial House Law, a Regency is established, the Regent shall perform his acts in matters of state in the Emperor's name. In this case, paragraph one of the preceding article will be applicable.

Article 6. The Emperor shall appoint the Prime Minister as designated by the Diet.

(2) The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.

Article 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

(i) Promulgation of amendments of the constitution, laws, cabinet orders and treaties;
(ii) Convocation of the Diet;
(iii) Dissolution of the House of Representatives;
(iv) Proclamation of general election of members of the Diet;
(v) Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
(vi) Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights;
(vii) Awarding of honors;
(viii) Attestation of instruments of ratification and other diplomatic documents as provided for by law;
(ix) Receiving foreign ambassadors and ministers;
(x) Performance of ceremonial functions.

Article 8. No property can be given to, or received by, the Imperial House, nor can any gifts be made therefrom, without the authorization of the Diet.

CHAPTER II. RENUNCIATION OF WAR

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

CHAPTER III. RIGHTS AND DUTIES OF THE PEOPLE

Article 10. The conditions necessary for being a Japanese national shall be determined by law.

Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

(2) Peers and peerage shall not be recognized.

(3) No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Article 15. The people have the inalienable right to choose their public officials and to dismiss them.

(2) All public officials are servants of the whole community and not of any group thereof.

(3) Universal adult suffrage is guaranteed with regard to the election of public officials.

(4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters, nor shall any person be in any way discriminated against for sponsoring such a petition.

Article 17. Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.

Article 18. No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

Article 19. Freedom of thought and conscience shall not be violated

Article 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority.

(2) No person shall be compelled to take part in any religious acts, celebration, rite or practice.

(3) The State and its organs shall refrain from religious education or any other religious activity.

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 22. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.

(2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 23. Academic freedom is guaranteed.

Article 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual diginity and the essential equality of the sexes.

Article 25. All people shall have the right to maintain the minimum standards of wholesome and cultured living.

(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Article 26. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

(2) All people shall be obligated to have all boys and girls under their protection receive ordinary educations as provided for by law. Such compulsory education shall be free.

Article 27. All people shall have the right and the obligation to work.

(2) Standards for wages, hours, rest and other working conditions shall be fixed by law.

(3) Children shall not be exploited.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

Article 29. The right to own or to hold property is inviolable.

(2) Property rights shall be defined by law, in conformity with the public welfare.

(3) Private property may be taken for public use upon just compensation therefor.

Article 30. The people shall be liable to taxations as provided by law.

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 32. No person shall be denied the right of access to the courts.

Article 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.

Article 34. No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.

(2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

(2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

(3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Article 38. No person shall be compelled to testify against himself.

(2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

(3) No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Article 40. Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

CHAPTER IV. THE DIET

Article 41. The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Article 42. The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.

Article 43. Both Houses shall consist of elected members, representative of all the people.

(2) The number of the members of each House shall be fixed by law.

Article 44. The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

Article 45. The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.

Article 46. The term of office of members of the House of Councillors shall be six years, and election for half the members shall take place every three years.

Article 47. Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law.

Article 48. No person shall be permitted to be a member of both Houses simultaneously.

Article 49. Members of both Houses shall receive appropriate annual payment from the national treasury in accordance with law.

Article 50. Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.

Article 51. Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

Article 52. An ordinary session of the Diet shall be convoked once per year.

Article 53. The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.

Article 54. When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convoked within thirty (30) days from the date of the election.

(2) When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session.

(3) Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.

Article 55. Each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.

Article 56. Business cannot be transacted in either House unless one-third or more of total membership is present.

(2) All matters shall be decided, in each House, by a majority of those present, except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue.

Article 57. Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two-thirds or more of those members present passes a resolution therefor.

(2) Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy.

(3) Upon demand of one-fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes.

Article 58. Each House shall select its own president and other officials.

(2) Each House shall establish its rules pertaining to meetings, proceedings and internal discipline, and may punish members for disorderly conduct. However, in order to expel a member, a majority of two-thirds or more of those members present must pass a resolution thereon.

Article 59. A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

(2) A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

(3) The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.

(4) Failure by the House of Councillors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the

House of Representatives to constitute a rejection of the said bill by the House of Councillors.

Article 60. The Budget must first be submitted to the House of Representatives.

(2) Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

Article 61. The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.

Article 62. Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records.

Article 63. The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations.

Article 64. The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.

(2) Matters relating to impeachment shall be provided by law.

CHAPTER V. THE CABINET

Article 65. Executive power shall be vested in the Cabinet.

Article 66. The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.

(2) The Prime Minister and other Ministers of State must be civilians.

(3) The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

Article 67. The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

(2) If the House of Representatives and the House of Councillors disagrees and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Represengatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

Article 68. The Prime Minister shall appoint the Ministers of

State. However, a majority of their number must be chosen from among the members of the Diet.

(2) The Prime Minister may remove the Ministers of State as he chooses.

Article 69. If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved with ten (10) days.

Article 70. When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign en masse.

Article 71. In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed.

Article 72. The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

Article 73. The Cabinet, in addition to other general administrative functions, shall perform the following functions:

(i) Administer the law faithfully; conduct affairs of state;
(ii) Manage foreign affairs;
(iii) Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet;
(iv) Administer the civil service, in accordance with standards established by law;
(v) Prepare the budget, and present it to the Diet;
(vi) Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law.
(vii) Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.

Article 74. All laws and cabinet orders shall be signed by the competent Minister of State and countersigned by the Prime Minister.

Article 75. The Ministers of State, during their tenure of office, shall not be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

CHAPTER VI. JUDICIARY

Article 76. The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

(2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

(3) All judges shall be independent in the exercise of their con-

science and shall be bound only by this Constitution and the laws.

Article 77. The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

(2) Public procurators shall be subject to the rule-making power of the Supreme Court.

(3) The Supreme Court may delegate the power to make rules for inferior courts to such courts.

Article 78. Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.

Article 79. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

(2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

(3) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

(4) Matters pertaining to review shall be prescribed by law.

(5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

(6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 80. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

(2) The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Article 82. Trials shall be conducted and judgment declared publicly.

(2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein

the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

CHAPTER VII. FINANCE

Article 83. The power to administer national finances shall be exercised as the Diet shall determine.

Article 84. No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.

Article 85. No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.

Article 86. The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.

Article 87. In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorized by the Diet to be expended upon the responsibility of the Cabinet.

(2) The Cabinet must get subsequent approval of the Diet for all payments from the reserve fund.

Article 88. All property of the Imperial Household shall belong to the State. All expenses of the Imperial Household shall be appropriated by the Diet in the budget.

Article 89. No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Article 90. Final accounts of the expenditures and revenues of the State shall be audited annually by a Board of Audit and submitted by the Cabinet to the Diet, together with the statement of audit, during the fiscal year immediately following the period covered.

(2) The organization and competency of the Board of Audit shall be determined by law.

Article 91. At regular intervals and at least annually the Cabinet shall report to the Diet and the people on the state of national finances.

CHAPTER VIII. LOCAL SELF-GOVERNMENT

Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

(2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

CHAPTER IX. AMENDMENTS

Article 96. Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

CHAPTER X. SUPREME LAW

Article 97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

(2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Article 99. The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

CHAPTER XI. SUPPLEMENTARY PROVISIONS

Article 100. This Constitution shall be enforced as from the day when the period of six months will have elapsed counting from the day of its promulgation.

(2) The enactment of laws necessary for the enforcement of this Constitution, the election of members of the House of Councillors and the procedure for the convocation of the Diet and other preparatory procedures for the enforcement of this Constitution may be executed before the day prescribed in the preceding paragraph.

Article 101. If the House of Councillors is not constituted before the effective date of this Constitution, the House of Representatives shall function as the Diet until such time as the House of Councillors shall be constituted.

Article 102. The term of office for half the members of the House of Councillors serving in the first term under this Constitution shall be three years. Members falling under this category shall be determined in accordance with law.

Article 103. The Ministers of State, members of the House of Representatives, and judges in office on the effective date of this Constitution, and all other public officials, who occupy positions corresponding to such positions as are recognized by this Constitution shall not forfeit their positions automatically on account of the enforcement of this Constitution unless otherwise specified by law. When, however, successors are elected or appointed under the provisions of this Constitution, they shall forfeit their positions as a matter of course.

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6

AJASE AND OEDIPUS: IDEAS OF THE SELF IN JAPANESE AND WESTERN LEGAL CONSCIOUSNESS

J. C. SMITH†

Justice and Mercy

The Supreme Court of Japan is one of the most impressive buildings in the city of Tokyo, and there is probably no finer edifice of a court of last resort anywhere in the world. One of the most striking features about this structure, to western eyes at least, is not the massive foyer, the size of the huge granite blocks, nor the fine woods and tapestries of the beautiful court rooms, but the statue of Justice, inconspicuously placed along one of the walls. While many court houses display the figure of the robed woman with scales in one hand and a sword in the other, that of the Supreme Court of Japan is truly unique; the head of the sculpture is the head of the Buddha.

Given the separation of church and state provided by the *Constitution of Japan*,[1] one would not interpret this as signifying any particular unity of the religious and the secular. Rather, it seems to symbolize for the legal world the familiar idea of "Western forms and Japanese soul".[2] One cannot help but wonder: is this union a reconciled unity or an unreconciled dialectic? Do the diverse parts make up a new harmony or do they operate together in tension as a contradiction?

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[1] *Constitution of Japan* (1947), Art. 20.

[2] *Wa kon yo sai*. See generally, G. B. Sansom, *The Western World and Japan* (1950) at 339-51 and 395-410; J. W. Hall, "Changing Conceptions of the Modernization of Japan" at 7, and M. B. Jansen, "Changing Japanese Attitudes Toward Modernization" at 43, both in M. B. Jansen, ed., *Changing Japanese Attitudes Toward Modernization* (1965).

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Prevailing social power structures often appear as natural and inevitable, and history is generally interpreted to produce this impression. I do not, as some Marxists might, wish to attack this tendency, which seems to be an aspect of all social ideologies. I would, however, concur with the Marxists in their recognition of the importance of identifying contradictions in order to gain a fuller understanding of historical development.

All cultures contain historical contradictions. It is important to identify these in order to gain a fuller understanding of historical development. In particular, the nature of the relationship between diverse cultural elements is central to a proper understanding of the ethical and legal consciousness of a culture.[3] If Japan has managed to reconcile the traditional spirit of its culture with western legal forms, it may well have a solution to problems which have long haunted the West. On the other hand, if the synthesis joins two contradictions, we might anticipate that certain aspects of traditional Japanese culture will be eroded as a result.

Another feature of the statue highlights this question. The head of the Buddha, unlike its western counterparts has no blindfold. On a conventional statue of Justice the scale symbolizes the formal, impartial nature of law, the sword the inevitability of the penalties and remedies prescribed by law following transgression agninst it, and the blindfold the exclusion of all factors, feelings, prejudices and emotions which deflect the full operation of the law.[4] The meaning of the blindfold is implicit in the western maxim *fiat justitia, ruat coelum* (let justice be done though the heavens fall) or, in an earlier form, *ruat mundus* (though the world comes to ruin). The blindfold signifies that the consequences of strictly applying the law must be shut out of our vision lest they influence the path of justice. This opposition, which is posited between the operation of justice and its consequences, is alien to the Japanese. The unconstrained gaze of the

[3] See text accompanying notes 7 and 8, *infra*.

[4] There are, of course, many versions of the Statue of Justice. A particularly interesting example can be found in Cesare Ripa's seventeenth-century work on iconography, *Iconoglia*. The figure is seated with the sword in one hand and the scales in her lap. In the background is the figure of King Zaleucus and his son, each having one eye gouged out. The king had passed a particularly severe law against adultery which his son had broken. His commitment to justice allowed no way for the penalty to be avoided. The most which he could do within the confines of justice was to sacrifice one of his own eyes for one of his son's in order that his son would not be totally blind. The text states that, "She (Justice) is blindfolded, for nothing but pure reason ... should be used in making judgments." See C. Ripa, *Baroque and Rococo Pictorial Imagery*, trans. E. A. Maser (1971) illustration #120.

Buddha suggests that emotions such as compassion can be consistent with the rule of law.

Such a suggestion runs counter to fundamental assumptions within the western legal tradition, which are reflected not only in the symbolism of the traditional figures of Justice which adorn so many of the court rooms of the western world, but also in western religion, morality, philosophy, art and literature. These assumptions reflect a bifurcated view of justice and mercy. Mercy must function outside the legal system. Thus, judges cannot pardon. The prerogative of mercy belonged historically to the Crown, and is now exercised by the executive, its successor. The delegation to the Chancellor of the power to override the common law enabled a strong element of mercy to function in correlation with, but externally to, the law. When the office of the Chancellor evolved into the Courts of Chancery administering the law of equity, this element of mercy disappeared, so that in the mid-eighteenth century Dickens chose the Court of Chancery as the recipient of his savage attack on the mercilessness of the legal system.[5]

In the novel *Billy Budd*, Herman Melville has touched a chord in the western collective psyche, and provides us with a clear example of the consequence of this bifurcation of justice and mercy.[6] The

[5] C. Dickens, *Bleak House* (1853).

[6] H. Melville, *Billy Budd, Sailor* (1924). *Billy Budd* has been discussed from several standpoints. See, for example, T. Stafford, *Billy Budd and the Critics* (1961); H. Franklin, "From Empire to Empire: *Billy Budd, Sailor*" in A. Lee, ed., *Herman Melville; Reassessments* (1984) at 199. The structure of the narrative of *Billy Budd* would indicate that Melville's primary artistic aim was to reveal the social mythology which masks the inability of law to combine justice with compassion. There are many other references to the tension between justice and mercy in the western literary tradition. A famous example is furnished by William Shakespeare in "The Merchant of Venice" Act IV, Scene I, lines 182-201:

> The quality of mercy is not strained;
> It droppeth as the gentle rain from heaven
> Upon the place beneath. It is twice blest;
> It blesseth him that gives and him that takes.
> 'Tis mightiest in the mightiest; it becomes
> The thronèd monarch better than his crown.
> His sceptre shows the force of temporal power,
> The attribute to awe and majesty,
> Wherein doth sit the dread and fear of kings;
> But mercy is above this sceptr'red sway;
> It is enthroned in the heart of kings,
> It is an attribute to God himself,
> And earthly power doth then show likest God's
> When mercy seasons justice. Therefore, Jew,
> Though justice be thy plea, consider this:
> That, in the course of justice, none of us
> Should see salvation. We do pray for mercy,
> And that same prayer doth teach us all to render
> The deeds of mercy. . . ."

story is set aboard a British warship at sea in 1797, when England was at war with revolutionary France. The plot contains three main characters: Billy Budd, first mate Clegg and Captain Devere. Billy Budd is a Christ-like figure who embodies goodness. Clegg is basically an evil man; Captain Devere is a kind and compassionate officer who runs his ship efficiently but humanely. The plot is simple, as befits these archetypal figures. Clegg, who is disturbed by Budd's inherent innocence and goodness, attempts to destroy him by accusing him of fomenting a mutiny. When confronted with this accusation in the presence of Clegg, Budd, whose only defect is that he is a stutterer, is unable to articulate his outraged denial. In frustration, he strikes Clegg with his fist. Clegg hits his head when he falls, and dies.

Killing an officer — indeed, merely striking an officer — was a capital offence in the British navy during this period. Yet, as Melville is at pains to point out, Billy Budd's moral guilt is minimal. He was accused of a crime which could cost him his life, and, given his stutter, was defending himself in the only way he could. Captain Devere is thus on the horns of an excruciating dilemma; he loves the beautiful and innocent Billy Budd as a son, but knows that if the law is not followed he will lose control of the crew. In the end Captain Devere obeys the law, does his "duty" and hangs Billy Budd. Although he is a good man, he cannot save Billy Budd; he cannot show mercy and still remain Captain. By having the officers of the court martial consider and eventually reject the various arguments which they themselves raise in attempting to save Billy Budd, Melville reveals two related, fundamental contradictions in the Judeo-Christian tradition, one pertaining to God, the other to law. God can be just, or He can be loving and merciful, but He cannot be both. Reflecting this dichotomy, the law can be either just or merciful, but not both. This contradiction between a God of justice and law and a God of love and mercy is reflected in the Judaic religious tradition in the dichotomy of "the Law and the Prophets". The law was administered by priests who taught duty to strict rules of obedience, while the prophets were the voice of compassion and righteousness, and were often critics of the law.[1]

The very strength of the Judaic tradition lay in the dialectical process which kept these contradictions in balance. There is always the danger that emotions will change. Love can turn to hatred and compassion to cruelty. The ties of the priests to the legal tradition

[1] See A. Heschel, *The Prophets* (1962).

kept the prophetic tradition from the excesses which often accompany charismatic leadership, and kept it within a consistent and logical structure. The prophets, on the other hand, when acting as critics of the priests and the law, produced in ancient Israel one of the most humane systems of law that the world has ever seen.[8]

This dialectical tension is vividly reflected in the teachings of Jesus of Nazareth, the last and greatest in the line of prophets who constituted the prophetic tradition of Judaism. On the one hand he bitterly denounced the priests and lawyers, the servants of the law. On the other, he asserted that the law was not to pass away, but was to be fulfilled.[9]

Paul, the author of the greatest part of the body of scripture which makes up the New Testament, also devoted much of his thought and writing to the relationship between prophetic and legal justice. Paul attempted to solve the contradiction implicit in the concept of a God of compassion and a God of love by postulating the doctrine of the atonement whereby Jesus took upon himself all the sins (law breaking) of the peoples of the world and paid with his death the penalty of the law. Jesus' meeting the demands of the law allowed God to show compassion through forgiveness.

When Christianity was no longer a Jewish sect but had become a world religion in its own right, this belief in the reconcilability of prophetic justice with the law facilitated the move towards a unification of the church and state, which witnessed the end of the prophetic tradition.[10]

It is somewhat ironic that the most Christ-like figure to appear in the twentieth century is Mohandas Gandhi, a product of the eastern spiritual tradition who, in the manner of an Old Testament prophet, decried the injustice of a western Christian nation. A further irony is that Gandhi was a lawyer, and appeared to find no contradiction between his views of law and of compassion and mercy.

It is of value, in understanding the difference between Japanese and western legal consciousness, to contrast briefly the view of law implicit in *Billy Budd* with that which is implicit in an incident which Gandhi relates in his autobiography, concerning his early

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[8] See R. de Vaux, *Ancient Israel*, vol. 1 (1961) at 143-52; Y. Kaufmann, *The Religion of Israel* (1977) at 316-40.

[9] See *The New Testament*, Matthew chs. 5 and 23.

[10] See J. Danielou, "Christianity as a Jewish Sect" in A. Toynbee, ed., *The Crucible of Christianity* (1969) at 262-82, and J. H. Randall, *Hellenistic Ways of Deliverance and the Making of the Christian Synthesis* (1970) at 135-44.

years of legal practice in South Africa.[11] Gandhi tells of a dispute arising out of a complicated business transaction in which his client stood either to lose or gain a substantial sum of money. Gandhi soon realized that the technical law was all on his side, and that his client should be successful in any forthcoming law suit. However, he was cognizant of the fact that the parties to the suit were related and that both belonged to the same community. Also, if the case proceeded, both would suffer the costs of extensive litigation. He therefore persuaded the parties to submit the case to an arbitrator in whom they both had confidence. This was done and, as expected, his client won. Still Gandhi was not satisfied, because if his client were to seek the immediate execution of the whole award the other party would be put into bankruptcy. Gandhi pleaded with his client to spread the payments in modest amounts over a lengthy period of time. In the end, his client reluctantly accepted these arrangements and Gandhi was able to write that "both were happy over the result, and both rose in the public estimation." He then went on to say that "[m]y joy was boundless. I had learnt the true practice of law ... I realized that the true function of a lawyer was to unite parties riven asunder."[12]

While the dialectical tension between law and feeling permeates western legal consciousness, no such contradiction is to be found in Gandhi's view of law. His view, in turn, seems very compatible with Japanese legal consciousness.[13] Much has been written by both Japanese and non-Japanese about the unique perspective with which the Japanese view law.[14] Their reluctance to litigate, their distaste

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[11] M. K. Gandhi, *An Autobiography; The Story of My Experiments With Truth*, trans. M. Desai (1957) at 131-34.

[12] *Id.* at 134.

[13] See for example, Y. Noda, "The Character of the Japanese People and Their Conception of Law" in H. Tanaka, ed., *The Japanese Legal System* (1976) at 301-10.

[14] See for example, M. Yasaki, "Legal Culture in Japan, Modern-Traditional" (1985) *Archiv Fur Rechts-und Sozialphilosphie* 168; M. Yasaki, "Law and *Shakai-Tsunen* as a Legal Form of Consensus Idea" (1982) 29 Osaka U.L.Rev. 1; M. Yasaki, "Significance of 'Legal Consciousness' in Regard to Social Facts and Social Institutions" (1984) 31 Osaka U.L.Rev. 1; A. von Mehren, "Some Reflections on Japanese Law" (1958) 71 Harv. L. Rev. 1486; T. Kawashima, "Dispute Resolution in Japan" in A. von Mehren, ed., *Law in Japan* (1963) 41; D. F. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern* (1965); M. Maruyama, "Patterns of Individuation and the Case of Japan: A Conceptual Scheme" in Jansen, *supra*, note 2 at 489; T. Kawashima, "The status of the individual in the notion of law, right and social order in Japan" at 429, both in C. Moore, ed., *The Status of the Individual in East and West* (1968); J. Dator, "Measuring Attitudes Across Cultures" at 71 and T. Kawashima, "Individualism in Decision-Making in

for adversarial procedures, their avoidance of confrontation, their preference for mediation and their desire to make agreements only in general terms, leaving unforeseen contingencies to be worked out through consultation and negotiation, have been widely discussed and need not be elaborated upon here. An examination of this literature enables one to recognize that the maintenance of social harmony, reflected in warm human relationships, is of prime importance to the Japanese. To the Japanese, as to Gandhi, business relationships arise out of human relations. The aim of dispute settlement is the restoration of social harmony. This harmony rests in a sense of identity within a community, which is generated mainly by emotional means.[15]

Amae and *Jibun*

According to one of Japan's most eminent psychiatrists, Dr. Takeo Doi, "the chief characteristic of the Japanese . . ." is best expressed by the concept of *amae*. *Amae* "is a thread that runs through all the various activities of Japanese society . . . [and is the foundation of] the spiritual culture of Japan."[16] It is clear from Dr. Doi's classical

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the Supreme Court of Japan" at 103, both in G. Shubert & D. Danelski, eds., *Comparative Judicial Behaviour* (1969); C. Stevens, "Modern Japanese Law as an Instrument of Comparison" (1971) 19 Am. J. Comp. L. 685; R. Benjamin, "Images of Conflict Resolution and Social Control: American and Japanese Attitudes Toward the Adversary System" (1975) 19 J. of Conflict Resolution 123; Tanaka, *id.*; F. Upham, "Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits" (1976) 10 L. & Soc'y Rev. 579; Y. Noda, *Introduction to Japanese Law*, trans. A. Angelo (1976). For a contrary view see J. Haley, "The Myth of the Reluctant Litigant" (1978) 4 J. of Japanese Studies 359. M. Galanter, in "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 U.C.L.A. Rev. 4 at 5, argues that "the familiar contention that American legal institutions are overwhelmed by an unprecedented flood of litigation which is attributable to the excessive litigiousness of the population" is not supported by the data.

[15] T. Doi, *The Anatomy of Dependence*, trans. J. Bester (1973) at 76.

[16] *Id.* at 26. While some writers and commentators have taken issue with Dr. Doi on various points, I have been unable to find any serious challenge to his book and its thesis. See for example T. Lebra, *Japanese Patterns of Behaviour* (1976) at 54, where the author states, "the role of expressing *amae*, called *amaeru*, must be complemented and supported by the role that accepts another's *amae*. The latter role is called *amayakasu*. Doi did not take into consideration the necessity of role complementarity between *amaeru* and *amayakasu*, perhaps because of the role asymmetry in the therapeutic relationship, where the therapist is inhibited from indulging the *amae* wish of the patient." Points such as these are matters of expansion rather than refutation. D. Mitchell, in *Amaeru* (1976) uses Dr. Doi's thesis to explain "The Expression of Reciprocal Dependency Needs in Japanese Politics and Law." While some have attacked this book for being simplistic or superficial, the criticism has generally not been of Doi's thesis, but of Mitchell's particular application of

study of the Japanese psyche, *The Anatomy of Dependence*, that *amae* is intimately related to the emotions.

Amae, according to the Foreword of *The Anatomy of Dependence*, "refers, initially, to the feeling that all normal infants at the breast harbor towards the mother."[17] It is the noun form of the verb *amaeru* which is defined in the Foreword as follows:

> It is the behaviour of the child who desires spiritually to "snuggle up" to the mother, to be enveloped in an indulgent love, that is referred to in Japanese as *amaeru* (the verb; *amae* is the noun). By extension, it refers to the same behavior, whether unconscious or deliberately adopted, in the adult. And by extension again, it refers to any situation in which a person assumes that he has another's goodwill, or takes a possibly unjustifiably optimistic view of a particular situation in order to gratify his need to feel at one with, or indulged by, his surroundings.[18]

The term *amae* is used to describe the feeling people have when they wish to be dependent upon and seek another's indulgence.[19] Dr. Doi points out that there is no similar term to be found in European languages, but that *amae* means the same thing as was meant by Michael Balint when he termed the phrase "passive object love".[20] According to Balint, "all the European languages fail to distinguish between active love and passive love."[21] Dr. Doi writes:

> I believe that *amae* was traditionally the Japanese ideology — not in its original sense of "the study of ideas" but in its modern sense of a set of ideas, or leading concept, that forms the actual or potential basis for a whole social system — and still is to a considerable extent today.[22]

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it. For example, see H. Wagatsuma, Book Review (1979) 39 J. of Asian Studies 173, and E. Tsurumi, Book Review (1978) 51 Pacific Affairs 310. Of interest to Japanese readers will be H. Otsuka, T. Kawashima & T. Doi, *Amae to shakai kagaku* ('Amae' and Social Science) (1976) (as yet untranslated).

[17] *Supra*, note 15 at 7.

[18] *Id.* at 8.

[19] *Id.*

[20] M. Balint, *Primary Love and Psychoanalytic Technique* (1965) at 56, 105, 108 and 233. Balint points out that it was Sandor Ferenczi who first coined the phrase and developed the idea of "passive object-love". For a comparison of the psychology of dependency in western culture see for example, J. P. Gurian & J. M. Gurian, *The Dependency Tendency* (1983); A. Memmi, *Dependence*, trans. P. Facey (1984); H. Parens & L. Saul, *Dependence In Man* (1971).

[21] Balint states, "In one respect, however, all European languages are the same — again as far as I know them. They are all so poor that they cannot distinguish between the two kinds of object-love, active and passive." Balint, *id.* at 56.

[22] *Supra*, note 15 at 57.

Dr. Doi goes on to state that he has become increasingly convinced "that what has traditionally been referred to vaguely as the 'Japanese spirit' or the 'soul of Yamato,' as well as more specific 'ideologies' such as emperor worship and respect for the emperor system can be interpreted in terms of *amae*."[22]

Amae, according to Dr. Doi, is the major component of *ninjō* which he roughly translates into English as human feeling.[24] *Giri*, or social obligation, exists "in a kind of organic relationship" to *ninjō*. *Ninjō* occurs spontaneously in relationships such as those between parent and child or between siblings. *Giri*, which is found in the relationship between master and pupil, or between friends and neighbours, "continually aspires toward *ninjō*." *Giri*, states Dr. Doi, is the vessel while *ninjō* is the content.[25] He concludes:

> It will be clear from the preceding that both *giri* and *ninjō* have their roots deep in *amae*. To put it briefly, to emphasize *ninjō* is to affirm *amae*, to encourage the other person's sensitivity towards *amae*. To emphasize *giri*, on the other hand, is to stress the human relationships contracted via *amae*. Or one might replace *amae* by the more abstract term "dependence," and say that *ninjō* welcomes dependence whereas *giri* binds human beings in a dependent relationship. The Japanese society of the past, in which *giri* and *ninjō* were the predominant ethical concepts, might without exaggeration be described as a world pervaded throughout by *amae*.[26]

In chapter four of *The Anatomy of Dependence*, entitled "The Pathology of *Amae*", Dr. Doi describes some of the pathological states of mind which can arise among Japanese living within what he calls "[t]he world of *amae*".[27] Among these are *taijin kyōfu* (anxiety in dealing with other people),[28] *higaisha ishiki* (sense of being a victim),[29] and in particular, *jibun ga nai*, (to have no self).[30] It is the latter which is of particular jurisprudential interest because the concept of the self, or of the person, is of special significance in legal and political theory.

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[22] *Id.*

[24] *Id.* at 33.

[25] *Id.* at 34. See also H. Minami, *Psychology of the Japanese People*, trans. A. Ikoma (1971) at 157-68; M. Masatsuga, *The Modern Samurai Society* (1982) at 89-92.

[26] *Supra*, note 15 at 35.

[27] *Id.* at 28-64.

[28] *Id.* at 104-27.

[29] *Id.* at 127-32.

[30] *Id.* at 132-41.

According to Dr. Doi, expressions such as *jibun ga aru* (to have self) and *jibun ga nai*, (to have no self) are probably peculiar to the Japanese. "The interesting question . . .", he states, "is why [the] Japanese [language] should go out of its way to remark on this presence or absence",[31] since western languages, at least, contain no precise equivalent.[32] "In the languages of the West the use of the first person pronoun is considered in itself adequate proof of the existence of a self."[33] These two Japanese expressions of self define the relationship of the individual to the group. "If the individual is submersed completely in the group, he has no *jibun*, . . . [but] an individual is said to have a *jibun* when he can maintain an independent self that is never negated by membership in the group."[34] Dr. Doi goes on to point out that an individual can also develop a sense of having no self as a result of being totally isolated from the group, and that some people so fear such a state of affairs that they

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[31] *Id.* at 133. Any people's collective view of the self is bound to be complex. This paper is attempting to focus only on a few aspects of the self from a comparative point of view. For a fuller discussion of the self in Japanese consciousness, see Minami, *supra*, note 25 at 1-33; C. Moore, ed., *The Japanese Mind* (1967); Masatsuga, *supra*, note 25 at 44-101; N. Hajime, "Consciousness of the individual and the universal among the Japanese" at 161; H. Ichiro, "The appearance of individual self-consciousness in Japanese religions and its historical transformations" at 227, F. Tesshi, "The individual in Japanese ethics" at 301, K. Masaaki, "The status and role of the individual in Japanese society" at 361, and T. Kawashima, "The status of the individual in the notion of law, right, and social order in Japan" at 429, all in Moore, *supra*, note 14. See also R. Smith, *Japanese Society* (1983) at 68-105 and Lebra, *supra*, note 16 at 156-68.

[32] A western example of the kind of emotion which would correspond to *amae* is to be found in the *New Testament*, in the First Epistle of Paul to the Corinthians. One translation reads:

> I may speak in tongues of men or of angels, but if I am without love, I am a sounding gong or a clanging cymbal. I may have the gift of prophecy, and know every hidden truth; I may have faith strong enough to move mountains; but if I have no love, I am nothing. I may dole out all I possess, or even give my body to be burnt, but if I have no love, I am none the better. Love is patient; love is kind and envies no one. Love is never boastful, nor conceited, nor rude; never selfish, not quick to take offense. Love keeps no score of wrongs; does not gloat over other men's sins, but delights in the truth. There is nothing love cannot face; there is no limit to its faith, its hope and its endurance . . . In a word there are three things that last for ever; faith, hope, and love; but the greatest of them all is love. (*The New English Bible*, I Cor. 13: 1-13)

In the traditional King James version of the New Testament, the Greek word *agape* is translated as "charity", a word that hardly conveys the true meaning of this passage, and is evidence of the fact that the English language does not contain a term adequate to this concept. One of the dictionary meanings of *agape* is "non-sexual love."

[33] *Supra*, note 15 at 133.

[34] *Id.* at 134.

will often put up with anything in order to remain within the group.[35]

Dr. Doi concludes that "man cannot possess a self without previous experience of *amaeru*";[36] at the same time noting that while submersion in the group may mean loss of the self it does not follow that one can produce a self by behaving selfishly and independently of the group. He further points out that while the problem of the development of the self "can be observed in a peculiarly clear form in the Japanese," and the awareness of having a self may be easier for the Westerner than for the Japanese, "in the West one finds a completely reverse phenomenon in which the individual while in his heart of hearts harboring an extremely complex feeling toward the 'absence of self,' or being in some cases aware, essentially, that he has no 'self,' behaves as though he does in fact have one."[37]

In comparing the western psyche with the Japanese, Dr. Doi deals with the western pathology of alienation, a condition which "has its ultimate origin in the discovery that man was mistaken in believing ... that he could stand on his own feet and be self-sufficient through reason alone."[38] "Men sense a drying-up of the springs of life, and in order to recover what has been lost they determine that they will return, as it were, to their naked selves, will live once more by feeling rather than reason. And in this new quest they are being led ... to *amae*."[39] "When the infant is left by its mother," he writes, "it feels an uneasiness, a threat to its very life; and it seems likely that it is precisely this feeling that lies at the heart of what is described by modern man as 'human alienation.' "[40]

There is no question that the idea and concept of individual freedom is a part of western consciousness, and that the demand for freedom is closely interrelated with the emphasis in western culture on individuality. Dr. Doi goes on to ask this penetrating question: "Is the freedom of the individual, that magnificent article of faith for the modern western world, really to be believed in, or is it merely an illusion cherished by one section of the population of the West?"[41] He suggests that the incisive analyses of Marx, Nietzsche and Freud

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[35] *Id.* at 138.
[36] *Id.* at 139.
[37] *Id.* at 140.
[38] *Id.* at 148.
[39] *Id.* at 149.
[40] *Id.* at 150.
[41] *Id.* at 94.

have seriously undermined faith in freedom and that the West "as we see it today is caught in a morass of despair and nihilism."[42] The western idea of freedom, if it is to mean something more than the simple gratification of individual desires, must entail "solidarity with others through participation" and must ultimately mean something very similar to the Japanese idea of *amae*.[43] He writes:

> In short, despite the precedence he (Western man) gives in theory to the individual over the group, there must exist inside him a psychological desire to "belong". This is, in other words, *amae*. And this desire, one suspects, is gradually coming to the surface of the consciousness now that the Western faith in freedom of the individual is breaking down.[44]

The "I" and the "We"

Psychoanalysis, the term coined by Freud, is concerned with the analysis of the soul, or what Jung termed the "self". The terms "psyche", "soul" and "self" mean much the same thing in psychoanalytic usage, and may be taken to be interchangeable.[45] It is not surprising that Freud produced an ego psychology, since the subjects of his analysis were psyches which developed in a western cultural context. This explains why the *ego* (Latin), *ich* (German) or the "I" (English) played such a prominent role in Freud's analysis of the self.[46] According to Freud, part of the ego resides in the unconscious, which justifies our postulating an "I-consciousness" and an "I-unconsciousness".[47] Jung, having delved into eastern religion, philosophy, art and mythology, developed the idea of the collective unconscious which he contrasted with the personal unconscious.[48] Dr. Robert Pos uses the term "the We-unconscious" instead of the term "collective unconscious". He contrasts this with the "I-unconscious".[49]

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[42] *Id.* at 95.

[43] *Id.*

[44] *Id.* at 141.

[45] See B. Bettelheim, *Freud and Man's Soul* (1982) at 70-78.

[46] *Id.* at 53-56.

[47] See *Standard Edition of the Complete Psychological Works of Sigmund Freud*, "The Ego and the Id," vol. 19 (1961) 1 at 18; "New Introductory Lectures on Psychoanalysis," vol. 22 (1964) at 69-80.

[48] See generally, in *The Collected Works of C. G. Jung*, 2d ed., vol. 7 (1966) "On the Psychology of the Unconscious" 1 at 64-79, "The Relations Between the Ego and the Unconscious" 120 at 127-38. In vol. 9:1 of the same edition see "The Concept of the Collective Unconscious" 42-53.

[49] Dr. Robert Pos, Clinical Professor of Psychiatry at the University of British Columbia, and Director of Clinical Services of the Forensic Psychiatry Institute of British Columbia.

This then allows us to replace the *ego* or *ich* with the I-conscious. From Dr. Doi's analysis of the Japanese psyche it is clear that we need to add "We-conscious" if we are to have a psychoanalytic framework of analysis of the psyche which allows cross-cultural comparisons.

Dr. Doi's thesis is that "man cannot possess a self without previous experience of *amaeru*."[50] At the same time, however, he recognizes the importance of freedom and autonomy (which is a part of the spiritual legacy of western culture) for a richer and fuller development of the self. This is to say that a well-developed self should have both a strong I-consciousness and a strong We-consciousness. Keeping in mind the existence of the unconscious, we can use the following model to analyze the processes of identification and differentiation, in terms of which individuals develop their own sense of self:

Differentiation	*Identification*
I-conscious	We-conscious
I-unconscious	We-unconscious

The process of development of the self commences in infancy as the child starts to recognize its separateness from the mother. I-consciousness is produced by differentiating the self from the external world, including other persons. When a child individuates itself from its mother, it develops an awareness of gender differentiation which the child will later learn is culturally identified with its biological sex.[51] As the child separates itself from its mother, it begins to learn that it is a member of a family. While identifying his or her self with the family, the child is differentiating itself from other persons, including its parents and siblings. In gender-polarized human societies, it is extremely difficult for any child to develop a sense of

[50] *Supra*, note 15 at 139.

[51] See for example S. Bem, "Gender Schema Theory: A Cognitive Account of Sex Typing" (1981) 88 Psych. Rev. 354; M. Mahler, F. Pine & A. Berman, *The Psychological Birth of the Human Infant* (1975); J. Money & A. Ehrhardt, *Man and Woman, Boy and Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* (1974); A. Oakley, *Sex, Gender, and Society* (1972); R. J. Stoller, *Sex and Gender*, vol. 1; *The Development of Masculinity and Femininity* (1974); L. Duberman, *Gender and Sex in Society* (1975).

self without a distinct gender identification. Gender identification comes about through identification with the gender groupings of male and female. Thus I-consciousness and We-consciousness develop in harmony with each other. Differentiation from others takes place in terms of the varying sets of group identities, and therefore inevitably involves identification. Our sex, family, extended family, tribe, language group and nationality are all a part of our personal identity. The relationship between the "I" and the "We", therefore, is distorted when it is construed as a dialectic between two conflicting poles in terms of which we must strike a balance. There can be no "I" without a "We", nor conversely, a "We" without a set of "I"s.

A strong sense of the "I" component is developed within people when they are allowed, encouraged and taught to be autonomous individuals, freely making their own choices and taking responsibility for them. The western tradition has always recognized the close link between freedom or liberty and responsibility.[52] Taking responsibility for one's actions, however, means choosing those actions in terms of their possible effect on other people. A strong sense of the "We" is developed when a person receives love and support within the family, and co-operation, fellowship, good feeling and compassion from the group. At the same time, few people can develop a strong sense of the "I" without having a sense of appreciation and status within the group, since our evaluation of ourselves will generally reflect to some degree that of the group. It is, of course, possible to have a strong I-consciousness in conjunction with a very weak We-consciousness. Such persons will suffer from some form of pathology such as alienation. The psychopath who is incapable of empathy for anyone else and who judges all action only in terms of his or her own immediate wants or desires is a classic example.

There is little evidence of any physical difference between the brains of the various races of humanity. Rather, differences are best explained in terms of cultural experience. T. P. Kasulis writes,

> the assumption that people in different cultures actually think differently in some inherent way is untenable ... [T]he difference among traditions derives not from variance in inherent thinking patterns, but from differences in what is thought *about*.... In summation, there is no prima facie reason to abandon the hypothesis that the logical form of rationality is the same around the world. Rather, the divergence between cultures lies in the traditional concerns of rationality, and therefore, the experiences to which logic is applied. Human

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[52] S. Coval & J. C. Smith, *Law and Its Presuppositions* (1986) chs. 1-3; R. Wolff, *In Defense of Anarchism* (1970).

experience is too complex to be analzed all at once. A tradition must be selective, choosing certain points to be examined first and others deferred until some later time. But once the initial topics are chosen, their complexity leads to ever further analysis and enrichment. New terms are developed and the answer to one question carries in its wake the beginnings of the next question. A tradition seldom has the leisure to return to those experiences initially bracketed from consideration. At the same time, in each culture certain forms of human experience come to be understood as being particularly profound or revealing. The experiences even become intensified as they are self-consciously named and analyzed. In short, each culture specializes, as it were, in the cultivation and analysis of particular human possibilities. This is why intellectual traditions diverge as much as they do.[53]

To the degree that the East views the self differently than the West, that difference will be echoed in the networks of institutions and conceptual structures upon which various cultures have developed a view of the world:

> [T]he Western mind is: analtyical, discriminative, differential, inductive, individualistic, intellectual, objective, scientific, generalizing, conceptual, schematic, impersonal, legalistic, organizing, power-wielding, self-assertive, disposed to impose its will upon others, etc. Against these Western traits those of the East can be characterized as follows: synthetic, totalizing, integrative, non-discriminative, deductive, nonsystematic, dogmatic, intuitive, ... nondiscursive, subjective, spiritually individualistic and socially group-minded, etc.[54]

Within the eastern tradition, Buddhism, which has had a profound impact on the development of the Japanese psyche, has produced the most well-articulated doctrine of the self.[55] The Buddhist tradition recognizes the temporal, passing, impermanent and changing nature of the ego, and by so doing finds the true self through identification with universal oneness. According to the Lama Anagarika Govinda:

> He who wants to follow the Path of the Buddha must give up all thoughts of "I" and "mine". But this giving up does not make us

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[53] T. P. Kasulis, "Reference and Symbol in Plato's *Cratylus* and Kukai's *Shojijissogi*" (1982) 32 Philosophy East and West 393 at 404.

[54] "Lectures on Zen Buddhism" in D. Suzuki, E. Fromm & R. de Martino, eds., *Zen Buddhism and Psychoanalysis* (1960) 1 at 5. See also H. Nakamura, *Ways of Thinking of Eastern Peoples* (1964); F. S. C. Northrop, *The Meeting of East and West* (1946).

[55] See for example S. Picken, *Buddhism, Japan's Cultural Identity* (1982); H. Shinsho, "Buddhism of the One Great Vehicle (Mahayana)" at 33 and U. Yoshifumi, "The Status of the Individual in Mahayana Buddhist Philosophy" at 164, both in Moore, *supra*, note 31; S. Ando, *Zen and American Transcendentalism* (1970) at 7-52; Suzuki, *supra*, note 54 at 24-43.

> poorer; it actually makes us richer, because what we renounce and destroy are the walls that kept us imprisoned; and what we gain is that supreme freedom, according to which every individual is essentially connected with all that exists, thus embracing all living beings in his own mind, taking part in their deepest experience, sharing sorrow and joy.[86]

Govinda further states that "all individuals . . . have the whole universe as their common ground, and this universality becomes conscious in the experience of enlightenment, in which the individual awakens into his true all-embracing nature."[87] Kasulis writes, "the rejection of the self as an independent agent separate from the web of interconnected conditioned causes is called in Sanskrit the doctrine of *anatman* ('no-ego'; . . . *muga* in Japanese)."[88] The great Zen teacher Rinzai is reported to have related that "in this clump of raw flesh . . . there is a true person of no status continually entering and exiting (your sense organs)."[89]

The Individual and the Community

Even a cursory examination of the major institutional and cultural streams of East and West reveals that the concept of the self in the West is very different from that in the East. The institutions and belief systems which have helped formulate I-consciousness/unconsciousness and We-consciousness/unconsciousness in the West, tend to be contradictory. The stress on individualism in western culture is a product of a belief system, a central feature of which is a set of fundamental or natural rights which guarantee or protect personal liberty by preventing wrongful interference. One of the most basic tenets of this set is the right of equality before the law. By assuming the existence of such a right, matters of sex, order of birth, family membership, race or skin colour become irrelevant for the purposes of our moral and legal rights and duties. From the moral point of view we are simply autonomous agents, from the political point of view we are merely citizens, and at law we are "legal" persons. In western law the legal person can be usefully conceived as a variable in a formulaic equation. Thus a contract can be conceived in the abstract as a legal relationship between any two persons, P_1 and P_2,

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[86] Cited by N. Jacobson, *Buddhism and the Contemporary World* (1983) at 84.

[87] A. Govinda, *Creative Meditation and Multi-Dimensional Consciousness* (1976) at 10.

[88] T. P. Kasulis, *Zen Action Zen Person* (1981) at 44.

[89] *Mu i shin jin*, *id.* at 51. See also Suzuki, *supra*, note 54 at 32.

in regard to any particular pattern of behaviour not prohibited by law.[60]

However, our gender identity, order of birth, family, colour and race are critical matters in formulating the We-consciousness which is an essential part of our concept of self. Thus the conceptual framework within which we formulate a part of our I-consciousness conflicts with the kind of conceptual framework within which we develop our We-consciousness.

The result is substantial dialectical tension within the western psyche. Consider, for example, the conceptual structure of fundamental rights and the corresponding idea of a social order based on a universal law of reason rooted in Stoicism and classical Roman law. This structure is in contradiction with the democratic view of law as reflecting the will of the majority which is to be normatively evaluated in terms of transcendental ideals of the good or the just rooted in turn in Platonic and Aristotelian ideas of the state. This fundamental conflict between individual rights and the will of the majority still permeates western law and politics.[61] The debates between theorists such as Nozick and Rawls,[62] Dworkin and Hart[63] or Hayek and Bay;[64] the dispute between judicial activists and conservatives;[65] the contrasts between formal justice and social or distributive justice,[66] and between liberty and equality;[67] and the

[60] See D. Derham, "Theories of Legal Personality" in L. Webb, ed., *Legal Personality and Political Pluralism* (1958) at 5; F. Lawson, "The Creative Use of Legal Concepts" (1957) 32 N.Y.U. L. Rev. 909 at 913-16.

[61] J. C. Smith & D. N. Weisstub, "The Evolution of Western Legal Consciousness" (1979) 2 Int. J. of L. & Psych. 215; J. C. Smith & D. N. Weisstub, eds., *The Western Idea of Law* (1983) chs. 3 and 4.

[62] R. Nozick, *Anarchy, State, and Utopia* (1974); J. Rawls, *A Theory of Justice* (1971).

[63] R. Dworkin, *Taking Rights Seriously* (1977); H. L. A. Hart, *Essays In Jurisprudence and Philosophy* (1983) at 49-87 and 123-58.

[64] F. Hayek, *The Constitution of Liberty* (1960), and *Rules and Order*, vol. 1 of *Law, Legislation, and Liberty* (1973); C. Bay, *From Contract to Community* (1978) at 29, and "Hayek's Liberalism: The Constitution of Perpetual Privilege" (1971) 1 The Political Science Reviewer 93.

[65] J. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129 at 143-44; L. Hand, *The Bill of Rights* (1958) at 11-15; A. Bickel, *The Least Dangerous Branch* (1962); C. McCloskey, "Judicial Review in a Democracy: A Dissenting Opinion" (1966) 3 Hous. L. Rev. 354; S. Halpern & C. Lamb, eds., *Supreme Court Activism and Restraint* (1982).

[66] For an example of an analysis of formal justice see J. C. Smith, *Legal Obligation* (1976) at 88-108 and 233-43. For an analysis of social or distributive justice, see for example D. Miller, *Social Justice* (1976); B. Ackerman, *Social Justice in the Liberal State* (1980); Rawls, *supra*, note 62. See also P. Ingram, "Procedural Equality" and P. Day, "Procedural Equality: A Reply to

range of the political spectrum between the poles of statism and libertarianism:[66] these exemplify the bifurcated conceptual framework within which western legal and political institutions function. Within a truly consistent democracy the will of the majority rules supreme. Minority rights can have no meaning in the face of the "will of the people".

Utilitarianism, which postulates the ideal of the greatest good for the greatest number, is the natural ethical counterpart to democratic political theory. Given that good is taken to mean pleasure, and that the people concerned are the best judges of what pleases them, then law can be taken to be the will of the majority produced through the political legislative process. On the other hand, a theory of law from which a doctrine of fundamental rights can be derived entails a concept of law which is deduced from principles which exist independently of what people think about them. Thus, the institution of a democratically elected legislature limited by a bill of fundamental rights enforced by judicial review is not the product of a unified political and legal perspective. Rather it is a dialectical synthesis which allows us to continue to live with the contradictions, and to benefit from the energy which is a product of this dialectical tension.[69] Japan inherits these contradictions in its post-World War II *Constitution*.

Mr. Ingram" in S. Guest & A. Milne, *Equality and Discrimination: Essays in Freedom and Justice* (1985) at 39-59.

[66] Liberty and equality (in an egalitarian sense as contrasted with the more formal concept of equality as is entailed in the idea of equality before the law) are conversely related in that the more government controls the acquisition of goods and services in order to achieve an equitable distribution, the more it must interfere and regulate market transactions and individual consumption. On the other hand, the fewer restrictions placed by government on these economic processes, the greater will be the development of economic inequalities between citizens. See for example D. Raphael, *Justice and Liberty* (1980) at 57-73; J. Lucas, *On Justice* (1980) at 197-207.

[68] For a defence of a social order founded on the state, see M. Sandel, *Liberalism and the Limits of Justice* (1982); M. Sandel, "The Procedural Republic and the Unencumbered Self" in (1984) 12 Political Theory 81 at 82; Rawls, *supra*, note 62. For a defence of no state or merely a minimal state, see: Wolff, *supra*, note 52; Nozick, *supra*, note 62; M. Rothbard, *The Ethics of Liberty* (1982). See also W. Lang, "Marxism, Liberalism and Justice" in E. Kamenka & A. Tay, *Justice* (1979) at 116-48.

[69] See Coval & Smith, *supra*, note 52. T. Lowi's, *The End of Liberalism*, 2d ed. (1979) furnishes an analysis of the political process in the United States which allows one to follow this dialectic in American political life. The dialectic has taken a different course in Canada. In 1960 the Canadian Parliament passed the *Canadian Bill of Rights*, R.S.C. 1960, c. 44 as an ordinary act of the legislature. In *The Queen* v. *Drybones* [1970] S.C.R. 282, in a six to three judgment the Court took the position that the *Canadian Bill of Rights* gave the courts the power to declare an act, or part thereof, of Parliament to be invalid if it infringed a provision of the *Bill of Rights*. In *A.G. of Canada*

The philosophical, religious and spiritual traditions of the East, by viewing the ego as illusionary, and by focusing on the relatedness of all persons and things, facilitates a strong We-consciousness and a weak I-consciousness in the formulation of a concept of the self. In the West the focus on individual agency with its related doctrines of autonomy, freedom and responsibility leads to a view of the self with a strong I-consciousness but a weak We-consciousness.

The illusory nature of freedom in the western tradition and the alienation which is characteristic of western man stems at least in part from the lack of an emotional foundation for We-consciousness in the West. This is illustrated by R. L. Rubenstein, in his brilliant but sadly neglected *The Cunning of History*, who argues that the holocaust was not an aberration of history resulting from a temporary madness of a particular set of people at a particular time, but rather "was an expression of some of the most significant political, moral, religious and demographic tendencies of Western civilization in the twentieth century."[10] The bureaucratic process which produced the holocaust, according to Rubenstein, "can be understood as a structural and organizational expression of the related processes of secularization, disenchantment of the world, and rationalization."[11] "The culture that made the death camps possible," he writes, "was not only indigenous to the West but was an outcome, albeit unforeseen and unintended, of its fundamental . . . traditions."[12] The holocaust, slavery and the condition of industrial workers in nineteenth-century England are all examples of objectification of human beings. Rubenstein shows that in order to treat people as objects their humanity must first be denied; in other words, they must be excluded from our We-consciousness.

At an intellectual level the western legal and political traditions proclaim the equality and brotherhood of all mankind, but no strong emotional basis has evolved to sustain a We-consciousness which goes much beyond the immediate family. Examples from a variety of eras

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v. *Lavell* [1974] S.C.R. 1349, the Supreme Court of Canada reversed itself on this point. The issue was finally resolved by political means with the adoption of the Canadian *Charter of Rights and Freedoms* as Part I of the *Constitution Act, 1982*. Even so, section 33 provides that Parliament or any provincial legislature can declare legislation operative notwithstanding sections 2 or 7 to 15 of the *Charter*, which contain most of the fundamental freedoms.

[10] *The Cunning of History: The Holocaust and the American Future* (1978) at 6.

[11] *Id.* at 27.

[12] *Id.* at 31.

and cultures serve to demonstrate this. The Greeks failed to extend freedom and equality to their women and slaves.[13] Classical Stoic Rome retained slavery and tolerated the most cruel abuses.[14] The English tradition of liberty failed to prevent imperialism, and the Americans practiced cultural and sometimes even physical genocide on their aboriginal inhabitants.[15] Also, the Americans maintained the institution of slavery in the South with laws which permitted and legalized extreme cruelty, in spite of the *Declaration of Independence* and the *Bill of Rights*.[16] Slavery was not abolished in the United States until individuals, compelled by human compassion, created a groundswell of feeling which made political action necessary and possible. The advancement which the Black civil rights movement made in the late 1950s and early sixties resulted from a short-lived wave of compassion which led to concrete changes in the law. These facilitated further progress after the wave of emotion had ebbed. People who participated in the civil rights movement of that period still vividly remember the strong emotional bond which brought black and white together in marches and political protests. The song, "We Shall Overcome" became a focus for that feeling. Finally, notwithstanding the highest ideals of Marxist egalitarianism, millions of people have died in the *Gulag* slave labour camps of the Soviet Union,[17] while in Cambodia, the Marxist Khmer Rouge slaughtered between one and three million of their own citizens.[18]

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[13] See for example P. Slater, *The Glory of Hera* (1968); S. Pomeroy, *Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity* (1975) at 57-87; W. Westermann, "Slavery and the Elements of Freedom in Ancient Greece" at 17, M. Finley, "Was Greek Civilization Based on Slave Labour?" at 53, R. Schlaifer, "Greek Theories of Slavery from Homer to Aristotle" at 93, and G. Vlastos, "Slavery in Plato's Republic" at 133, all in M. Finley, ed., *Slavery in Classical Antiquity* (1960).

[14] *Institutes of Roman Law by Gaius*, trans. E. Poste (1904) at 37. Poste, in his commentary on the law relating to slavery, writes that "the condition of the slave was at its worst in the golden period of Roman history" and at 38 states that "Roman law to the end, unlike other legislations which have recognized forms of slavery, refused to admit any rights in the slave."

[15] See for example D. Brown, *Bury My Heart at Wounded Knee* (1970).

[16] W. Jordan, *The White Man's Burden* (1974) at 59-64, 81-83, 150-52; M. Tushnet, *The American Law of Slavery* (1981). Three classic studies of slavery in America are: F. Tannenbaum, *Slaves and Citizens: The Negro in the Americas* (1947); S. Elkins, *Slavery: A Problem in American Institutional and Intellectual Life*, 3d ed. (1976); D. Davis, *The Problem of Slavery in Western Culture* (1966).

[17] See A. I. Solzhenitsyn, *The Gulag Archipelago*, vol. I (1974), vol. II (1975), vol. III (1978); A. Shifrin, *The First Guidebook to Prisons and Concentration Camps of the Soviet Union* (1980).

[18] W. Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (1984) at 45-69.

By appealing to the deep spiritual roots of Hinduism, Islam and Christianity, Mohandas Gandhi, a single individual, generated an emotional wave which brought about the withdrawal of the British from India in a way that would not have been possible through force of arms or political manoeuvring.[10] His Muslim friend and associate Abdul Ghaffar Khan used similar methods and social forces to lead 100,000 fierce Pathans, who in taking an oath of non-violence achieved power far beyond that which the possession of arms had given them.[10] The lesson of history is clear. Progress towards the goals of universal freedom and respect seldom goes beyond what can be achieved through an emotional sense of identity with others. Although the western legal and political tradition has broken conceptual barriers and paradigms which retarded the extension of the emotional sense of solidarity and identification which generates We-consciousness, this tradition in itself is seldom able to generate that emotion. This is so because the western social paradigm is, by its nature, an obstacle to We-consciousness. The twentieth century marks the westernization of the world: as non-western countries have industrialized to protect themselves and to compete, they have found it necessary to adopt western technology and western forms of social and political organization. Yet no other century has seen the slaughter, cruelty and violence which the twentieth century has produced.[11]

The western legal and political tradition has attempted to achieve a sense of community identification through transcendental ideals of

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[9] See for example: E. Erikson, *Gandhi's Truth* (1969); W. H. Shirer, *Gandhi* (1979); L. Collins & D. Lapierre, *Freedom At Midnight* (1976).

[10] E. Easwaran, *A Man to Match His Mountains* (1984).

[11] G. Eliot, in *Twentieth Century Book of the Dead* (1972) at 211-34 estimates that approximately one hundred million people have been slaughtered as the direct result of official government action or decree. If one tries to duplicate his calculations, starting with the Turkish genocide of the Armenians at the beginning of the century, adding the casualties of World War I, and continuing through with the estimates of other wars, revolutions, slave labour and death camps, Eliot's startling figure appears to be fairly accurate. To dwell on one detail, the presence of torture tells a great deal about the nature of societies and states, and the relationship of the individual to the state. The revival of torture in the twentieth century and its widespread use by persons and institutions as an instrument of government also provides a good indication that western civilization has failed to develop strong emotional bonds between people. See for example the Amnesty International Report, *Torture in the Eighties* (1984), and E. Peters, *Torture* (1985) at 74-187. When we compare societies, nations and cultures, Japanese society, held together by the emotional bonds which are the product of the world of *amae* is truly a unique social phenomenon. And even if it is the case that the *burakumin* and Japanese residents of Korean ancestry have not been fully brought into the circle of *amae*, it still remains, in our fragmented world, a success yet to be achieved by other peoples.

morality, justice or goodness. Such ideological paths to community inevitably fail, since conflicting theories or views of what is the good, and the tendency of people to interpret the good or justice in terms of their own self interests, prevent a shared consensus regarding the ideals which the community should reflect. The inevitable failure of people to achieve their ideals even when a consensus can be reached tends to fracture rather than consolidate a sense of community. In any case, logic, argument and intellectualization cannot in themselves produce the emotional basis for the sense of We-consciousness which must exist for true community.

Nothing brings to our awareness more clearly the vast chasm between the ideals of western civilization and its realities than does the holocaust. This terrible event haunts the consciousness of western man because the holocaust marks the breaking of a "hitherto unbreachable moral and political barrier in the history of Western civilization".[82]

There is no contradiction between I-consciousness and We-consciousness when the latter is based on emotional identificaion or feeling, since community based on feeling is consensual community and is therefore consistent with the autonomy of the individual. The dichotomy between individuality and community which plays such a major role in western political theory is a rather artificial distinction when we take into account that the very thought processes of consciousness which make the concept of the individual possible, entail language, which is a social phenomenon impossible outside of the context of a community. Part of the problem is the tendency to think of community only in political terms, so that communities not based on political organization are ignored. Consequently we only look for political solutions to social ills. The rich variety of communities and social practices which exist independently of the political process and which contribute greatly to human welfare tend to be discounted in academic kinds of analyses.

There is no contradiction between autonomy and the fundamental rights which furnish its necessary condition, and the resolution of disputes through mediation. It has been argued that traditional Japanese law and dispute resolution methods did not involve rights consciousness and consequently there is a discontinuity between the western legal system, which Japan has adopted in the process of modernization, and traditional Japanese dispute settlement mechan-

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[82] Rubenstein, *supra*, note 70.

isms.[44] Much stress is put on the fact that Japan has far fewer lawyers per capita, fewer law suits and a greater tendency to use mediation over litigation, than is to be found in other countries having a western legal system. The prevailing view reflected in this literature is that the western legal tradition entails universal rules, while the Japanese legal tradition stresses the uniqueness of each particular situation, and therefore the uniqueness of the particular resolution of the dispute. The problem with this literature is that American legal consciousness is treated as representative of western legal consciousness, with the result that people fail to realize that rights consciousness does not necessarily entail litigiousness consciousness. The methods of dispute settlement are among the least important aspects of western law. Arbitration and mediation are becoming widespread in America as forms of dispute settlement, particularly in the areas of labour, commercial and matrimonial law. This experience reflects no basic discontinuities or contradictions. Western law is consistent with many different forms of dispute settlement mechanisms, including mediation.

That which makes western law truly unique is its individualistic concept of the self, and the idea of individual liberty which is derived from it.[45] Legalism or rulism can equally be a disease of non-western legal systems. China, for example, has gone through periods of extreme legalism.[46]

Since autonomy entails no transcendental norms of social justice or the good other than those which are necessary to guarantee the freedom of action of each individual, to the extent that it is consistent with the freedom of action of others, it is inconsistent with what Professor Shklar calls "legalism" and what Professor Yasaki calls "rulism," which invites adversarial confrontation and litigation.[47] Also, there is no contradiction between autonomy and Buddhism. To respect the agency of people is to respect the uniqueness and spontaneous creativity of human life.

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[44] See *supra*, note 14 for a selection of articles discussing this debate.

[45] See in general F. S. C. Northrop, *The Complexity of Legal and Ethical Experience* (1959) at 106, 143-64 and 183-215; Smith & Weisstub, *The Western Idea of Law*, *supra*, note 61; J. C. Smith, "The Unique Nature of the Concepts of Western Law" (1968) 46 Can. Bar Rev. 191.

[46] See T. Ch'u, *Law and Society in Traditional China* (1965) at 226-79; *The T'Ang Code*, trans. W. Johnson (1979).

[47] J. Shklar, *Legalism* (1964) at 1; M. Yasaki, "Legal Culture in Japan, Modern-Traditional" (Paper delivered at the 11th World Congress of the International Association for Philosophy of Law and Social Philosophy, Helsinki, 1983) [unpublished].

The idea of freedom, however, in the western legal and political tradition is very different from that of freedom in the Buddhist tradition. The western idea of freedom stresses freedom in relation to human action, and entails two types of liberty: freedom from wrongful interference with human action, and freedom to do what one wants to do so far as is consistent with the freedom of others from interference. The idea of freedom in the Buddhist tradition relates less to action itself, and more to freedom from illusory limitations which, if shed, would transform human actions.[87]

Autonomy and fundamental rights, contrary to the view of the Marxists, do not necessarily entail a reification of the "I".[88] Compassion and feeling lead to seeing the "I" in the "We" and the "We" in the "I"; in other words, to a proper view of the self wherein the "I" and the "We" are in balance. The western juridical tradition defines the "I" in terms which are universal for all human beings,[89]

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[87] See N. Jacobson, *supra*, note 56 at 85-117. At 86-87, Jacobson describes the difference between the western concept of freedom and that which is implicit in Buddhism as follows:

> The legacy of European learning impresses upon the minds of men and women everywhere the conclusions which a few tens of thousands — almost exclusively nonpigmented, male, middle-class, and Occidental — have found helpful in their drive for values. We of this universe are now confronted with the task of freeing life on this good earth from these assumptions and one-sided perspectives which have carried the baton of civilization during the last three hundred years, assumptions and viewpoints which have placed the fertility of human experience at large under a strange enthrallment to second and third-hand conclusions regarding the nature and meaning of life ... The chief role of Buddhism now is to increase the freedom men and women can enjoy from the pathological compulsions of life. The Buddhist legacy is prepared to participate in opening the lives of millions to new flexibility in discovering the meaning of life, thus providing ways of curing people of the egocentricity and narcissism that mount to pathological heights of self-worship in some parts of the present world.

[88] K. Marx, "On the Jewish Question" in D. McLellan, ed. & trans., *Karl Marx Early Texts* (1971) at 104. Marx writes, "Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community." Marxists are correct in assuming that fundamental rights permit persons to be egoistic and selfish. However, it does not follow from this that egoism will be the inevitable result of recognizing fundamental rights. Nor does it follow that their denial removes a barrier to achieving community. The failure of communist political systems to eradicate egoistic man, so ably analyzed by Milovan Djilas in *The New Class* (1957), would indicate that the emotional foundations necessary for the sense of We-consciousness which is required for the development of a non-egoistic self, cannot be achieved through a political solution, whether of the right or left, libertarian or egalitarian.

[89] The western juridical tradition of the autonomy of the individual, equality before the law and law as the rule of reason rather than the will of individuals or any class of individuals, contains no meaning for social hierarchy. The dialectical tensions within the western legal and political traditions referred to in notes 61-69 *supra*, are a product of the contradiction between

and the Buddhist tradition reveals what is true or non-illusory or real within the "I" and furnishes another basis for universality in the oneness of all life. Just as there is no meaning in the western juridical tradition for social hierarchy, there is likewise no meaning for social hierarchy in the Buddhist tradition with its concept of the self as *mu i shin jin* — "true person without status".[90] Consequently, Buddhism is always found in conjunction with some other conceptual structure which can provide such a meaning. The concept of the true self is very similar if not almost identical in philosophical Hinduism and Taoism. Hinduism, however, derives meaning for social hierarchy from its stress on status and caste; Taoism coexisted with Confucianism which provided a basis for status and hierarchy; and Shintoism has served a similar function in Japan. Thus the eastern religious and political traditions contain a fundamental contradiction which, although different, runs parallel to a similar contradiction in the West.

Paternalism and Maternalism

Whether there is a contradiction between autonomy and *amae* is a difficult issue. Since in its narrowest usage in ordinary Japanese discourse, *amae* refers to the desire which a child has to cling to its mother, *amae* appears to represent a relationship where one wishes to lose autonomy by relying on a substitute mother figure.[91] From this view *amae* points to dependency, whereas western culture stresses an autonomy based on equality between agents. The relationship between mother and child is very complex, however, and neither should autonomy and *amae* be posited as simple opposites. Both autonomy and *amae* presuppose certain psychological states of mind. According to Doi, *amae* also implies some awareness of individualism. The collectiveness which is so characteristic of Japanese society always co-existed with the ambition to be first, or outstanding, and it never denied the possibility of acting on one's own.[92] If these states can be said to be consistent with each other, then it is highly likely that the concepts which presuppose them can also co-exist without contradiction. Therefore, to investigate the relationship between

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the juridicial paradigm and the political paradigm which was evolved by the Greeks in order to legitimize the continuation of human domination rendered illegitimate by the juridical paradigm.

[90] See *supra*, notes 56-59.

[91] *The Kodansha Encyclopedia of Japan*, vol. 1 at 48.

[92] See T. Doi, *Omote to ura* (Front and Back) (1985) at 55.

autonomy and *amae* it is necessary to explore the psychology underlying these concepts.

A particularly striking illustration of the psychological aspect of autonomy is provided by the oldest reference to freedom which exists in any written text. This is a Sumerian document *circa* 2350 B.C. The word which the Sumerians used to refer to the concept of freedom was *amargi*, which means literally "return to the mother".[92] The experts on ancient Sumerian culture admit that they have absolutely no idea why, when "we find the word 'freedom' used for the first time in man's recorded history", this particular figure of speech came to be used.[94]

To understand why and how "return to the mother" came to mean freedom we would need to know what one was turning from in "the return". This first appearance of the word *amargi* was in a Sumerian document which "records a sweeping reform of a whole series of prevalent abuses, most of which could be traced to a ubiquitous and obnoxious bureaucracy consisting of the ruler and his palace coterie", and which also "provides a grim and ominous picture of man's cruelty toward man on all levels — social, economic, political and psychological".[95]

What the turning was from is revealed by the context within which the word *amargi* or freedom appears; it was a turning from law and the authority of kingship. But what did the "return to the mother" consist of, and why was this state equated with freedom? An examination of the preliterate history of this area as reconstructed through archaeological evidence and the earliest recorded myths suggests an answer. The earliest Sumerians worshipped the Goddess Inanna.[96] Evidence suggests that women held a high status which was gradually lost with the development of patriarchy in the form of a transition to the worship of male gods, kingship and the rise of law. Throughout much of Europe and the Middle East (as well as many other parts of the world) are to be found numerous female figurines and sculpture, dating from the upper Paleolithic period into the Bronze Age, and even beyond, which suggest an age of matriarchal consciousness when a goddess was worshipped and

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[92] S. Kramer, *The Sumerians* (1963) at 79.

[94] *Id.*

[95] *Id.*

[96] S. Teubal, *Sarah the Priestess: The First Matriarch of Genesis* (1984) at 77-131; E. Fisher, *Woman's Creation: Sexual Evolution and the Shaping of Society* (1979) at 267-80; W. Thompson, *The Time Falling Bodies Take To Light: Mythology, Sexuality, and the Origins of Culture* (1981) at 159-208.

women were held in high esteem and played an important, if not leading, cultural and societal role.[97]

The archaeological evidence uncovered at the site of the ancient town of Catal Huyuk in Anatolia, for example, which covered approximately thirty-two acres and had a population of several thousand people, furnishes evidence of a period in which women were afforded a high status of such a nature as to be inconsistent with a patriarchal culture. For example, women and children were buried under the large central platforms of houses while men were buried in smaller corner spaces along with their hunting weapons.[98]

Many of the ancient Japanese myths suggest that Japanese society was also probably matriarchal originally. These myths are to be found in the *Kojiki* and *Nihon Shoki*.[99] The first ruler of the world was the Sun Goddess Amaterasu Omikami, who was the direct ancestor of the first Emperor of Japan. The earliest indication of the existence of Japan in Chinese literature stated that the country was ruled by a female by the name of Himiko.[100] Itsue Takamura studied matrimonial systems in ancient Japan and came to the conclusion that early Japan was matriarchal and matrilineal.[101] Freedom as "the return to the mother" would mean, therefore, a return to *The Mother*, that is to matriarchal consciousness, which would mean a return from kingship to collective social order, from law to custom and from "masculine political power" to "feminine cultural authority".[102]

Freud believed that the evolution of human culture followed a similar pattern to the evolution of the individual human psyche; consequently, human history can be interpreted in terms of the Oedipus complex.[103] Freud's theory of the Oedipus complex explains

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[97] See in general, E. Neuman, *The Great Mother*, trans. R. Manhiem, 2d ed. (1963); E. O. James, *The Cult of the Mother Goddess* (1959); M. Gimbutas, *The Goddesses and Gods of Old Europe* (1982); M. Stone, *When God Was A Woman* (1976).

[98] See J. Mellaart, *Catal Huyuk: A Neolithic Town in Anatolia* (1967). For a critique of Mellaart see I. Todd, *Catal Huyuk in Perspective* (1976). See also M. French, *Beyond Power* (1985) at 46; Thompson, *supra*, note 96 at 138-50.

[99] See S. Iida, ed., *Nihon shoki shinko* (New Lectures on Japanese Tales) vol. I (1936) 29-69.

[100] Chin Jin, ed., *Gishi wajin den* (Chinese Literature on Japan).

[101] See I. Takamure, *Bokeisei no kenkyu* (A Study on Matrilineage) (1938) and *Sho seikon no kenkyu* (A Study on Marriage as an Incorporation of the Groom to the Bride's Family) (1953).

[102] Thompson, *supra*, note 96 at 149.

[103] S. Freud, "Totem and Taboo," *Standard Edition*, *supra*, note 47, vol. 13 (1964).

how the male child makes the transition from a continuity with and an affection for the mother, in which the child sees the father cast as a rival, to a positive identification with the father accompanied by a disparagement of women. In this way the age of matriarchal consciousness can be viewed as the parallel of the period of the male child's close identification with the mother, and the rise of patriarchy as the equivalent of the male child's shift of allegiance from the mother to the father. Freud himself did not take this view of matriarchy. He accepted that historically there had been such a period, but he believed that this was only a temporary development in the stages of patriarchy which arose after the killing of the father by the brothers when they renounced control over women in order to be able to live at peace with one another.[104] Some of Freud's staunchest supporters, however, would disagree with him on this question. N. O. Brown, for example, writes:

> The proper starting point for a Freudian anthropology is the pre-Oedipal mother. What is given by nature, in the family, is the dependence of the child on the mother. Male domination must be grasped as a secondary formation, the product of the child's revolt against the primal mother, bequeathed to adulthood and culture by the castration complex. Freudian anthropology must therefore turn from Freud's preoccupation with patriarchal monotheism; it must take out of the hands of Jungian *Schwärmerei* the exploitation of Bachofen's great discovery of the religion of the Great Mother, a substratum underlying the religion of the Father — the anthropological analogue to Freud's discovery of the Oedipal mother underlying the Oedipal father, and comparable, like Freud's, to the discovery of Minoan-Mycenaean civilization underlying Greek civilization.[105]

It is the fear of castration which spurs the shift from a positive view of the mother and a negative view of the father to a positive view of males and a negative view of females. The father is internalized in the form of the super-ego, and the Oedipus complex is transcended when the individual is able to escape the father complex by the development of a strong ego through the renunciation of illusion, and the acceptance of the reality principle. The development of the myth of the social contract to ensure equality between brothers after the killing of the primal father could then be said to correspond to the escape from the father complex as the male's own ego matures.

Eli Sagan, in his study of the complex cultures which bridge the

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[104] *Id.* at 131.

[105] N. Brown, *Life Against Death* (1959) at 126.

gap between primitive societies and the archaic civilizations which are their successors, compares the development of these societies with the pre-Oedipal stages of the development of infants.[106] Using Margaret S. Mahler's three stages of the psychological birth of the self in the human infant: autism, symbiosis and separation and individuation,[107] Sagan shows that human societies themselves go through parallel processes, with comparable psychic trauma, when they separate from the kinship system as monarchy develops. He has thus developed a psychoanalytic social theory based on a triadic interrelationship between society, the family and the individual psyche.[108] His model is equally applicable to psychoanalytic jurisprudence.

Jerome Frank, among others, has explained law in Freudian terms as a father substitute.[109] Law can thus be viewed as the public projection of the super-ego. The individual male's escape from the father complex is facilitated by the creation of institutional substitutes, the primary one being the state. To the degree that people require father substitutes in the form of institutional domination, they still remain under the influence of the Oedipus complex.

Professor Takeyoshi Kawashima, relying in part on Frank's Freudian analysis of law, contrasts the western view, which he terms "paternalism", with that of the Japanese, which is paternalism moderated by the psychology of *amae* which he terms "maternalism". According to Professor Kawashima, this is the source of the Japanese dislike for the rigid application of rules and the desire to achieve social harmony through warm human relations.[110] For him, at least, there appears to be no conflict between *amae* and autonomy. He writes that:

> the Japanese traditionally expect that in principle social obligations will be fulfilled by a voluntary act on the part of the person under obligation, usually with particular friendliness or benevolence ... The actual value of social obligation depends upon the good will and favour of the obligated person....[111]

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[106] E. Sagan, *At the Dawn of Tyranny: The Origins of Individualism, Political Oppression and the State* (1985).

[107] M. Mahler, F. Pine & A. Bergman, *supra*, note 55.

[108] *Supra*, note 106 at 348.

[109] J. Frank, *Law and the Modern Mind* (1930).

[110] Otsuka, Kawashima & Doi, *supra*, note 16 at 146 and 188-92.

[111] T. Kawashima, "The status of the individual in the notion of law, right, and social order" in Moore, *supra*, note 14 at 430.

What *amae* and autonomy have in common, and what therefore makes them consistent with each other, is voluntariness.

Where a dependency relationship is maintained on the basis of human feeling, all of the parties to the relationship are in it of their own free will, given that some need makes one of them dependent upon the other. The persons who are dependent upon others retain their autonomy so long as the people upon whom they are dependent do not take advantage of their dependency to force them to act contrary to their will.

The maternal principle was first expounded by the pioneer of Japanese psychoanalysis, Heisaku Furusawa.[112] He describes the psyche of the Japanese male in terms of what he calls the "Ajase complex". Ajase was the prince of Osha Castle in ancient India. In the actual Buddhist text, the story is about a father and son relationship in which the son kills his father but is forgiven by his father from heaven. In the story as modified by Furusawa and Okonogi to match the Japanese psyche, Ajase was the son of King Binbashara who was converted to Buddhism by his wife Idake. Idake feared that the king might lose interest in her as her features were not as they used to be. She thought that the only way to guarantee his continued affection was to have a son. She was told by a prophet that a wizard living in the forest would die in three years time, and would be reincarnated as her son. As she was too anxious to wait three years, she contrived to cause the wizard's death and become pregnant. The prophet had also told her that the son would kill his father. Fearing the spite of the yet to be born wizard-son, and having second thoughts, she sought to abort the unborn child, which was later delivered in a tower. Ajase was lovingly raised by his parents and only discovered the secret of his conception and birth at maturity. After much agony of spirit caused by the loss of his idealistic view of his mother, Ajase decided to kill Idake. At the moment of formulating this resolution, Ajase was swept with guilt, causing him to shake with fever and to break out into malignant sores which produced a terrible smell. Because of the stench, everyone deserted him except his mother, who

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[112] Heisaku Furusawa, *Zaiaku ishiki no nishu*, (Two Kinds of Feeling of Guilt) (1931); S. Yamamoto & K. Okonogo, *Nihonjin no Shakai Byori* (Social Pathology of the Japanese) (1982) at 68-88. I am grateful to professor Yoshiyuki Matsumura who drew my attention the Ajase complex in his paper, "The Role of Law in Western and Eastern Societies" (unpublished). He there states that "this story of Ajase is similar to *mabuta no haha* (literally, 'mother of eyelids', meaning the mother from whom he has been separated since his childhood, a popular drama in Japan) and presents the original form of the common mother-child experience through which we Japanese must pass without fail to reach maturity."

forgave him for resolving to kill her. With a silent and loving devotion she nursed and cared for him. Ajase, now aware of his mother's sacrifice and suffering, in turn forgave her, and mother and son recovered their original oneness.

The Ajase complex does not seem to be an alternative to the Oedipus complex, but is rather a culturally different expression of it, in the sense that both represent in mythic form the painful process of genderization which humans endure in the passage from infancy to adulthood. The Ajase myth marks a reconciliation with the mother which is missing in the western form of the complex. The maternal principle, reflected in the permeations of *amae* through Japanese culture, is absent in the West.

Freud believed that since women do not experience castration anxiety, they maintain a pre-Oedipal attachment to their mothers and consequently do not fully develop super-egos. "I cannot evade the notion", wrote Freud, "that for a woman the level of what is ethically normal is different from what it is in men ... they show less sense of justice ... and are more often influenced in their judgements by feelings...."[112] The Swiss child psychologist Jean Piaget noted that boys displayed an inclination to follow rules, and a facility in their application, while girls tended to be more pragmatic and less inclined to follow rules slavishly in their games and behaviour.[114] The Harvard psychologist, Lawrence Kohlberg, devised a scale of levels of moral development in terms of facility in the use of rules and logical consistency in reaching moral judgments, upon which he tested men and women, and concluded that women fell substantially lower on the scale.[115] Carol Gilligan, a Harvard colleague of Kohlberg, confirms that there is a difference between the way boys and girls, and men and women, approach moral disputes and rules; however, in her study *In A Different Voice*, she strips away the aura of superiority which is given to the masculine mode.[116]

Gilligan, who worked with Kohlberg in some of his research with children, discusses a typical reaction of a boy, Jake, and a girl, Amy,

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[112] S. Freud, "Some Psychical Consequences of the Anatomical Distinction Between the Sexes", *Standard Edition*, *supra*, note 47, vol. 19 (1961) at 257-58.

[114] J. Piaget, *The Moral Judgement of the Child* (1965), *Six Psychological Studies*, trans. A. Tenser (1967), *Structuralism*, trans. and ed. C. Maschler (1970).

[115] L. Kohlberg, *The Philosophy of Moral Development* (1981); "A Cognitive Developmental Analysis of Sex-Role Concepts and Attitudes" in E. Maccoby, ed., *The Development of Sex Differences* (1966) at 82-173.

[116] C. Gilligan (1982).

to a moral dilemma which Kohlberg posed to a group of eleven year olds to measure their moral development. The dilemma was whether a man who requires a drug to save his wife's life, and can not afford to purchase it, should steal it. Jake was clear that the man should steal the drug because a life was more valuable than property. Amy, on the other hand, considered neither property nor law, but was more concerned about the various human relationships which were involved in the situation. She responded, "if he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money." Gilligan comments,

> seeing in the dilemma not a math problem with humans but a narrative of relationships that extends over time, Amy envisions the wife's continuing need for her husband and the husband's continuing concern for his wife and seeks to respond to the druggist's need in a way that would sustain rather than sever the connection.[117]

There would appear to be some striking similarities between the approach and attitude of the Japanese to dispute settlement and rules and that taken by women in the West, which seem to justify Kawashima's use of the term maternal principle and its connection to *amae*, in contrast to the paternal principle.[118] The paternal principle dictates the obedience of an inferior in a hierarchical social order to a superior who has the authority to lay down rules for which obedience can be demanded as a duty. The maternal principle reflects the nurturing relationship whereby a dependent person can impose upon the love or emotionally-based good will of another for the satisfaction of a need. Each principle leads to a different form of We-consciousness. The paternal principle encourages individuals to define their selves in terms of their place in a hierarchical social order, while the maternal principle seeks a definition of the self in terms of relationships of dependency and mutual dependency. Autonomy, therefore, is inconsistent with the paternal principle, but consistent with the maternal. To the degree that *amae* represents the maternal principle, it is consistent with autonomy. When, however, paternalistic relations of domination are set in terms of *amae*, contradictions arise.

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[117] *Id.* at 25-32.

[118] *Supra*, note 111.

All of this must inevitably lead to the conclusion that the contradiction in western legal consciousness between legal justice on the one hand, and mercy, love, emotion or what has been called prophetic justice in the Judeo-Christian tradition, on the other, has its origins at least in part in gender bifurcation. Thus we can conclude that there is a fundamental relationship between western legal consciousness and the Oedipus complex. The identification of law with authority, authority with the father, and the father with the state, while at the same time identifying love, mercy and emotion with the mother, and excluding the mother from power, helps insure the separation of law and human emotion which is so characteristic of the western legal tradition.

The Ajase complex explains why the influence of *amae* permeates Japanese legal consciousness, rather than coalescing as a contradictory pole, as in the western tradition, even though Japan also has a patriarchal culture. In the Ajase complex the son returns to the mother. The reconciliation of the son to the mother is thus reflected in the particular view which the Japanese take of law, rules, justice and dispute settlement.

Freud, however, considered a return to the mother as an impediment to the development of the self. He viewed it as a form of wish-fulfillment which left one within the grips of the Oedipus complex, never able to transcend it. This accounts in part for his positive evaluation of the masculine and his negative evaluation of the feminine,[119] and furnishes a possible explanation for the difficulty experienced by some Japanese in fully developing a sense of the self.

It would appear that this leaves us in something of a dilemma. The maternal principle, *amae*, or some similar emotional foundation for We-consciousness is a necessary condition for human freedom. If we attempt to meet the needs arising from our interdependency through the paternal principle, we lose much of our autonomy. If, on the other hand, we follow the maternal principle alone, there is a danger that the self will not fully mature.

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[119] See J. Van Herik, *Freud on Femininity and Faith* (1982). In a brilliant analysis of the Oedipus complex, she shows that Freud's theories of gender, religion and the Oedipus complex are all interrelated and inseparable. Because females are already "castrated" since they lack a penis, there can be no fear of castration which will drive them through the complex. Rather they remain in a pre-Oedipal state which Freud equates with wish-fulfillment. Judaism is a more advanced religion because it renounces wish-fulfillment and is thus closer to the reality principle, while Christianity remains an expression of wish-fulfillment. Thus the asymmetry which Freud finds between male and female he finds also reflected in the contrast between Judaism and Christianity.

Reconciliation and Transcendence

The way out of this dilemma is through transcending the Oedipus and Ajase complexes. The Oedipus complex is fully transcended only when the gender gulf is healed within the individual psyche. Only then can the "I" and the "We" be in proper balance in a fully developed self. The male must return to the mother, but only after the "I" is strong enough that the centre of the self can withstand the loss of boundaries entailed in reconciliation with the feminine. Similarly, the Ajase complex can only be transcended when the return to the mother takes place after the self is strong enough to retain its boundaries. The Ajase complex produces the world of *amae* where We-consciousness is strong and I-consciousness is weak, a world of feeling with little autonomy. The Oedipus complex produces a world of authority and law, with little feeling, and where freedom is an illusion. So long as human emotions, qualities and abilities are bifurcated along gender lines, and the care and nurturing of children are left exclusively to women, we will be in the grips of these or similar complexes.[120]

As stated by Sagan, "the development of the psyche is the paradigm for the development of culture and society."[121] The psychological problems of the separation-individuation process of the individual psyche of the child unfolds in the context of a protective and nourishing mother who nevertheless represents "psychological death, the loss of boundaries"[122] under the shadow of the paternal power of the father who exercises authority over both child and mother. It is in this context of authority, power and dependency that we must seek the keys to understanding the evolution of legal consciousness in both East and West.

For me, the Buddha of Justice found in the great hall of the Supreme Court Building symbolizes autonomy with feeling, and calls for a view of the self in which both I-consciousness and We-consciousness are strong and in balance. In assimilating fundamental rights Japan need not lose the traditional sense of *amae* which, according to Dr. Doi, is the core of the Japanese soul. Individuality should be possible without alienation. If, however, the entire western

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[120] See D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976); N. Chodorow, *The Reproduction of Mothering* (1978); A. Rich, *Of Woman Born* (1976).

[121] *Supra*, note 106 at 364.

[122] J. Benjamin, "Shame and Sexual Politics" (1982) 27 New German Critique 151 at 155.

legal and political tradition is taken over, including the western views of substantive justice or transcendant goodness, along with western ideologies such as utilitarianism or Marxism, which reflect these ideals, then a dialectical tension will exist which will inevitably erode the sense of community which the Japanese presently enjoy.

The cultural bifurcation between East and West has its origins in a paradigmatic shift which took place in both cultures with the recognition that sensed experience is subjective; that is to say, relative to the observer. The shifts, however, went in opposite directions. In the East, the awareness developed that the sensed properties of objects such as colour, temperature, texture and so on were the products of human experience, so reality was sought in the recognition that the differentiations of experience were illusory and that only pure undifferentiated experience out of which the differences arose was real. This was the Brahman without differences in Hinduism, Nirvana in Buddhism, and the Tao in China.

The paradigmatic shift which gave birth to western culture occurred with the Greeks with the evolution of science, mathematics and philosophy. Unlike the East, which sought ultimate reality in terms of pure experience unadulterated by conceptual thought, the Greeks sought ultimate reality in terms of theoretical constructs of a cosmic order of universal law which they sometimes referred to as the logos. The success of the Greeks in mathematical astronomy, in the formulation of the laws of harmony in terms of mathematical relations, and the formulation of geometry into a logical deductive system culminating in *Euclid's Elements*, laid the foundation for their faith in reason, which faith took its ultimate form in Stoicism. It was Stoicism which gave birth to the western juridical tradition. The basic epistemological presuppositions of Stoic science and Stoic morals and law are thus much the same.[123]

With the radical transformations in twentieth century physics, stemming in particular from Einstein's theories of relativity, Heisenberg's uncertainty principle, and Bohr's concept of complementarity, there appears to be a convergence between the views of ultimate reality of East and West. This convergence has been the subject matter of a spate of books in the last few years.[124]

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[123] See Smith, Smith & Weisstub and Northrop, *supra*, note 84.

[124] See Northrop, *supra*, note 54; F. Capra, *The Tao of Physics* (1975); M. Talbot, *Mysticism and the New Physics* (1981); G. Zukav, *The Dancing Wu Li Masters* (1979); H. Yukawa, *Creativity and Intuition* (1973); A. de Riencourt, *The Eye of Shiva* (1980).

It should be kept in mind that there is no single quantum view of reality, in that quantum physics does not give us "a single metaphor for how the universe actually works", in the way Newtonian physics did. In fact, a number of possible views of reality are consistent with quantum physics, and not all of these are consistent with eastern metaphysics. A number, however, are, including the most influential, called "the Copenhagen Interpretation", which came out of Niels Bohr's Copenhagen Institute.[125]

The point I wish to make is that a convergence between the eastern and western world views has clearly started to take place, although some versions of each are more compatible than others. If a convergence between eastern and western metaphysics is possible, and this would certainly appear to be the case for some branches of western metaphysics, then a convergence should be possible between any moral or ethical theories which can be derived from them and which share similar basic presuppositions.

Legal and political theory contain both express and implicit ideas about the self. Our conceptions of the self are a product of our mental life. This being true, it is folly for legal and political theorists to ignore psychology, psychoanalysis and psychiatry.[126] Albert Einstein attested to the importance of psychoanalytic social theory for stable world political order when in 1932 he wrote to Sigmund Freud, seeking some solution, solace or hope in the face of his knowledge of the potential for the release of atomic energy, and the threat of impending war in Europe.[127] In response Freud wrote:

> Our mythological theory of instincts makes it easy for us to find a formula for *indirect* methods of combating war. If willingness to engage in war is an effect of the destructive instinct, the most obvious plan will be to bring Eros, its antagonist, into play against it. Anything that encourages the growth of emotional ties between men must operate against war. These ties may be of two kinds. In the first place they may be relations resembling those towards a loved object, though without having a sexual aim. There is no need for psychoanalysis to be ashamed to speak of love in this connection, for religion

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[125] See N. Herbert, *Quantum Reality* (1985).

[126] See for example Smith & Weisstub, *supra*, note 61; J. C. Smith, "The Sword and Shield of Perseus: Some Mythological Dimensions of the Law" (1983) 6 Int'l J. of L. & Psych. at 235, "Gods and Goddesses of the Quadrant: Some Further Thoughts on the Mythological Dimensions of the Law" (1985) 7 Int'l J. of L. & Psych. at 219; E. Fromm, *Escape From Freedom* (1941); S. Milgram, *Obedience to Authority* (1974); M. Moore, *Law and Psychiatry* (1984).

[127] Letter from Einstein to Freud (30 July 1932) in "Why War", *Standard Edition*, *supra*, note 47, vol. 22 (1964) 194 at 199.

itself uses the same words: 'Thou shalt love thy neighbour as thyself.' This, however, is more easily said than done. The second kind of emotional tie is by means of identification. Whatever leads men to share important interests produces this community of feeling, these identifications. And the structure of human society is to a large extent based on them.[134]

Freud's suggested solution to the problem posed by Einstein appears to correspond somewhat with the Japanese concept of *amae*. Thus the cure recommended by one of Japan's leading psychiatrists for the alienation suffered by western man, and the solution to war postulated by the greatest psychologist produced by the western world, also converge.

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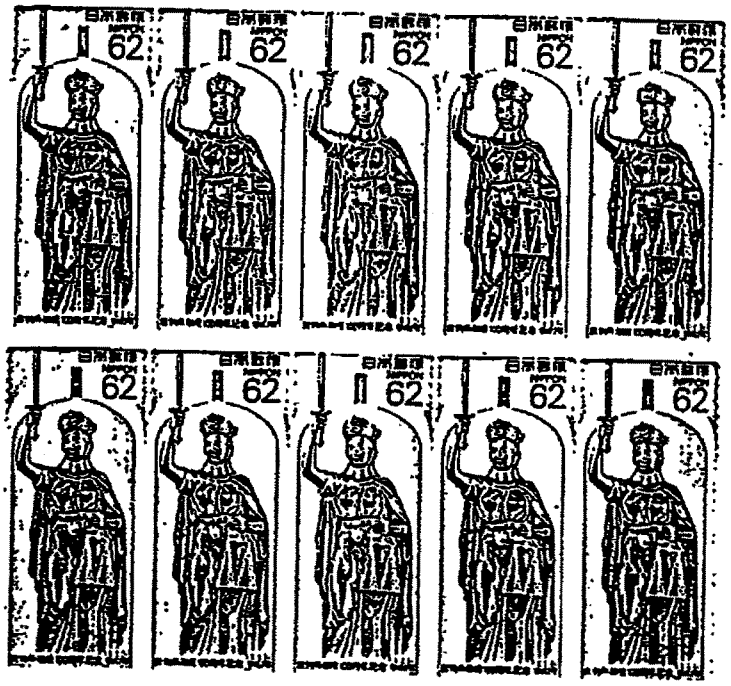
[134] *Id.* at 212. See also "Civilization and Its Discontents", *id.*, vol 21 (1961) ch. 5, 57 at 108-16.



Postage stamps issued to commemorate the centennial of Japan's judiciary 1890 - 1990

131

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I

The Post-War Court System as an Instrument for Social Change

Yasuhei Taniguchi

In what follows, I shall first explain the pre-war Japanese court system and related institutions as a prerequisite for understanding the direction taken by the post-war reforms. Then I shall proceed to consider the impact of these judicial reforms on the post-war social change.

The Pre-War Court System and Related Institutions

CHARACTERISTICS OF THE PRE-WAR SYSTEM

The Organizational Dependence of the Judiciary. The court system developed under the Court Organization Law (Saibansho koseihō) of 1890 was largely patterned after that of Germany. The whole judiciary was made part of the Ministry of Justice (Shihōshō), which functioned as a branch of the executive, headed by the Minister of Justice. Thus, the judiciary branch of government in post-restoration Japan was not organizationally independent from the executive. Such incorporation of judiciary functions under a Ministry of Justice is still very common in European countries. The Meiji Constitution of 1889 did not provide specifically for judicial independence except in regard to the tenure of judges (Art. 58) and the principle that a judge must follow the law (Art. 57). Nevertheless, a judge's independence in deciding cases was well established vis-à-vis the executive power. It is fair to assume, however, that the judiciary remained in obscurity, hidden behind the powerful Ministry of Justice.

Limited Judicial Power. The power of the judiciary was limited in two important areas. First, it was not given power to exercise any control over legislation by judicial review. Therefore, judges were bound even by provisions of law which they considered clearly violated the Constitution. Correction of such legislation was left entirely to the political process,

which, in turn, did not characteristically function in a democratic fashion.

Another limitation was that administrative acts remained outside judicial review. Such power was given exclusively to a special organ called the "Administrative Court," which belonged to the executive rather than to the judiciary. It was staffed not with ordinary judges, but with administrators serving as judges, a system borrowed from France (cf. the Conseil d'Etat). The availability of the Administrative Court for redress was limited: it sat only in Tokyo; no appeal was allowed from its decision; and its jurisdiction was limited to five specifically designated categories of cases, such as cases involving taxation or public construction.

Hierarchy within the Judiciary. The judiciary was organized on four levels: the Grand Court of Judicature (Daishin-in), created in 1876 as the highest appellate court; the Court of Appeals (Kōsoin), as an intermediate appellate court; the District Courts (Chihō saibansho), as first-instance courts of general jurisdiction; and the Ward Courts (Ku saibansho), as first-instance courts of limited jurisdiction. The Grand Court of Judicature had about fifty judges, each of whom belonged to one of ten Chambers consisting of five judges. These Chambers were either criminal or civil, according to their specialty. Under certain conditions all civil and/or criminal Chambers had to be united for a decision. All of these judges were chosen from among lower court judges. It was the highest position obtainable as a judge. There was no recruitment from outside the judiciary. Its decision always was given *per curiam*, no dissenting opinion being published.

The Court of Appeals and the District Courts were also collegial courts. Only at the level of the Ward Court were there single judges. Ward Courts were not simply small claims courts. They had exclusive jurisdiction over bankruptcy, land registration, and noncontentious matters related to family law and succession.

Career Judiciary. Judgeships were career positions like other positions in governmental offices. Judges were paid no better than administrators of the same rank. Up until 1923, judges and procurators (presently public prosecutors) were recruited through a national examination held for that purpose. Applicants for private practice in law had to take a separate bar examination which was substantially easier. The system was later changed so that applicants for any one of these three legal careers had to take a uniform national examination called the "High Civil Service Examination—Judicial Section." After the examination, candidates for judgeships and procurator positions were separated from those aspiring to private practice and were trained an additional year and a half as judicial apprentices. After this training, a second examination qualified them to become either judges or procurators. Young judges

received further training as members of collegial courts and could expect gradual promotion upward, the most fortunate ones eventually reaching the bench of the Grand Court of Judicature. Judges, especially able ones, were transferred in the course of promotion from a court to the administrative section of the Ministry of Justice to engage in supervisory work or legislative work such as rulemaking and preparation of bills. They were sent back to a court after several years of these extrajudicial services. Most judges served until retirement age.

Strong Procuracy Attached to Courts. As noted, judges were recruited and trained together with prospective procurators. As a matter of fact, procurators were officers of the court. A "procurator," taken from the French *procureur*, was considered a guardian of social order and public good. Procurators not only brought criminal prosecutions before a court, but also controlled the police and even had theoretical power to watch over judges' work. Their office (Kenjikyoku) was attached to each court and was called, for example, the Kenjikyoku of the Tokyo District Court. It was always housed in the same building as the corresponding court. Thus, judges and procurators appeared similar in function to the laity. In the courtroom, the procurator sat on the elevated platform with the judge, while the defense counsel had to stay on the floor with the accused. Since the procuracy was a politically powerful organ, the more ambitious and elitist young men tended to aspire to become procurators rather than judges.

OTHER FACTORS AFFECTING THE PRE-WAR SYSTEM

The Weakness of the Barrister. Until 1923, any graduate of a national (then imperial) university's law faculty was eligible to practice law. Other graduates had to take a national examination for admission to the bar. From that year on, a uniform civil service examination was imposed even on those who wished to practice law; but unlike judges and procurators, they were allowed to practice immediately without any further training as apprentices. It was only in 1936 that a year-and-a-half apprenticeship was introduced as a requirement for admission to the bar. But those apprentices were not paid any salary, while judicial apprentices were paid by the State. It is evident that small importance was attached to the practicing bar. Bar associations were not independent and autonomous bodies, but under the close supervision and control of the Ministry of Justice and its powerful local agency, the Kenjikyoku.

The general attitude of the public toward litigation and practicing lawyers, as well as the relative weakness of the Japanese economy and the way business was conducted at the time, did not favor the practicing bar. It could not attract youth from among the social elite except for a period during the early Meiji era when some ambitious youth who had studied in

the United States and England endeavored in vain to build up a more prestigious Japanese bar. Lawyers' activities were mostly limited to representation of clients in court, where they were minor figures humbly submitting their pleas to dominant judges and procurators. On the whole, practicing at the bar fostered little concern, let alone enough ability or prestige, to bring novel social problems as issues to be presented at court or to fight for the cause of social justice through the judicial process.

Authoritarian Procedures. At the end of World War II, civil procedures were still regulated by the Code of Civil Procedures of 1890, and criminal procedures by the Code of Criminal Procedures of 1922. Both were based on German codes. Common to both was the leading role played by the judge and the relatively minor roles played by private parties, either the criminal defendants and their counsel, or the parties to civil actions with their lawyers, if any were used. For example, witnesses were questioned mainly by the judge. Lawyers had a right to question supplementarily, but they normally did not exercise this right, fearing that it might offend the judge. Since the judge had the power to conduct by his own motion whatever investigation he thought necessary, a natural tendency on the part of the parties and lawyers was to depend on the judge's initiative. In criminal cases, the role of the procurator was dominant. Most characteristic of pre-war criminal justice was the institution called the "preliminary hearing." Originated in France as "instruction," it was first adopted in Japan as early as 1881 in the French-style Code of Criminal Instruction (Chizaiho), and was kept on in the still French-style Code of Criminal Procedure of 1890, and was further maintained in the German-style Code of Criminal Procedure of 1922. The preliminary hearing was the proceeding whereby the "judge of instruction" examined the case, without the presence of a defense counsel, simply on the basis of the evidence provided by the procurator and, only if deemed necessary, further evidence gathered by the judge himself in order to decide whether the case was suitable for a formal prosecution. If he ruled for prosecution, the documents gathered were handed over to the sentencing court far before trial. This practice implied a continual danger of biasing the sentencing court against the accused.

The Weak Political and Social Status of the Judiciary and the Legal Profession as a Whole. From the early Meiji period on, the modern Japanese judiciary was not intended to become a strong locus of power. The most important incentive for creating a modern judicial system was to persuade foreign powers to abandon their extraterritorial privileges. The Ministry of Justice and the judiciary within it were considered secondary to the formation of policy or the exercise of state control. When the new Grand Court of Judicature was founded and one of the then top political

leaders, Iwakura was asked to take the position of its president, he bluntly refused. For a considerable period, the judiciary could not be staffed by first-class candidates. Legend holds that the best graduates of Tokyo Imperial University's Law Faculty became administrators, the second best became professors, and the residue accepted judgeships. Very few even thought of becoming barristers. Under such conditions, the subordinate role of the judiciary was inevitable.

The public looked at the judiciary with awe rather than with respect or expectation. It was an institution that a good citizen should avoid. Disgust with legal practitioners and the process of litigation was a legacy of the Tokugawa regime that could not be easily removed, especially since the newer generation of leaders had no real intention to change such attitudes. It did not occur to judges or lawyers that the court and court procedure could become an instrument for significant social change.

Post-War Reforms

THE JUDICIARY UNDER THE NEW CONSTITUTION

Organizational Independence. Under the Constitution of 1946, the judiciary was separated from the Ministry of Justice and became an independent branch of government on a par with the Cabinet and the Diet. The judicial branch of government was now headed by the Supreme Court. Its Chief Justice was raised to a rank equal to that of the Prime Minister and the Chairman of the Diet. Administration of the whole court system became the responsibility of the Judicial Conference of the Supreme Court. Thus, the judiciary was made an autonomous organization, still controlled indirectly only by the legislature's power to allocate funds in the national budget and by the power reserved to the executive to appoint both Supreme Court justices and lower court judges.

A Unitary Judiciary and Abolishment of Administrative Courts. The post-war Constitution does not recognize any special administrative courts. All judicial power belongs to the Supreme Court and the lower courts subordinate to it. Accordingly, the pre-war Administrative Courts lost their constitutional basis and were abolished. Power to review any acts of administration became the province of the judiciary branch. The Family Court system was newly created, but not as special courts because the system was subordinate, as were all other lower courts, to the Supreme Court. Although many quasi-judicial bodies such as a Fair Trade Commission and a Labor Relations Commission were also created, their decisions were made subject to judicial review. A citizen's right to have any "legal controversy" resolved by the court system is constitutionally guaranteed.

The Power of Constitutional Review. This is probably one of the most significant post-war innovations brought in from American law. The judiciary is now given the power to review the constitutionality of legislation and any other state action. This power is vested not only in the Supreme Court, but also in all lower courts, the theory being that an unconstitutional law is to be considered null and void whenever an issue is brought to legal attention. The Supreme Court has exercised this power with much caution. While it has used all sorts of avoidance techniques in order to forego judgments on constitutional issues, nevertheless there have been certain decisions on important constitutional questions. The lower courts, in fact, have been more courageous in their decisions on pressing issues and have had some social impact, although most of their decisions have subsequently been reversed on higher appeal.

THE ROLE OF THE SUPREME COURT

Judicial and Administrative Functions. The Supreme Court is the highest appellate court, having no first-instance jurisdiction. Since it is the court of last resort for any constitutional question, an eventual appeal to the Supreme Court is always guaranteed. It serves also as the highest organ through which the entire judiciary is administered. The Ministry of Justice has no judicial function—rather it is principally concerned with law enforcement, as will be discussed in following chapters in this volume.

The judicial function of the Supreme Court is normally performed by a bench of five justices, called the "Small Bench." However, in cases involving constitutional questions and on other special occasions, fifteen justices are seated as the "Grand Bench." The justices are assisted by a group of judge-investigators (Saikōsaibansho Chōsakan), who are themselves experienced judges. There is suspicion that the current justices are much too dependent on these very competent helpers.

The administrative function of the Court belongs to the "Judicial Conference," which is assisted by a rather large subsidiary organization, the Secretariat of the Supreme Court. This organization is divided into several sections and many subsections, each headed by a judge and staffed by the administrative employees of the court.

The Justices. Unlike the former Grand Court of Judicature, the Supreme Court has only fifteen justices. They are appointed by the Cabinet without any right of approval by the Diet. In this sense, the Supreme Court can be said to be under the influence of the executive. Appointments, however, must be approved by the electorate. At the first general election after an appointment, the populace can vote for or against the appointment. If a majority votes against, the justice is removed from the office automatically. Such electoral review over appointment takes place every ten years thereafter. So far, no justice has been removed

from office in this way. Against-votes have rarely exceeded one percent.

Supreme Court justices are recruited from within as well as from outside the judiciary. The law provides that five of the justices need not be full jurists. At the time of the court's foundation, career judges, practicing lawyers, law professors, public prosecutors, and even nonjurists shared the bench. But the subsequent tendency has been to appoint more career judges. From the foundation of the Supreme Court till 1979, seventy-four justices have been appointed. Out of these, twenty-seven were judges from a lower court, eight were prosecutors, twenty-six were lawyers, seven were professors, three were diplomats, and three were administrators. Because the lawyers appointed tended to be older than the other appointees, they have served less time, and hence their relative presence has not been as large as it may look. At any rate, there are important differences from the practice of the former Grand Court of Judicature.

The Case Load of the Court. The Supreme Court is said to be suffering from an almost unbearable case load. The enormity of the task can be readily imagined if one considers that fifteen justices must now handle constitutional cases and administrative cases in addition to ordinary civil and criminal cases which were handled by the previous fifty justices of the Grand Court of Judicature. Except for criminal cases, there is no device similar to the American "certiorari" which screens undeserving cases. In 1980, the Supreme Court received 2,187 appeals in civil cases and gave a judgment in 1,522. In the same year, it received 2,409 criminal defendants on appeal and disposed of 2,300. With this heavy burden, the Supreme Court could not take time to consider constitutional or otherwise important issues in a satisfactory manner and had to rely heavily on the help of its judge-investigators.

THE LOWER COURTS

The District Courts remained more or less unchanged. The Courts of Appeals changed their name to the High Courts (Kōtō saibansho), but their function has not been greatly changed. The Family Court system is new. The Ward Courts became Summary Courts (Kan-i saibansho) and underwent functional changes. Here I shall consider only the Family Courts and the Summary Courts.

THE FAMILY COURTS

Jurisdiction. The Family Court has two divisions: the Juvenile Division and the Family Division. The Juvenile Division handles juvenile delinquency and is essentially a criminal court of a special character. The Family Division handles family conciliation and a variety of cases of a so-called noncontentious nature. The latter cases include the division of a decedent's estate among heirs, adjudication on support, declaration of

incompetence and appointment of a guardian, permission to change a name, etc. But such contentious procedures as may occur in divorce or in the recognition of an illegitimate child must be dealt with formally by the District Court. Conciliation of family disputes is conducted by the conciliation committee, consisting of a judge and two conciliators, set up for each case. In 1981, 83,873 family conciliation cases were filed, and a successful conciliation was achieved in roughly 41 percent of the cases. Conciliation is not only popular but also a required prerequisite to any action involving domestic relations. One cannot go, for example, directly to the District Court to bring a divorce action without having gone through an unsuccessful attempt at conciliation in the Family Court.

Personnel. Family Court judges are ordinary judges having no previous special training. They are rotated periodically by transfer from other lower courts.

One important feature of the Family Court is that it is staffed with special Family Court Investigators (or Family Court Counselors, Kateisaibanshō Chōsakan) who are trained in programs in sociology or psychology considered relevant to family and/or juvenile problems. This nonlegal professional resource makes the Family Court a unique institution. The investigators' task is to pursue investigation and give objective advice to the deciding judge or to the conciliation committee as well as to give counseling to the parties.

Family conciliators are part-time personnel and, unlike the civil conciliators described later, usually have no training in law. They are volunteers such as housewives, Buddhist priests, retired businessmen, and retired public officials. Originally some were considered to be too elderly, thus losing the confidence of the users. Retirement age recently was set at 70 to remedy this situation.

Procedure. Proceedings in the Family Court are informal and not open to the public. In its juvenile cases, it receives delinquent and pre-delinquent juveniles (under 20) sent from the Public Prosecutors' Office. It sends back to the Public Prosecutor those juveniles considered appropriate for a formal prosecution before a criminal court. Other juveniles are either sent to a Juvenile Home or put under the official supervision of a probation officer. The probation officers in turn put the juveniles under the direct attention of volunteers known as *hogoshi* (voluntary probation officers) (Wagatsuma and DeVos, 1983, Chapter 3).

Applications for a noncontentious adjudication of family matters are numerous (277,594 cases in 1981), but are disposed of swiftly (82.9 percent within a month). There is no formal trial. Parties are heard informally. In the conciliation proceeding the conciliation committee hears both parties together or one by one and proposes, if necessary, a

plan for settlement. Conciliation sessions normally are repeated several times until unreconciliability becomes apparent. Representation by a lawyer is allowed but not encouraged. Even if a lawyer is retained, the personal appearance of the parties is always required. The filing fee is nominal, and applications can be filed orally. Some courts are open in the evening. All in all, the Family Court is the most accessible and, accordingly, the most popular court in Japan.

SUMMARY COURTS

Jurisdiction. The Summary Courts may look like direct successors of the pre-war Ward Courts, but in fact they were intended to be a radically different court system. "Summary" is the translation of "kan-i," meaning simple and easy. The Summary Courts' jurisdiction is much narrower than that of the Ward Courts. Former bankruptcy power has gone to the District Court system. Noncontentious jurisdictions are the province either of Family Courts or District Courts. The Summary Courts can handle minor criminal cases and civil litigation involving lesser monetary amounts. Judicial power is limited to imposing fines or imprisonment up to three years only for certain designated crimes, and adjudicating civil cases involving less than 900,000 yen (raised in 1982 from 300,000 yen). Summary Courts handle most nonfamily civil conciliation cases under the Civil Conciliation Law of 1951. In 1980, 61,863 conciliation cases were brought to the Summary Courts (2,189 in District Courts). Successful conciliation was achieved in 55.7 percent.

Personnel. In addition to ordinary judges (including assistant judges with over three years experience), special "summary court judges" serve here. They are not full jurists, but are selected by a strict competitive examination from persons who have engaged in legal work for many years as court clerks, family court investigators, conciliators, prosecutor's clerks, etc. Therefore, they have considerably more experience than simply appointed lay judges, which do not exist in Japan.

Procedure. Summary Court procedure was made as simple and flexible as possible so that citizens could have daily disputes adjudicated with relative ease. But actual practice seems to have developed in a contrary direction. As far as civil cases are concerned, the function is similar to District Court procedures. An oral filing of complaint, though permitted by law, is hardly practiced. Judges and clerks, as well as lawyers, seem to feel more comfortable with a more complicated and dignified procedure. The recent increase of the jurisdictional limit to 900,000 yen has made it difficult for the Summary Courts to function as small claims courts for ordinary citizens. The trend seems to be returning toward the practices of the pre-war Ward Courts.

Unified Training for Prospective Judges, Public Prosecutors, and Practicing Lawyers. As before the war, a uniform national examination must be taken by all. But the further training of the candidates for these three branches of legal jobs is no longer separate. They all go through the same educational program at the Legal Research and Training Institute (Shihō Kenshūsho), which is under the administration of the Supreme Court. Training lasts for two years. The first and last four months are spent in the classroom, and the middle sixteen months in the field: eight months in civil and criminal courts, four months in the Public Prosecutors' Office, and four months in a lawyer's office. A second examination qualifies the candidates as full jurists eligible to be appointed as judges (assistant judges) or public prosecutors, or to be admitted to the bar for legal practice. The extreme difficulty of the legal examination is well known. Only about 500 out of almost 30,000 applicants pass each year. Out of 500 graduating from the Institute, seventy to eighty become assistant judges, thirty to forty become public prosecutors, and the rest become practitioners.

Post-war reform of legal education has not quite brought about a more unified legal profession as envisioned in the Anglo-American tradition. However, the more unified training program has had a considerable social impact. It has greatly raised the quality of the practicing bar. It has also fostered a mutual understanding between barristers and the judicial officialdom, so notably lacking under the separate pre-war training programs.

The New Role of Prosecutors. As a result of the organizational independence of the judiciary from the Ministry of Justice, the prosecutor's office was separated from the court and remained with the Ministry. At the same time, the power of the procurators was much curtailed. Their power is limited now to criminal investigation (supplemental to that of the police, over whom prosecutors no longer have any control) and prosecution of suspects before the court. The previous French style procurator has thus become a mere public prosecutor, although the Japanese title "kenji" has not been changed. The Procurators' Office, however, has become the Public Prosecutors' Office (Kensatsu-cho) and is no longer housed in the same building as the court.

The Judges. The independence of judges (and justices) is better guaranteed than before by the new Constitution. A judge's salary was drastically increased as compared with that of other civil servants, although the difference over the past thirty years has become progressively smaller. Judges are appointed for a term of ten years, a new system

introduced in the post-war reform. Whatever the legislative intention, it has not brought about the total independence of judges in a career judiciary, as I shall discuss later.

Young judges are first appointed as assistant judges for a ten-year term. As such they cannot decide cases alone. But special legislation has made exceptions. An assistant judge can decide alone after three years of experience in a Summary Court, and after five years he (or she) can function in the same capacity as a full judge with an approval of the Supreme Court—which approval is invariably given. That means that an assistant judge as young as twenty-nine can sit as a single judge in a District Court.

Lower court judges are recruited almost exclusively from fresh graduates of the Legal Research and Training Institute. The appointment of practicing lawyers to the bench occurred only in the early post-war period, although the practice is strongly advocated by Japanese bar associations. It is practically impossible because judicial positions, except on the prestigious Supreme Court, are not attractive enough for eligible practitioners, who in general earn substantially more than judges. Accordingly, the traditional career nature of the judiciary has been preserved except for the Supreme Court, for which outside appointment remains common. Young judges must go up the ladder by promotion, which is controlled by the Secretariat of the Supreme Court. There is a danger, therefore, that judges seeking a promotion will sacrifice judicial independence and make carefully noncontroversial decisions. The Supreme Court even has the power to refuse reappointment for a judge at the end of his or her ten-year term. Nonreappointment happened in 1971 to an assistant judge who was a member of the Communist-oriented Youth Lawyers' Association (Seihōkyo). This action caused a memorable social controversy. A judge's independence is not jeopardized by outside influences, but by stringent internal control. Bar associations have been voicing criticism of the "bureaucratization" of the Supreme Court and the judiciary in general. As already mentioned, the Supreme Court itself is under political influence in that its justices are appointed by the Cabinet and its budget is controlled by the Diet. Moreover, the Cabinet maintains its theoretical power to refuse the reappointment of lower court judges. Appointments and reappointments are made by the Cabinet from a list prepared by the Supreme Court. Although the recommendations of the Supreme Court so far has been followed by the Cabinet, the Cabinet remains aware of its power to reject. The Supreme Court's caution and self-restraint can be partially explained in this context.

The proportionate number of judges has not increased in any drastic way since the Meiji era, although the number of lawyers has (see Table 1).

Table 1

Year	Population (in thousands)	Civil Actions	Judges	Non-Summary Court Judges	Lawyers
1900	43,847 (100%)	585,355 (100%)	1,244 (100%)	—	1,590 (100%)
1925	59,737 (136%)	943,616 (161%)	1,116 (90%)	—	5,673 (357%)
1950	83,200 (190%)	794,635 (136%)	2,261 (182%)	1,533 (123%)	5,883 (370%)
1975	111,934 (255%)	1,376,470 (235%)	2,643 (212%)	1,864 (150%)	10,146 (638%)

An Independent and Autonomous Bar. Practicing lawyers and their organizations are no longer supervised by any governmental agency. Under the provisions of the Attorney Law of 1949, they enjoy full autonomy. According to that law, lawyers must belong to a local bar association. There is one bar association for each prefecture, except for Tokyo, which has three. Local bar associations are organized into a Japan Federation of Bar Associations. Absorbing the great majority of the graduates from the Legal Training Institute, bar associations in the larger cities and the Federation have become influential politically and socially.

As mentioned earlier, Japanese lawyers had minor social and political importance in the past. People did not accord them much respect. This condition started changing from the late 1950s on. Younger and more promising people began to become practitioners. Soon the judiciary began to experience some difficulty in finding a sufficient number of assistant judges because many eligible young graduates from the Institute chose to go to the bar. A solution was to increase the number of students at the Institute. The number has been increased gradually from 250 in the middle 1950s to the present 500. There has been an unprecedented improvement in the quality of practicing lawyers. Legal practice is now one of the most popular career goals of the better law students. The public attitude toward lawyers has also changed considerably. People now look at them with respect and recognize them as doing a socially useful job. The involvement of progressive lawyers in civil rights activities, pollution, and other social issues has certainly improved the public image of the bar as a whole.

Japan remains noted for its small number of lawyers. As shown in the above table, there are only a little more than ten thousand lawyers, two-thirds of them concentrated in metropolitan Tokyo, serving more than one hundred million people. But it should be mentioned that much legal work performed by lawyers in other countries is assumed in Japan by trained nonlawyers such as legal scriveners, tax attorneys, corporate

personnel,, etc. They can be called "quasi-lawyers." It certainly has been a way to reduce costs. There is fear that any further drastic increase in the number of lawyers could damage the now well established bar's present reputation.

PROCEDURAL REFORMS

Criminal Procedures. The post-war reform of criminal procedures has been most drastic. A new Code of Criminal Procedure replaced the old one; but it is not necessary to go into the details. The rights both of suspects and the accused have been enhanced. The notorious preliminary hearing was abolished, and an adversary system was introduced. With no previous knowledge of the presented case, the court considers only evidence presented by both parties at the trial. Since the prosecutor has discretion not to bring prosecution, and unsure cases are not normally prosecuted, most criminal trials result in a conviction. Moreover, since most defendants admit their crimes, the task of the defense counsel often is to plead for mitigation of punishment.

Civil Procedures. The Code of Civil Procedure has undergone only a few amendments, but their philosophical impact has been considerable. A basic change has been the introduction of adversary procedures. Pre-war civil procedures were already adversary in a sense, but the judge was expected to play the leading role. Post-war reforms have emphasized the parties' roles. The judge was deprived of power to initiate any examination of evidence by motion of the court. A witness must be questioned first by the party who called him or her, and then cross-examined by the adversary party. Although there was no written amendment to this effect, it was believed that the judge should not exercise the so-called clarification right to make any suggestions to the parties to present further allegations or to produce added evidence. In considering this last point, the Supreme Court has changed its view and now declares that the proper exercise of such power is the judge's duty. One fact is clear: post-war reforms have offered a more important role and an expansion of activities to the practicing bar.

Administrative Litigation Procedure. Under the pre-war system, relief from any illegal act of the administration could be obtained, in limited circumstances, from an Administrative Court. Now relief is directly available through a lower court. In order to better regulate procedures in such cases, there is the Administrative Litigation Procedure Law of 1962, which is an amendment of the previous law of 1948. There are three principal kinds of administrative litigation recognized by the Law: "attacking action," "party action," and "taxpayer's action." Attacking action (kokoku sosho) is the most popular procedure, through which one seeks either to have an administrative act or decision set aside or declared

void, or administrative inaction declared illegal. An attacking action can be brought to the District Court or to the High Court in certain categories of cases by any citizen whenever he has "legal interest" to do so. What constitutes a legal interest has been the main issue of discussion. "Party action" can be brought to court by a governmental employee for payment of his salary, for example. Such cases are far less numerous than attacking actions.

A large number of administrative litigations were processed during the early post-war period in response to problems raised by post-war land reform. Ever since, the number has been stable at around 1,000 per year. In 1981, out of 763 administrative litigations brought to the District Courts, 655 were attacking actions (539 seeking the setting aside of an administrative decision), 25 were party actions, and 80 were taxpayer's actions. The most numerous kinds of attacking action are those which attack decisions of the Patent Office and those involving tax problems. Recently, many administrative litigations have involved legally difficult and politically and socially controversial issues, such as the use of injunction against excessive noise at an international airport, the construction of a nuclear power plant, etc. These actions have attracted much public attention.

The procedures involving administrative litigation are a modification of civil procedures. Even if an action is instituted to attack an administrative act, the relevant administrative agency is not prevented from proceeding to enforce it. But the court may order a suspension of the act if necessary. Such suspension is automatically removed when the Prime Minister files an objection to it. This is the way in which the law balances the powers of the two branches. Judgment is binding not only on the defendant administrative agency, but also on other agencies. This is an exception to the rule that a judgment binds only the parties to the action.

The Social Impact of the Post-War Court System

BACKGROUND CONDITIONS

No social change can be brought about by a single causal agent. Social change is a more complicated phenomenon than that. Even if the reform of a court system could be considered one of the major causes of a particular social change, it is difficult to determine how much it alone affected the society. It is also difficult to distinguish cause and result. What looks like a cause can in fact be a result of something else. In considering the social impact of court reform, the very limited effectiveness of the court system as an instrument for social change should be kept in mind. There are three basic reasons for such

limitations.

Firstly, the judicial machinery can be set in motion only when someone comes to the court to do so. The courts are responders rather than initiators. Passivity characterizes the courts in comparison with other branches of the government. Curiously, social change can occasionally be brought about by not using the court machinery at all. For example, the general reluctance to prosecute for certain forms of abortion (a crime under the Japanese penal code) may have contributed to considerable change in Japanese society by decreasing the birth rate and increasing the proportion of small families. But this result is rather due indirectly to the policy of the police department, a part of the executive. The function of criminal justice is thus always dependent on the policy of the executive. Not pursuing such issues, we limit the scope of our consideration to the civil side, where private initiative determines the use or nonuse of the judicial machinery. Whether a person decides to go to court or not depends on many factors.

It is generally admitted that the Japanese do not like to bring a lawsuit. The number of lawsuits is certainly much less than in the United States, Germany, or France. It could be a result of the nonlitigious character of the Japanese people. Professor Haley (1978) doubts this, however, and has proposed the hypothesis that the Japanese are as litigious as other people, but are only prevented from bringing suit because of their difficult court system. Another possible explanation could be that the total number of disputes in Japanese society is less than elsewhere, although the degree of litigiousness is similar. Whatever the correct answer may be, the Japanese do resort to the court. But there are at least three barriers to overcome.

The first barrier is psychological. It originates from the feeling of discomfort most people have with a dispute. Because of such discomfort, one tries not to recognize even the existence of the dispute. But when a grievance passes a certain bearable point, one takes an action to seek relief, such as bringing a suit to court. Perhaps this mechanism is common to all cultures. If the Japanese are different, their bearable point may be higher than elsewhere. But the psychological barrier seems to become lower in Japan in a number of situations—notably, where a grievance is shared by many others and an action for relief can be taken collectively; where a grievance is directed against an impersonal body like the government or a corporation; and where the process of resolving the grievance does not imply too much direct confrontation.

The second barrier is economic—namely, the availability of money and the time needed to go to court. This barrier becomes a particularly prohibiting factor when the result of an action cannot be clearly foreseen.

The third barrier is the availability of proper legal service. Good legal service is essential in a difficult case. Therefore, this barrier is low for a simple case. When we consider the social impact of court actions, this barrier is very important, because socially influential cases normally involve novel questions of law and complicated questions of fact. Only an imaginative and energetic legal service can engage such purposes. In large cases the task can be accomplished through a concerted effort of many lawyers.

Secondly, the judicial machinery can work only according to the law. Procedure and substance are both regulated by law. If there is no procedure to attain an objective, no relief can be attempted. It would have been just a waste of time under the Meiji Constitution to seek relief from unconstitutional legislation, because there was no procedure for the constitutional review of legislation. In addition to the available procedure, there must also be a proper substantive rule of law which permits particular relief. This poses a more subtle problem because there are always subtle possibilities as well as definable limits in legal interpretation. A judge's responsiveness to subtle questions of interpretation varies. It is inevitable that his conclusion will be affected by unique features of personality and background. The legitimacy of his conclusions could be derivative of the independence of his mind as well as the procedural due process he observed.

Thirdly, the judicial proceeding is intended, as a rule, to affect only the parties to it. If so, any social change cannot be expected from it, because a social change is something that affects everybody in a society. But the fact is that there can be some de facto effect of a court proceeding upon others, even the society generally. When a provision of law is declared unconstitutional, it is likely to be deleted voluntarily by the legislature. Even if an action is lost, the very fact of bringing the action to court can trigger the political process to remedy the situation. Such results do not occur automatically. Certain efforts must be made to mobilize machineries for social change in connection with a court action, such as a community movement, a labor movement, the mass media, etc. Such de facto social effects will be greater when the number of persons involved in a court proceeding is large. The strategy of so-called mass action aims at this. All this shows that a court action as such can have little, if any, social impact.

SOME REFLECTIONS ON NEW INSTITUTIONS

Taking these conditions into account, I shall proceed to evaluate how the post-war reforms of the court system could and did work to bring about social changes during the past thirty years. I begin with some of the new institutions.

Family Court. This court, particularly its Family Division, succeeded in removing some of the aforementioned barriers by making itself very accessible to citizens. It is said that when asked about the location of the courthouse in town, an ordinary citizen would be likely to indicate the Family Court rather than the District Court. The Family Court was founded at the same time as the promulgation of the radically progressive new family laws. The court was instrumental in having the ideals of the new family laws permeate the citizenry. Family conciliation was utilized to educate the people, so to speak. It was also a convenient device by which the court could itself avoid a socially inadequate result of the new laws. Taking the middle way became possible in conciliation, whereas in a decision the result would of necessity be for one side or another. Interestingly enough, the institution of conciliation promoted a social change intended by the substantive rules of the new family laws and, at the same time, mitigated any adverse effects. Moreover, many disputes which would have been resolved previously within a family—for example, through the assertion of paternal or joint family authority—have been brought to conciliation because the family is no longer capable of performing such a function, especially once legal support of such authority is withdrawn. In this sense, Family Court conciliation has constituted a useful tool of conflict dissolution in a changing society.

Summary Court. This new court could have become a significant instrument for consumer justice. But, as explained before, it failed to make itself sufficiently accessible to ordinary citizens by removing some of the barriers to accessibility mentioned earlier. Small grievances of consumers are now better processed by consumer centers often run by local (city or prefecture) governments. Such contact costs nothing, and is rapid and effective, too.

The civil conciliation taking place in Summary Courts has in general been successful. These processes are not a post-war institution, but were started in the 1920s in order to cope with the social changes occurring after the First World War in such matters as housing disputes, agricultural tenancy disputes, and family disputes. Their contemporary function should not be ignored.

Conciliation prospers in the Summary Court, but also has been utilized successfully in some extrajudicial institutions, such as the local and central Pollution Control Commissions, the Labor Relations Commission, and the Constructions Disputes Dissolving Commission. These are areas where the substantive law is not yet firmly established and where a case-by-case consideration is highly needed.

At one time, civil conciliation within Summary Courts had to assume the task of trying a large amount of traffic accident cases. By now

these cases are not particularly numerous, because the substantive rules governing fault have been relatively well established through previous courts' decisions. Now traffic accident disputes can be better settled in an Automobile Accident Disputes Settlement Center, an extralegal private organization. Such utilization again demonstrates how conciliation is only partially processed in legal institutions and how social change is only indirectly influenced by court procedures.

The Supreme Court and Constitutional Review. By its very nature, a constitutional decision should have great social and political impact. In fact, the labor movement, for example, has been much affected by the Supreme Court's decisions on whether or not public employees have a right to strike. It first upheld the constitutionality of a restriction on strikes, then loosened its attitude, and finally went back to the original strict position. There are only nine or ten occasions on which the Supreme Court has held a State act, including legislation, unconstitutional. But what kind of social change eventuated from each of them is a good question. Some decisions have not even been followed by legislative action. A 1973 decision holding unconstitutional a Penal Code provision punishing patricide more severely than normal homicide was unpopular among the members of the Liberal Democratic Party, and no amendment or deletion of the provision has been made. A 1976 decision held unconstitutional the way voting districts were organized because the weight of each vote differed very much from district to district. But this decision did not nullify the result of the particular election attacked by the plaintiff.

Constitutional decisions upholding the constitutionality of given laws are numerous. They have frequently approved the present state of affairs as meeting the constitutional standards. These decisions are more or less conservative politically (for example, decisions upholding restrictions on demonstrations) as well as socially and culturally (for example, decisions on obscenity). The Supreme Court has not had the occasion to respond to the constitutionality of progressive acts passed by the legislature, a situation most unlikely to change, given the generally conservative orientation of the Liberal Democratic party.

However, it must be admitted that the very institution of constitutional review has brought about one major social change, a society has been developing in which the constitutionality of legislation and other State acts can be discussed freely before a court of law. Constitutional norms have become the norms of positive law. And here we should not overlook the role of an active bar which has presented those issues to the court, removing the legal service barrier of the private parties.

The Supreme Court has been more innovative in nonconstitutional matters. It has issued a series of decisions protective of the socially weak, restricting the landlord's right to rescind the lease of a house, protecting the interests of an unregistered wife, interpreting against the language of an Anti-Usury Law on the payment of interest as part of principal, relieving the victims of medical malpractice by lessening the burden of proof, etc. In criminal cases, it has several times exercised its exceptional power to reverse conviction on the ground of an error of facts. Whether these rather liberal decisions could have come out from the highest pre-war court or whether they are really a result of the post-war reform of the court cannot be answered.

Administrative Litigation. Here main issues center around the proper relation between judicial power and that of the executive. Courts have often refrained from giving any relief, saying that the attacked act of an administrative agency falls within the proper discretion of the agency, thereby upholding the validity of the act. Courts have also dismissed many attacking actions by saying that there is not yet an administrative act vulnerable enough in its application to become a proper target of an attack. This has been particularly detrimental to plaintiffs, given Japanese administrative practice, which more often takes the form of informal "administrative guidance" rather than a formal administrative order or a clearly identifiable act of administration. But probably the most controversial issue in this area is the problem of standing to sue: the question of whether a particular plaintiff has sufficient legal interest to attack a particular administrative act. Courts have been rather restrictive, generally requiring actual harm to the plaintiff's interest specifically protected by law. This doctrine has limited the availability of judicial relief in the environmental field. Many actions have been brought attacking a grant of license to build a power plant or petrochemical plant, for example, by the residents nearby. The well-known Osaka Airport case (see Chapter 2) raised the issue of whether residents can enjoin the operation of an airport, a public agency. Osaka High Court granted such an injunction, but the Supreme Court reversed it, saying that an injunction is too much judicial interference with administrative power.

Here again, one thing cannot be disputed: the new institution of administrative litigation has brought about a society in which an act of administration can be attacked by the persons affected. Such a general rule was lacking under the pre-war system. And again we must also think about the bar's ingenious activities on behalf of this law despite the conservative disposition of the Supreme Court.

The New Position of the Practicing Bar. This leads me to the last, but not the least, important point I would like to make: the role of the bar in

social change. As suggested earlier, this kind of caption would have been almost, if not totally, irrelevant under pre-war conditions. Today the bar's initiative in socially important problem areas cannot be passed over without mention.

Perhaps the first notable success of trial lawyers was in pollution cases. These cases were originally instituted by a group of leftist lawyers with a strong political motive to use litigation as a tool to make known the vices of the capitalistic economy, to attack the government policy of expanding the economy, to organize pollution victims politically, etc. But the problems so utilized were real and also came to attract the attention of politically "neutral" people. Such politically neutral lawyers soon became sympathetic to the causes and came to consider "public interest" activities as a normal part of their professional concern. A host of litigations followed, involving a "right to sunshine," a "right to a healthy environment," or a "right to seashore," as well as product liability of drugs, medical malpractice, and other consumer issues. There is no longer any inhibition on the part of practicing lawyers to raise novel questions of law and to attempt to persuade the courts in what some consider aggressive moves. Such activities are reported daily in newspapers or other mass media. In pre-war times, newspapers only reported criminal cases that attracted public attention. Nowadays they are more concerned with civil cases. Whether this is a result of a general social change or a cause of further social change is a difficult question. Most likely an interactive process is involved. One can be sure that the practicing bar has become instrumental in utilizing the open forum of the court as a means of directing change. This has been made possible by the increased freedom of action as well as the higher status afforded the bar, which have resulted from the post-war reforms affecting the bar and the standards of legal education.

References

Haley, John O. "The Myth of the Reluctant Litigant." *Journal of Japanese Studies*, 4:2 (1978), 345–370.

——— "The Politics of Informal Justice: The Japanese Experience, 1922–1942." In Abel, Richard L., ed., *The Politics of Informal Justice*. Academic Press, 1982.

Kitagawa, Zentaro. "Resonance Theory—A Tentative Approach to the Dispute Settlement Mechanism." In Lüke, Gerhard et al., eds.,

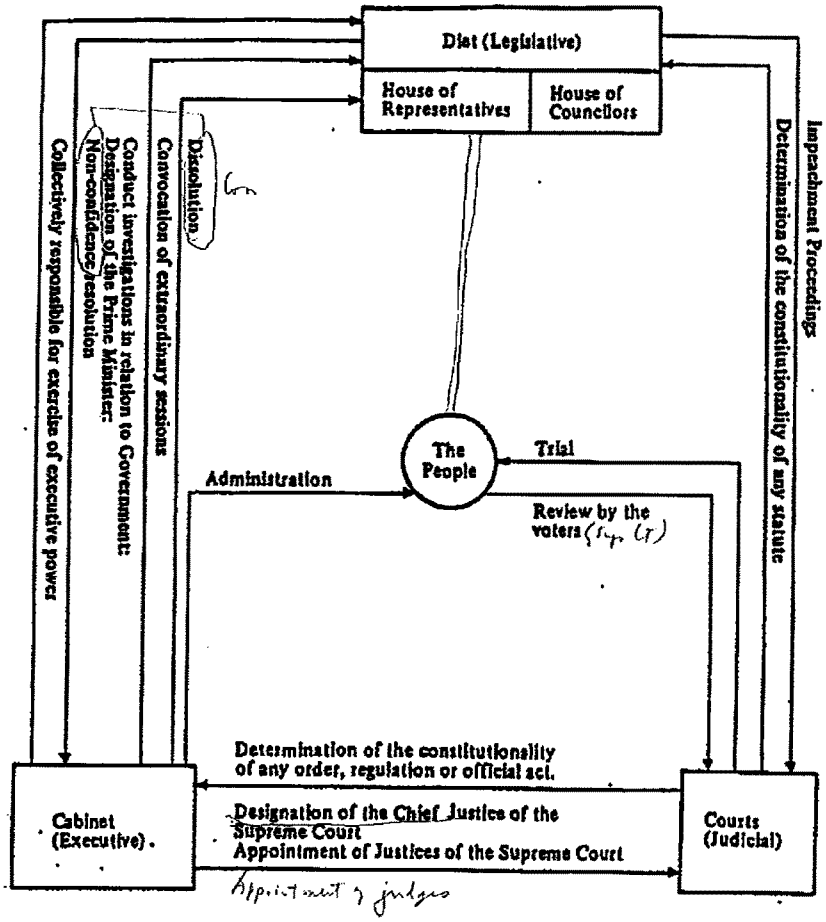
Rechtsvergleichung, Europarecht und Staatenintergration. Carl Heymanns, 1983.

Kojima, Takashi, and Yasuhei Taniguchi. "Access to Justice in Japan." In Cappelletti, Mauro, ed., *Access to Justice*, vol. I, book 2. Giuffre-Sijthoff, 1978.

Taniguchi, Yasuhei. "Extra-judicial Dispute Settlement in Japan." In Kötz, Hein, and Reynald Ottenhof, eds., *Les Conciliateurs, la Conciliation, une Etude Comparative.* Economica, 1983.

——— Taniguchi, Yasuhei. "Legal Education at the Legal Training and Research Institute: An Introduction, 25 Jiyû to Seigi 7 (1974)." As translated in Henderson, Dan F., and John O. Haley, *Law and the Legal Process in Japan.* Seattle: University of Washington Press, 1978.

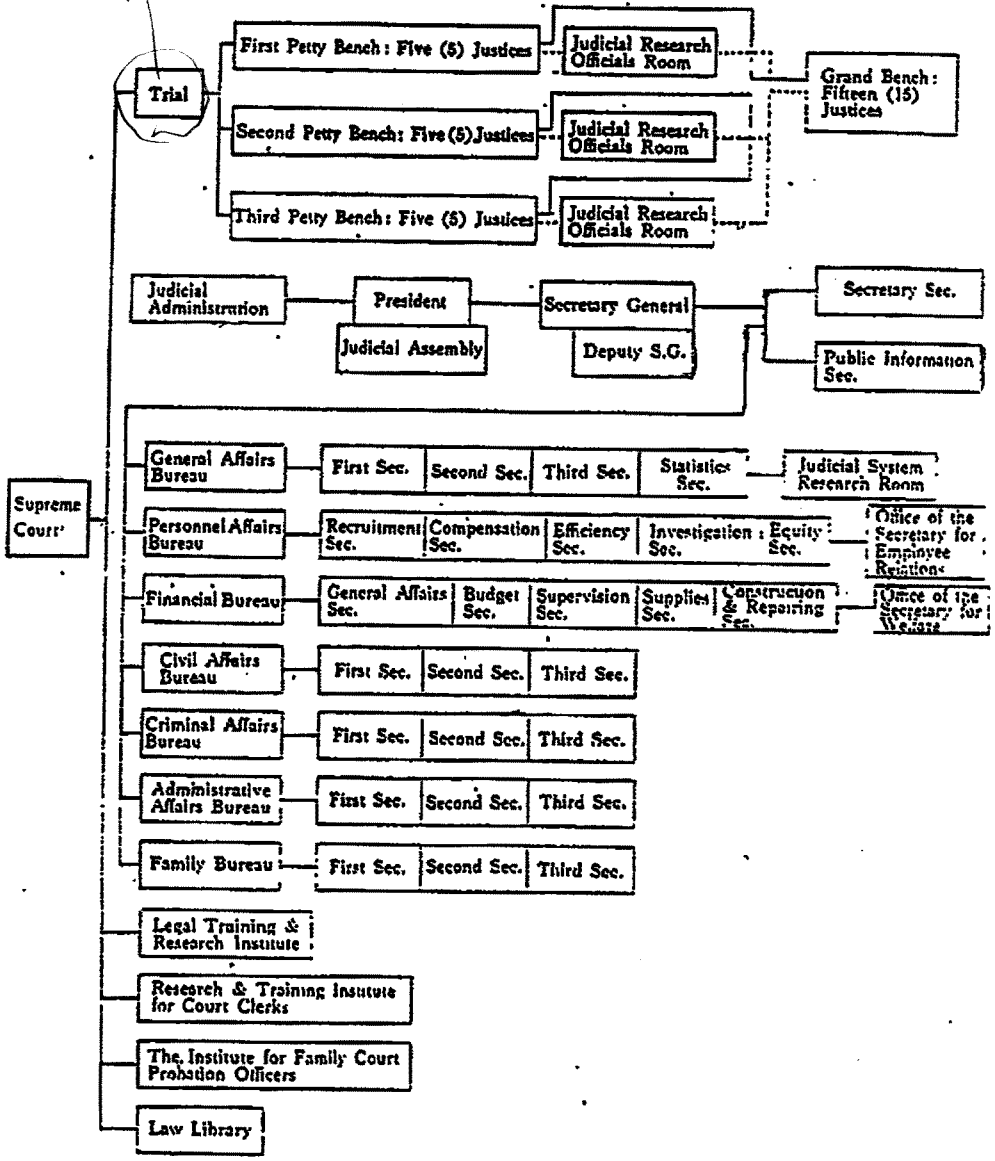
Wagatsuma, Hiroshi, and George A. DeVos. *Heritage of Endurance.* Berkeley: University of California Press, 1983.



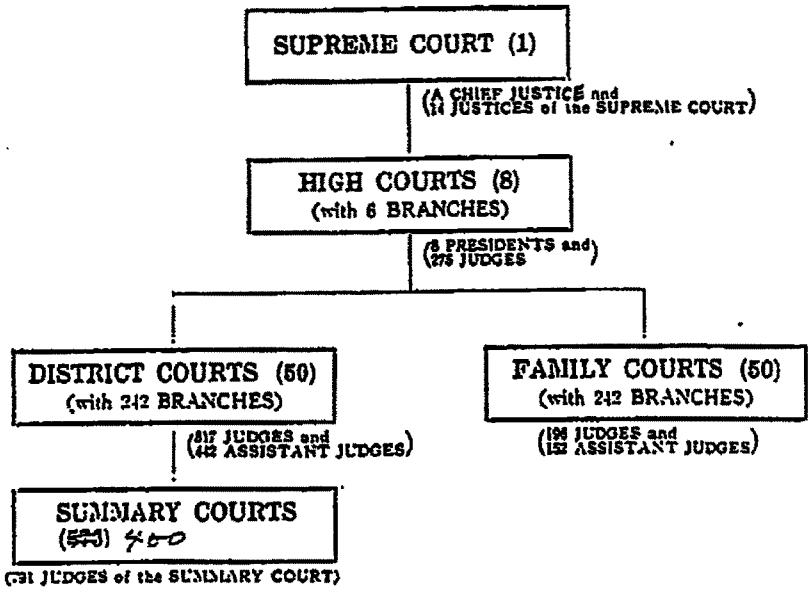
Fixed Number of Judges and Supporting Personnel (1976)

Classification	Number
Chief Justice of the Supreme Court	1
Justice of the Supreme Court	14
President of the High Court	8
Judge	1,288
Assistant Judge	594
Judge of the Summary Court	791
Court Clerk	6,582
Family Court Probation Officer	1,517
Court Stenotypist	935
Court Secretary	6,972
Bailiff	1,883
Other	3,806
Total	24,391

Organization Chart of the Supreme Court



Court Organization Chart

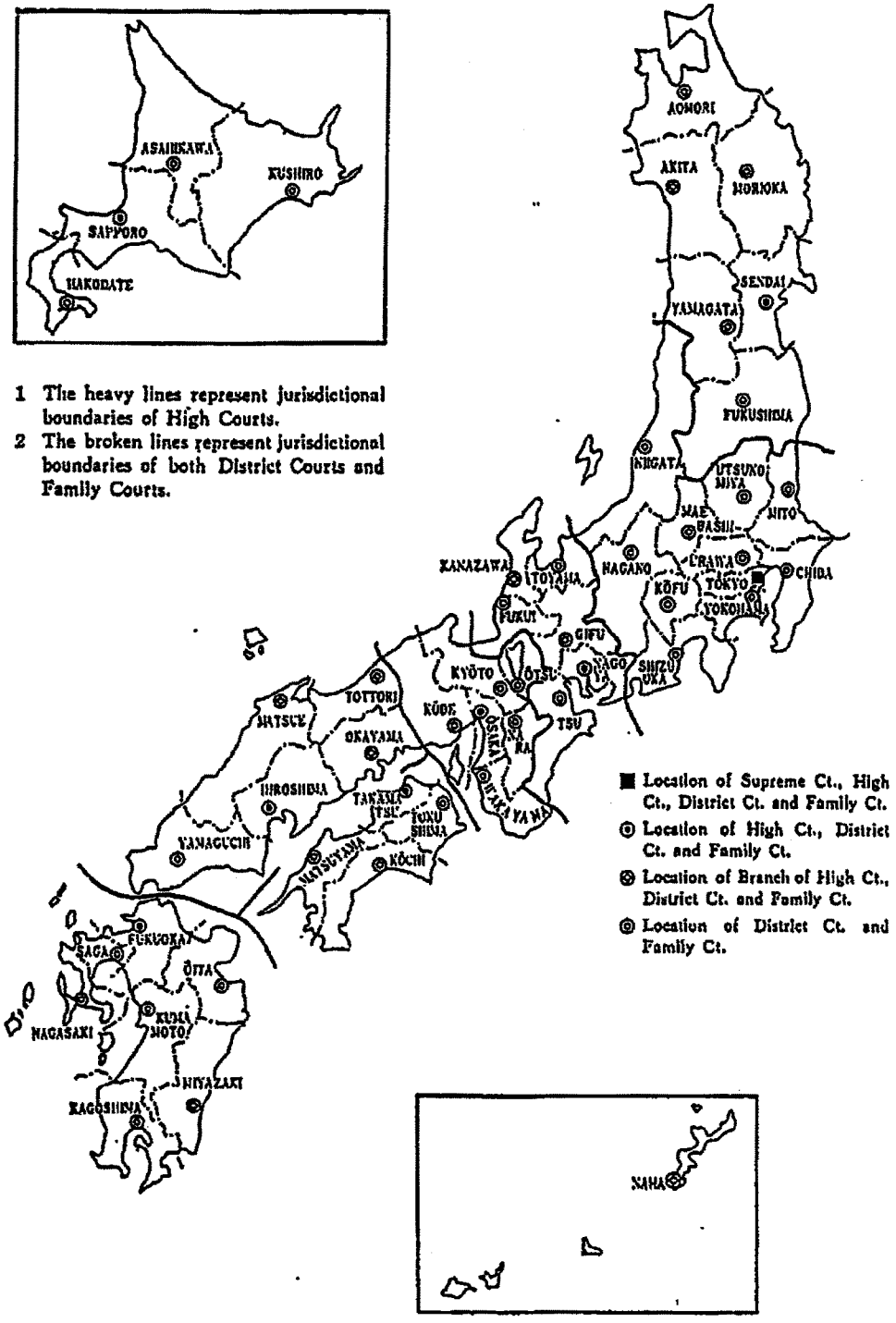


Jurisdiction and Procedure of Japanese Courts III

FAMILY CASES

SUPREME COURT	Same as in Civil and Criminal Cases
HIGH COURT	Appellate Jurisdiction only by a THREE-JUDGE COURT
FAMILY COURT	Original Jurisdiction by a SINGLE-JUDGE COURT Disputes affecting domestic relations (adjudgement and conciliation); Juvenile delinquencies; Adult criminal cases affecting children's welfare.

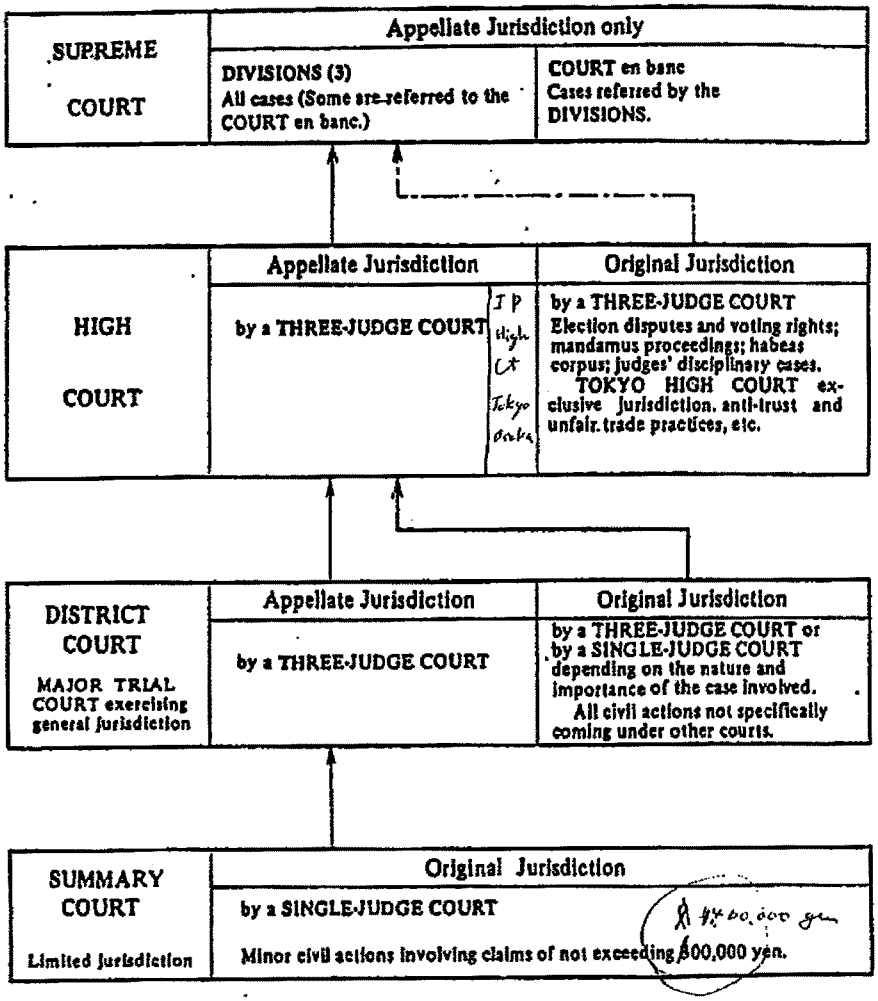
Note: A direct appeal may be made to the SUPREME COURT from a judgment of the FAMILY COURT in which the court decided unconstitutionality of law, ordinance, etc.


ASAHIKAWA
KUSHIRO
SAPPORO
HAKODATE
AOMORI
AKITA
MORIOKA
SENDAI
YAMAGATA
FUKUSHIMA
NIIGATA
UTSUNOMIYA
MITO
MAEBASHI
KANAZAWA
TOYAMA
NAGANO
SAITAMA
CHIBA
KŌFU
TŌKYŌ
YOKOHAMA
FUKUI
GIFU
KYŌTO
ŌTSU
NAGOYA
SHIZUOKA
TOTTORI
KŌBE
OSAKA
TSU
MATSUE
OKAYAMA
HIROSHIMA
TAKAMATSU
TOKUSHIMA
YAMAGUCHI
MATSUYAMA
KŌCHI
FUKUOKA
SAGA
ŌITA
KUMAMOTO
NAGASAKI
MIYAZAKI
KAGOSHIMA
NAHA
1 The heavy lines represent jurisdictional boundaries of High Courts.
2 The broken lines represent jurisdictional boundaries of both District Courts and Family Courts.
■ Location of Supreme Ct., High Ct., District Ct. and Family Ct.
◎ Location of High Ct., District Ct. and Family Ct.
⊗ Location of Branch of High Ct., District Ct. and Family Ct.
◎ Location of District Ct. and Family Ct.

(9)

Jurisdiction and Procedure of Japanese Courts I

CIVIL CASES

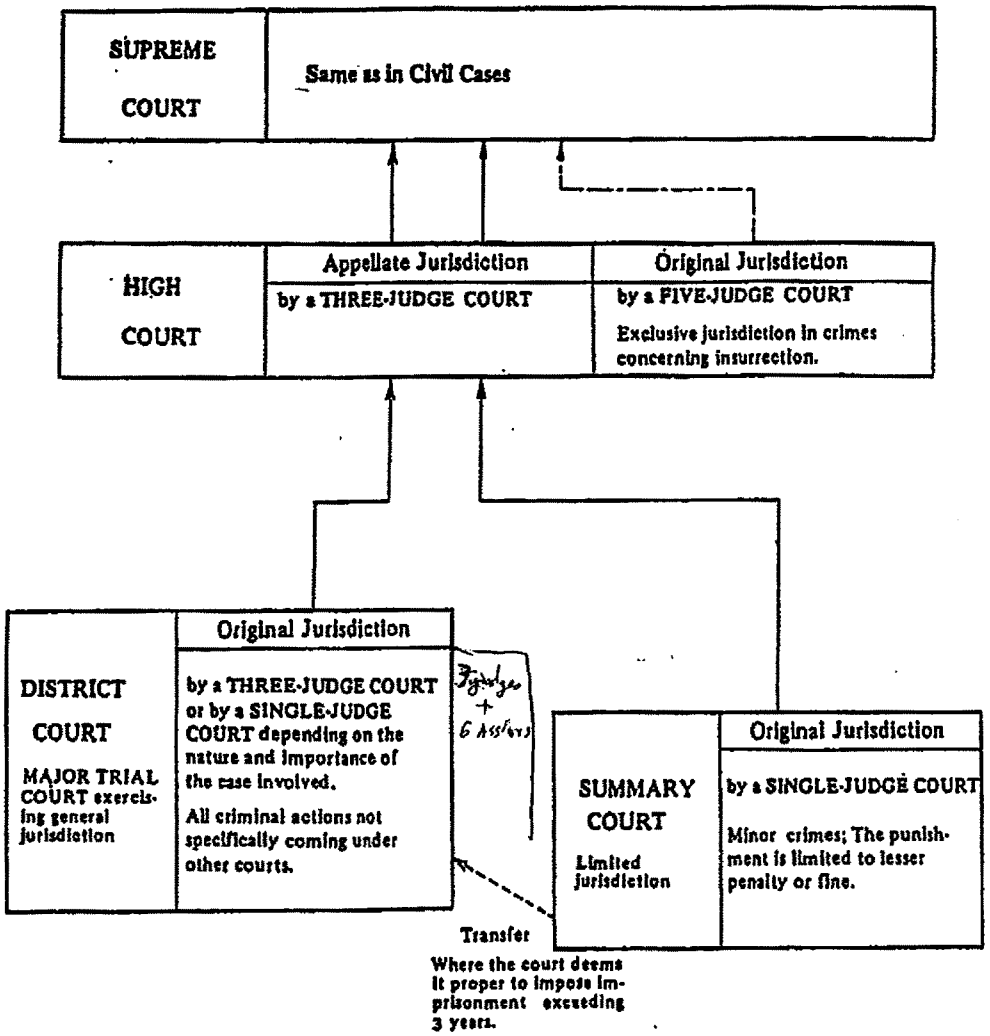


Note: 1) Where both parties agree, a jumping appeal may be made from a judgment of the SUMMARY COURT to the HIGH COURT or from a judgment of the DISTRICT COURT to the SUPREME COURT.

2) Where a SUMMARY COURT case involves constitutional questions, a special appeal may be made from a judgment of the HIGH COURT to the SUPREME COURT.

Jurisdiction and Procedure of Japanese Courts II

CRIMINAL CASES



Note: A direct appeal may be made to the SUPREME COURT from a judgment of the DISTRICT COURT or the SUMMARY COURT in which the court decided unconstitutionality of law, ordinance, etc.

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Judicial Independence in Japan Revisited

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Judicial independence in Japan has only rarely concerned outside observers of the Japanese legal system. Until recently an occasional historical essay,[1] a paragraph or two in a work on Japanese civil procedure,[2] or brief mention in descriptive studies of Japanese constitutional law[3] seemed to suffice. Taken together they presented a generally positive picture.[4] Japanese judges, we were told, were able quite early in Japan's modern history to withstand attempts by political leaders to direct the outcome of cases.[5] Despite jealous protection by judges themselves, the Meiji constitution (1889–1946) could not, however, fully guarantee judicial independence, particularly in criminal cases, because of the organization of judges and procurators as justice officials. The Ministry of Justice had administrative authority over the appointment, promotion, and assignment of both procurators and judges, and there was career mobility between the two offices.[6] But these defects were presumably corrected under the postwar legal reforms by transferring personnel administration of career judges to the Supreme Court.[7]

Recently, doubts have begun to emerge. Scholars on both sides of the Pacific question the previous perception of the Japanese judiciary as a politically neutral organ of state authority. First, senior judges, particularly those in the administrative arm of the Supreme Court, in alliance with conservative party leaders, are accused of purposefully suppressing progressive tendencies among younger

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[1] See, e.g., Barbara Teters, *The Ōtsu Affair: The Formation of Japan's Judicial Conscience*, in MEIJI, JAPAN'S CENTENNIAL: ASPECTS OF POLITICAL THOUGHT AND ACTION 36–63 (David Wurfel ed. 1971).

[2] See, e.g., TAKAAKI HATTORI AND DAN F. HENDERSON, CIVIL PROCEDURE IN JAPAN 3.02[5] (1983).

[3] See, e.g., John M. Maki, *Japanese Constitutional Style*, 43 WASH. L. REV. 893, 913 (1968).

[4] The description of judicial administration under the Supreme Court by the late former Chief Justice Takaaki Hattori, who was a leading participant for much of his career, deserves special mention: Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69 (1984). However, as indicated below, younger Japanese scholars have been considerably more critical, especially since the Miyamoto affair in 1971.

[5] Nearly all accounts of judicial independence in Japan begin with the *Ōtsu* case in which Chief Justice Iken Kojima in 1891 refused to yield to government pressures to impose the death penalty on the would-be assassin of the future Czar Nicholas II of Russia during an official visit to Japan. The standard account is included in *id.* at 69–70. For the story with the sequel that allegedly led to Kojima's retirement, see J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 142–143 (1993).

[6] See, e.g., Hattori, *supra* note 4, at 70.

[7] The postwar reforms are summarized in English in Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under the Allied Occupation*, in LEGAL REFORMS IN JAPAN DURING THE ALLIED OCCUPATION: WASH. L. REV., Special Reprint Volume, 1977, at 20–24. Among the changes Oppler emphasizes was the "clear-cut separation of the public procurators from the courts" (at 24).

judges.[8] Also decried is a tendency to assign judges to the procuracy.[9] Then enter a provocative pair of exceptionally able American scholars to challenge all prevailing views.[10] Notwithstanding prewar history and postwar reforms, and going beyond even criticisms of internal judicial administration, they adamantly deny the independence of the judiciary from direct outside political direction. By aggressive manipulation, they contend, Japan's political leaders actively control both Supreme Court justices as well as lower court career judges to obtain the judicial decisions they want. "In substance," they conclude, "Japanese judges are agents of [Liberal Democratic Party] principals."[11]

The issue is important. Japan's legal system has long provided models for others to emulate. Every legal system in East Asia today reflects at least in part the influence of Japan's adaptations of European law and legal institutions.[12] If indeed Japan has been able to devise a judicial system that effectively guarantees the independence of judges from political and administrative influence, Japan's experience is especially significant for those nations in East Asia, especially China,[13] that today seek to institute reforms to ensure the effectiveness of constitutional and other legal constraints on those who wield political and economic influence. Little is to be gained from emulating the Japanese experience, if, on the other hand, judicial independence in Japan is only a facade. In short, judicial independence in Japan is worth another look.

At issue is whether through cabinet appointment of career judges and Supreme Court justices, the political groups in power are not only able to but actually do effectively determine, if not the outcome of particular cases, at least the ideological directions of judge-made and interpreted legal rules. No one questions the possibility of such control. By lodging the authority to appoint judges and justices with the cabinet, as detailed below, the postwar constitution was intentionally designed to achieve a degree of political accountability. At least for the Americans who contributed to the drafting of the postwar constitution, judicial independence did not mean judicial autonomy. Although individual judges were to be bound by their "conscience" (*kokushin*) as well as the law in each case they adjudicated, direct political control over the appointment of Supreme Court justices and lower court career judges was intentionally provided. To argue

[8]See, e.g., Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, in JAPANESE CONSTITUTIONAL LAW 123–149 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds. 1993); Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in PHILIP C.S. LEWIS, LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 263 (1994).

[9]Miyazawa, *supra* note 8.

[10]RAMSEYER & ROSENBLUTH, *supra* note 5.

[11]*Id.* at 178.

[12]Late 19th century and early 20th century legal reforms in both Thailand and China reflected the influence of the perceived success of the Meiji legal reforms. *See, e.g.*, David M. Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn*, 9 MICHIGAN PAPERS ON SOUTH AND SOUTHEAST ASIA at 76 (1975). Neither Taiwan nor Korea had much choice. They both were forced to relive the Japanese experience under military occupation. *See, e.g.*, Tay-sheng Wang, *Legal Reform in Taiwan under Japanese Colonial Rule (1895–1945): The Reception of Western Law* (Ph.D. dissertation, University of Washington Asian Law Program, 1992).

[13]On the need to create institutional protections for an independent and professionally competent judiciary in contemporary China, see Donald C. Clarke, *The Enforcement of Civil and Economic Judgments in China*, CHINA QUARTERLY (forthcoming 1995).

therefore that there has not been any political influence is to question this original design. In effect in question is the efficacy of the postwar constitutional scheme itself.

Historical Themes

Japan's judiciary has almost from its inception been organized as a remarkably autonomous elite bureaucracy within the civil law tradition. In that tradition, as career government officials, judges neither enjoy the degree of individual autonomy nor the overtly political role of common law judges. They form a highly specialized, elite corps responsible for the administration of justice and the interpretation and enforcement of legislated rules. Without powers taken for granted in common law systems—such as equity and contempt—they depend far more on public confidence in their nonpartisan professionalism and expertise than their common law counterparts. Without juries they function under the burden of ultimate responsibility for determinations of fact and law in every case they decide. They are also subject to the predominant values of the civil law tradition, which include an emphasis on legal certainty and uniformity in the application of law. The result is greater caution and passivity in the exercise of judicial authority than their counterparts in the common law tradition.[14]

By the late 19th century in Japan, judicial independence in terms of a separation of powers, insulation from intervention in the adjudication of particular cases, and the personal security of judges had been largely secured by constitution and statute. The 1889 constitution provided (article 57) that the courts exercised their authority "in the name of the emperor" (*tennō no na ni oite*), thereby insulating the courts from any direct political intervention in the adjudication of cases by either legislative or administrative organs. Like the military's plea that the "supreme command" of the emperor precluded legislative or executive civilian control, the inscription "in the name of the emperor," placed prominently in all courtrooms, served as a meaningful reminder to imperial officials and subjects alike that the emperor's judges were not subject to political direction. The security of judges was also guaranteed under the express provisions of article 58. Japan's first comprehensive court law,[15] enacted pursuant to the constitution in 1890, established the structure of Japan's contemporary career judiciary. Judges were to be appointed by the emperor with life tenure. However, unless physically or mentally unable to carry out their duties or pursuant to a criminal conviction or disciplinary sanction, no judges could against their will be removed to a different office or court, nor could they be suspended or dismissed or have their salaries reduced.[16] These protections were not perfect. For example, the authority over appointment was delegated to the Minister of Justice and judges were made subject to mandatory retirement from active judicial service at age 65.[17] Judges also could be persuaded to resign. The protections did, however, give judges a significant degree of formal security.

[14]JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 34–38 (2nd ed. 1985).

[15]Court Organization Law (*Saibansho kōsei hō*), Law No. 6, 1890.

[16]Court Organization Law (1890), articles 73 and 74.

[17]Court Organization Law, article 74–2 (added by amendment, Law No. 101, 1921).

Judicial independence meant more than protection against outside political intervention. Of equal importance were statutory requirements to prevent political activity by judges. The political neutrality and professional integrity of the career judiciary was a critical aspect of judicial independence as understood by the makers of Japan's modern state. The 1890 Court Organization Law prohibited judges "on the active list of the judicial service" from engaging in the following activities:

1. To publicly interest themselves in political affairs.
2. To become members of any political party or association or of any local, municipal, or district assembly.
3. To occupy any public office to which a salary is attached or which has for its object pecuniary gain.
4. To carry on any commercial business or to do any other business prohibited by administrative ordinance.[18]

By the end of the 19th century all judges in Japan were selected by examination. The 1890 Court Organization Law provided that judges and prosecutors had to pass two successive tests. Between the two, a three year period of practical training in the courts was required.[19] Graduates of an imperial university were exempted from the first but not the second examination.[20] Imperial university professors were eligible after three years without examination.[21] By 1900 Japan's judiciary comprised 1244 career judges, most of whom had been selected through this process.

In practice the independence of Japan's prewar judiciary from direct political control does not appear to be in doubt. Although in the 1930s judges like other government officials were subject to the increasing pressures of military and ultra-nationalist forces and many shared prevailing conservative nationalist views,[22] there is little in the record to show any significant change in the direction of the courts. Richard Mitchell's exhaustive studies of censorship, thought control, and political repression in prewar Japan[23] confirm former Chief Justice Takaaki Hattori's observation that judicial independence remained intact and judges were considered the most trustworthy of all government officials.[24] Inasmuch as the pool of qualified judges was limited by the examination system—in 1936 there were still only 1391 career judges, whatever informal pressures might have persuaded particular judges to resign or retire early could not lead to any massive

[18]Court Organization Law (1890), article 72.

[19]Court Organization Law (1890), article 58.

[20]Court Organization Law (1890), article 65.

[21]*Id.*

[22]For an example of the attitude of judges in the late 1930s toward stricter penalties for violations of the 1925 Peace Preservation Law (*Chian iji hō*), see RICHARD H. MITCHELL, JANUS-FACED JUSTICE: POLITICAL CRIMINALS IN IMPERIAL JAPAN 99 (1992).

[23]In addition to Mitchell's JANUS-FACED JUSTICE, see his THOUGHT CONTROL IN PREWAR JAPAN (1976) and CENSORSHIP IN IMPERIAL JAPAN (1983). Mitchell cites repeated examples of "judges refusing to be bullied by procurators" and their "scrupulous regard for the letter of the law," JANUS-FACED JUSTICE, at 151, 153.

[24]Hattori, *supra* note 4, at 74.

change in the composition of the judiciary. The examination imposed severe limits on the pool of judges from which politically acceptable candidates could possibly have been chosen. Nonetheless, judges were not totally insulated from politics.

Some Japanese scholars view the issue of prewar judicial independence in Japan more in terms of the long-term influence on both the procuracy and judiciary of two of Japan's most important ultra-conservative prewar political leaders, both of whom began their careers in the Ministry of Justice. The first was Kiichirō Hiranuma, who entered the Ministry of Justice in 1888. He was Procurator-General from 1912 to 1921 and then briefly Chief Justice of the Great Court of Cassation. In 1922, as Vice Minister of Justice, Hiranuma reached the pinnacle of his career as a government official. Late that year he entered politics to become Justice Minister. Subsequently, he served as Vice President of the Privy Council from 1926 to 1936, President of the Privy Council from 1936 to 1939, and Prime Minister in 1939. The second figure was Hiranuma's ally, Kisaburō Suzuki, who also began his career in the Ministry of Justice, in 1891. By 1907 he had become Chief Judge of the Tokyo District Court and he later served as a justice on the Great Court of Cassation. In 1912 Suzuki was appointed procurator of the Great Court of Cassation and in 1921 served as Procurator-General. Suzuki followed Hiranuma in politics and also became Minister of Justice (1924). He later served as Home Minister (1928) and president of the Seiyūkai[25] political party. The commanding political presence of both men throughout the prewar period was a telling reminder of the nexus between politics and justice officials—procurators and judges.[26] Their ardently conservative views[27] were unquestionably felt within both the procuracy and judiciary. Their careers indicate, however, less the intrusion of politicians on the career justice officials than the reverse. Such political activities by former prosecutors and Justice Ministry officials may help to explain why the Seiyūkai's political rivals in the Minseitō were among the most vocal critics of the Justice Ministry's administrative control over the judiciary.[28]

Others also voiced concern over Ministry of Justice dominance of the judiciary. The Japanese bar was especially active in seeking a change.[29] The close identification of judges with the procuracy was considered an unjust obstacle for defense

[25]See, *e.g.*, Shimizu Makoto, *Senzen no hōritsuka ni tsuite ikkōsatsu* [*Some thoughts on prewar jurists*], *in* GENDAI NO HŌRITSUKA (CONTEMPORARY JURISTS), *Gendai hō* (*Contemporary law*) 8–18 (1966).

[26]Suzuki lost his seat in the Diet in the 1936 election. Tetsu Katayama, later to become Japan's first Socialist prime minister, placed first in the same district. ASAHI SHIMBUN, Jan. 22, 1936, p. 1.

[27]Both Hiranuma and Suzuki were instrumental in enabling the enactment of the Peace Preservation Law of 1925 and the subsequent suppression of socialist-communist activities.

[28]See, *e.g.*, ASAHI SHIMBUN, July 9, 1936, p. 2, on the Minseitō's deliberation of proposals for legal reform that initially included placing the Ministry of Justice's administrative authority over judges under the Great Court of Cassation, selecting judges from the bar, and abolition of the Ministry of Justice. Only two proposals were eventually recommended: the unification of the colonial Korean and Taiwanese legal systems with Japan's and elimination of the preliminary trial system because of its domination by procurators. ASAHI SHIMBUN, August 11, 1936, p. 2.

[29]NIHON BENGOSHI SHI (HISTORY OF ATTORNEYS IN JAPAN) (Nihon Bengoshi Rengōkai [Japan Federation of Bar Associations] ed. 1959).

attorneys and they were galled by their inferior status relative to both procurator and judge.[30]

For the judiciary the problem of the prewar scheme was lack of full autonomy. The administrative authority of the Ministry of Justice meant that the procuracy had an often determinative voice in the assignment of judges, including appointment of the Chief Justice of Japan's highest court,[31] and also could claim equality of status.[32] Since judges were equals within the ministry bureaucracy, it should be emphasized, they did exercise a significant degree of influence over the administration of justice in general and predominant influence over the administration of the courts. Nonetheless, conflicts were bound to occur and when they did the potential for prosecutorial influence was unavoidable. Thus it seems likely that among the postwar reforms desired by the judiciary itself was to gain as much autonomy as possible.

Japanese concerns over judicial independence echoed within the small group of Japan specialists assembled in the United States Department of State in the early war years to begin preparations for a military occupation of a defeated Japan.[33] Judicial reforms were hardly their first priority, however; the transfer of administrative control of the judiciary from the Ministry of Justice was the only reform related directly to the legal system that appears in their early planning documents. The first mention of any need for judicial reforms in available presurrender planning documents is a May 9, 1944 revision of a preliminary memo on "Japan: Abolition of Militarism and Strengthening Democratic Processes," dated five days earlier and drafted by Hugh Borton, who directed the effort. The revised version recommended changes in the process for appointing judges by the Ministry of Justice.[34] In July 1944 the planning group prepared a separate memo on the judicial reforms. Entitled "Japan: Treatment of Courts in Japan during Military Government," the document commended the high professional standards of Japanese judges, who received appointment, in the words of the memo, "after rigorous qualifying examinations."[35] The memo suggested no reforms in the existing system except the elimination of the administrative court

[30]Satō Atsushi, *Shihō kanryō to hōsei kanryō (Judicial administration and legal affairs administration)*, *in* GENDAI NO HŌRITSUKA, *supra* note 25, at 44–60. On activities by the bar to seek reform, see NIHON BENGOSHI ENKAKUSHI (HISTORY OF DEVELOPMENT OF THE JAPANESE BAR) 183–197 (Nihon Bengoshi Rengōkai [Japan Federation of Bar Associations] ed. 1959).

[31]In 1935, for example, procurator Raisaburō Hayashi was appointed Chief Justice of the Great Court of Cassation over objections by career judges who favored Judge Torajirō Ikeda. ASAHI SHIMBUN, April 22, 1935, p. 2; *id.*, May 8, 1935, p. 2. A year later, however, Hayashi became Justice Minister and was replaced as Chief Justice by Ikeda. ASAHI SHIMBUN, March 13, 1936, p. 1. Hayashi, it might be noted, was a relatively liberal reformist Justice Minister.

[32]See HASEGAWA MASAYASU, SHIHŌKEN NO DOKURITSU (INDEPENDENCE OF JUDICIAL AUTHORITY) 85 (1971).

[33]For a general description in English on pre-surrender planning for a military occupation of Japan, see IOKIBE MAKOTO, BEIKOKU NO NIHON SEISAKU (AMERICAN OCCUPATION POLICY) (1985) (2 vols.); Marlene Mayo, *American Wartime Planning for Occupied Japan, in* AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944–1952, 2–51 (Robert Wolfe ed. 1984); Robert E. Ward, *Presurrender Planning: Treatment of the Emperor and Constitutional Changes, in* ROBERT E. WARD AND SAKAMOTO YOSHIKAZU, DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION 1–41 (1987).

[34]National Archives, Diplomatic Section, Notter Files, T-1221 reel 3, CAC 185/185a.

[35]Notter Files, T-1221 reel 4, CAC 249, July 7, 1944.

and some provision to assure the "independence of judges" from the Ministry of Justice.[36]

The presurrender American proposal to protect judicial independence by transferring administrative authority from the Ministry of Justice was implemented by the Occupation authorities. The constitutional revisions proposed initially by the committee headed by Minister of State Jōji Matsumoto, which the Supreme Commander for the Allied Powers (SCAP) rejected outright, included only one reform related to the courts: the abolition of the administrative court and transfer to the regular judiciary of competence to adjudicate direct appeals from administrative decisions. In the end this change would be enthusiastically endorsed by the Occupation authorities who, like the presurrender planners, were not comfortable with the European dichotomy between administrative and regular courts.[37] But U.S. policy demanded more fundamental reforms. A committee headed by Col. Charles L. Kades, Deputy Chief of Government Section, was formed in February 1946 to draft a model constitution to be presented to the Japanese officials responsible for constitutional revision.[38] The point of major contention within the SCAP drafting committee was the transfer of administrative authority to administrative organs of the proposed Supreme Court. The views of the majority coincided with concerns of postwar Japanese progressives who urged the removal of jurisdiction over judicial administration from the Ministry of Justice.[39] Kades, however, repeatedly questioned the powers the committee on the judiciary had proposed for the courts, arguing with perceptive foresight that the "kind of Supreme Court established in this draft might develop into a judicial oligarchy."[40] The solution, which did not fully satisfy Kades,[41] was to provide for cabinet appointment of all judges and electoral review with potential dismissal of Supreme Court justices.[42] By these means some assurance of political accountability would balance the implicit powers of judicial review.

No record was kept of the discussions during the marathon thirty-two hour conference held on the 4th and 5th of March 1946 among the Americans who submitted the model draft and the Japanese who translated its provisions.[43] The result, however, was acceptance of nearly all of the American proposals on the judiciary. Japan's postwar constitution, as revised by a joint American and Japanese effort and later during deliberations in the Diet, includes nearly all of the

[36]*Id.* at 2.

[37]See comments by Commander A.R. Hussy, Jr., Meeting of Steering Committee with the Committee on the Judiciary, Memorandum of 7 February 1946, *in* TAKAYANAGI KENZŌ, ŌMOTO ICHIRŌ & TANAKA HIDEO, NIHON KEMPŌ SEITEI NO KATEI (PROCESS OF DRAFTING THE CONSTITUTION OF JAPAN) 186 (1984).

[38]Charles L. Kades describes the making of the postwar Japanese constitution, including this meeting, in *The American Role in Revising Japan's Imperial Constitution*, POLITICAL SCIENCE QUARTERLY, vol. 104, no. 2, 215–247 (1989).

[39]See, e.g., Memorandum of Robert A. Fearey, Jr., *Comparative Analysis of the Published Constitutional Revision Plans of the Japanese Progressive, Liberal, Socialist and Communist Parties, Two Private Study Groups [including the Federation of Bar Associations], and Dr. Takano Iwasaburo*, in VIII FOREIGN RELATIONS OF THE UNITED STATES, 170 (1946).

[40]TAKAYANAGI, ŌMOTO & TANAKA, *supra* note 37, at 186, 256.

[41]*Id.* at 256.

[42]Constitution of Japan, article 79, paragraphs (2) and (3).

[43]See Kades, *supra* note 38.

provisions and much of the language related to the judiciary of the original SCAP model.[44] The provisions for judicial independence were almost identical. The Constitution of Japan provides:

> Article 76.
>
> . . . .
>
> All judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the laws.[45]
>
> Article 80. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.
>
> The judges of inferior courts shall receive, at regular fixed intervals, adequate compensation, which shall not be decreased during their terms of office.

Several themes emerge from the events and concerns that led to the particular institutional structure of Japan's independent judiciary. A judiciary free from direct political direction and control was institutionalized from the beginning. The postwar reforms from both American and Japanese perspectives were intended to preserve this independence but also to end administrative—particularly procuratorial—influence and to elevate the status of judges over the procuracy. Balancing judicial autonomy with political accountability was more of an American concern. Less apparent but still evident was the underlying emphasis on the need for public trust in a professional judiciary. In combination with events in the early 1970s these themes reinforced the tendency toward even greater judicial autonomy.

Judicial Autonomy

Despite the attempt to assure a degree of political accountability, Japan's new constitutional structure has operated to ensure greater not less judicial autonomy and political insulation. At least to this extent, Kades' fears of a judicial oligarchy have been realized, albeit without the powers that would have given them cause. Yet the political checks remain and do influence judicial administration. Those who administer the career judiciary are mindful that their autonomy depends on the trust of political leadership in their ability to maintain a corps of effective and competent judges whose decisions are within predictable and generally accepted parameters. Individual judges also function within the shadow of potential political intrusion. They cannot help but be aware that in adjudicating highly publicized, politically sensitive cases, they can be held professionally accountable for their decisions. Nevertheless, direct oversight is exercised by judges themselves. The response of the judiciary, particularly senior judges in charge of its administration, to the potential politicization of the courts in the 1970s, secured

[44] See Constitution of Japan, chapter VI, articles 76–82.

[45] A more accurate translation of this provision would read "judges shall exercise their authority [or function] independently in accordance with their conscience and shall be bound by this constitution and the laws."

the necessary political and arguably public confidence for them to continue to claim immunity from politics. In the end, however, the judiciary, not the political branches of the Japanese government, determines the parameters of responsible judicial behavior. This conclusion is best understood through close examination of the process for appointment and promotion of career judges as well as Supreme Court justices, the career judiciary's influence on the Court, and the mechanisms for judicial socialization. These are among the principal factors that help to explain the cohesion of the judiciary and its autonomy.

Appointment and Promotion

Japanese judges generally spend a professional life of thirty to forty years within a nationwide or unitary court structure that they themselves as judges administer. They begin their professional lives usually in their mid- to late twenties upon graduation from the court-administered Legal Training and Research Institute, spend the first ten years as assistant judges until their appointment as full judges for ten year terms. Reappointment has been routine and more than half continue to serve until they reach retirement age at 65.[46] (Mandatory retirement for both Supreme Court justices and summary court judges is at age 70.)

The selection of assistant judges begins with entry to the Legal Training and Research Institute on the basis of what is widely recognized as Japan's most competitive national examination. Although formally appointed by the cabinet from a list of nominees presented by the Supreme Court, the selection is actually made by the personnel bureau of the Supreme Court, which prepares the list. Assistant judges are formally appointed to ten year terms. At the end of the ten year term, they are eligible for appointment as full judges, again for a term of ten years. Nearly all are promoted. In each instance that reappointment has been denied, the personnel office of the Supreme Court made the decision. The judge was not included on the list presented to the cabinet for appointment.

Despite the greater potential for at least indirect influence on the Supreme Court by political leaders and the electorate, it remains in fact one of the most autonomous highest courts in the industrial world. Appointments to the court are formally among Japan's most politically significant. The Chief Justice is nominated by the cabinet with ceremonial appointment by the emperor and is accorded the same rank and salary as the prime minister. The other fourteen justices have equal rank and salary as ministers of state and are appointed by the cabinet. The statutory requirements for appointment to the Supreme Court are rather broad. Article 41 of the 1947 Court Organization Law[47] provides:

> Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than forty years of age. At least ten of them shall be persons who have held one or two of the positions mentioned in item (1) or (2) for not less than ten years, or one or more of the positions mentioned in the following items for a total period of

[46] The source for the data on judges is ZENSAIBANKAN KEIREKI SŌRAN (RECORD OF CAREER HISTORY OF ALL JUDGES) (Nihon Minshū Hōritsuka Kyōkai [Japan Democratic Lawyers Association] and Shihō Seidō Iinkai [Judicial System Commission] eds. 1990).

[47] *Saibansho hō* (1 ɴw No. 59, 1947).

twenty years or more:

(1) Chief judge of a high court
(2) Judge
(3) Summary court judge
(4) Public procurator
(5) Lawyer
(6) Professor or assistant professor of jurisprudence in a statutorily designated university.

Hence the potential for political appointments is rather great.

In fact, however, since the first justices were selected, rarely if ever have purely political considerations influenced even the appointment of the Chief Justice. In a paper on the administrative control of the Supreme Court's General Secretariat over individual judges,[48] Setsuo Miyazawa notes that the promotion of Justice Kazuto Ishida as Chief Justice in 1969 was the result of the advice to Prime Minister Eisaku Satō by a conservative politician, former Justice Minister Tokutarō Kimura. Although Miyazawa suggests that the recommendation of Ishida over Justice Jirō Tanaka, a former University of Tokyo law professor, was motivated by concerns over a series of liberal decisions, Kimura was, as Miyazawa emphasizes, a long time friend and former colleague of Ishida. In any event, such incidents have been rare certainly since 1969. Who becomes a Supreme Court justice or the Chief Justice has been largely determined by the judges who administer the judiciary. More typical than the Ishida appointment is the *Mainichi Shimbun* Social Affairs Bureau account of the appointment of Ryōhachi Kusaba as Japan's twelfth Chief Justice in February 1990.[49] Two months before the appointment, soon-to-retire Chief Justice Kyōichi Yaguchi visited the official residence of then-Prime Minister Kaifu. The purpose was to inform the Prime Minister of the judiciary's choice for his replacement, a choice made with the participation of the principal administrators of the judicial branch—all career judges themselves. Kaifu did not object. As one official is quoted to have said (translated into idiomatic English): "We wouldn't have the vaguest idea who anyone they might suggest was, and we wouldn't have any way of finding out whether they would be suitable. The Supreme Court people have researched this. We trust their judgment."[50] A similar procedure has been followed in the appointment of every Chief Justice for a quarter of a century. Trust counts.

Prime Minister Kaifu's trust had context. Since 1971 the judiciary has denied promotion and reappointment as full judge to only one assistant judge. That year Assistant Judge Yasuaki Miyamoto was excluded from the list submitted to the cabinet. No reason was given, but the cause was widely acknowledged: Miyamoto's membership in the leftist Seihōkyō (Young Lawyers Association, *Seinen Hōritsuka Kyōkai*), which had been formed in the early 1950s. By 1971 about 230 judges had joined, many during the late 1960s at the height of radical student activity in Japan. The senior judiciary was clearly concerned and began

[48] Miyazawa, *supra* note 8.

[49] KENSHŌ-SAIKŌSAIBANSHO: HŌFUKU NO MUKŌ DE (VERIFICATION-SUPREME COURT: INSIDE THE JUDICIAL ROBES) 263–266 (Mainichi Shimbun Shakaibu ed. 1991).

[50] *Id.* at 266.

to take a variety of steps to prevent the Seihōkyō influence.[51] Nearly two-thirds of the Legal Training and Research Institute apprentices denied appointment as assistant judges between 1970 and 1976 were Seihōkyō members. Career judges who belonged were subject to discriminatory treatment in court assignments and promotions. Still, denial of reappointment was an extreme measure, and the response to Miyamoto's denial was immediate. Nearly a third of Japan's judiciary protested in one form or another.[52] Articles and books denouncing the case poured forth.

For many the independence of individual judges from the judiciary itself was the issue. In the words of Tohoku University law professor Toshiki Odanaka, "From the perspective of judicial democracy (*minshushugi shihō*) . . . active associations of judges are to be welcomed, for through them democratic movements of various forms and organizations must develop within the courts."[53] And, as Odanaka noted, judges also enjoy basic civil rights and freedoms. New consideration was given to the ambiguous words of article 76, originating in the American draft of the constitution, that judges were to be "independent in the exercise of their conscience."[54] There was no question, however, that the decisions on appointments, reappointments, and assignments were made by judges, not politicians.

We need to recall first their broader context in evaluating the importance of these events. They occurred in the midst of a decade of global radical student activity. Paris, Berkeley, and Prague no less than Tokyo witnessed student protests against those in authority. Beginning in 1966 students in Tokyo began to occupy university buildings. The general education campus at Kyoto University remained occupied for nearly a decade. Demonstrations were so violent at the University of Tokyo that in 1968, for the first and only time in its history, entrance examinations were cancelled. Consequently, there was no graduating class from the *Tōdai* law faculty in 1972.

Other countries experienced similar challenges. The experience of the Italian judiciary during this period, as described by Frederic Spotts and Theodore Wieser, is especially relevant:

> The problem began in the Fascist era when the Piedmontese model of a politically neutral judiciary was increasingly compromised. By 1945 Italy was in the hands of a judiciary that was deeply conservative in its approach to the law and the role of the courts. The senior judges, being at the top of a tightly organized judicial system, tacitly imposed their own points of view on the new judges as they rose through the ranks. But when they lost control of

[51] Nearly all recent discussions of judicial independence in Japan focus on the Miyamoto and related incidents. They generally include full accounts. See, e.g., Luney, *supra* note 8, at 140–143; RAMSEYER & ROSENBLUTH, *supra* note 5, at 164–168. Setsuo Miyazawa does not deal with the Miyamoto case but does provide the best description of related incidents. Indeed, his *Administrative Control*, *supra* note 8, is in effect a study of the measures senior judges in the Supreme Court's administrative office took to prevent what they saw as a threatened takeover of the judiciary by Japan's radical left.

[52] IKEDA MASAAKI AND MORIYA KATSUHIKO, SAIBANKAN NO MIBUN HOSHŌ (GUARANTEES FOR JUDGES' STATUS) 357 (1972).

[53] Odanaka Toshiki, GENDAI SHIHŌ NO SHISŌ (THE IDEA OF THE CONTEMPORARY JUDICIARY) 28 (1981 ed.).

[54] See, e.g., *id.* at 235–245.

promotions, they lost their hold on the subordinate judges. A sense of intellectual liberation swept through the judiciary. Younger judges in particular began to challenge both their superiors' authority and their theory of law.

This disagreement coincided with the wave of student and worker unrest in 1968–69, which radicalized a large number of judges, especially the younger ones in the North, driving many of them to the extreme left. By the end of the 1960s the judiciary was split from top to bottom over issues as basic as the nature of law and the role of judges. The consequence was a political polarization that fractured the unity of the judiciary and has impeded the administration of justice.[55]

Spotts and Wieser conclude that the Italian judiciary's loss of political immunity also led to a loss of independence as the Italian judicial system increasingly became "prey" to government and other external pressures on individual judges intended "to cajole or intimidate magistrates into redirecting their activities or dropping a case."[56]

The parallels to Japan are striking, and the contrasts even more striking. In Japan, the Miyamoto incident had two apparent if somewhat paradoxical consequences. First, it affirmed the trust of conservative political leadership in the judiciary's self-policing mechanisms to prevent ideological shifts leftward. Without belaboring the obvious, prior to 1970 senior judges in Japan, in contrast to Italy, had not lost control over judicial promotions and the attitudes and activities of younger judges. Nor in exercising that control did the Japanese judiciary lose the confidence of either the government or the public.[57] Instead the career judiciary in Japan strengthened its influence on Japan's highest and most political court.

Second, however, the embarrassing outcry it produced among scholars, lawyers and, more importantly, judges themselves made it difficult for any future judicial administrators ever again to deny reappointment and promotion to assistant judges for political reasons. As a result the judiciary as an institution gained both greater political trust and more secure judicial tenure. In any event the stakes were high, particularly with respect to the character of constitutional decisions. This is best understood in terms of the career judiciary's influence on Japan's highest and most political court.

The Career Judiciary's Influence on the Court

All but four of Japan's twelve chief justices have themselves been career judges. Only one lawyer (Fujibayashi), appointed in 1976, followed the next year by the one prosecutor (Okahara), have held the office. Two University of Tokyo law professors (Kotarō Tanaka and Kisaburō Yokota) were appointed back to back as

[55] FREDERIC SPOTTS & THEODORE WIESER, ITALY: A DIFFICULT DEMOCRACY 158–159 (1986).

[56] *Id.* at 161.

[57] Japanese public opinion polls consistently find significantly higher levels of public trust in the courts than in any other major Japanese institution, including universities, labor unions, the national railways, and large business enterprises. The Diet ranks last by large margins. See, e.g., National Yomiuri Poll Nos. 447 (June 1983) and 348 (June 1989).

the second and third Chief Justices in 1950 and 1960. The remaining eight were all career judges, five of whom had previously held the position of *Saikōsai jimu sōchō*, the judiciary's highest administrative post.[58]

Similarly, by convention a third of all Supreme Court justices are appointed from the career judiciary, with another third from the practicing bar and the remaining five of the fifteen justices other persons of "attainment in their profession with a knowledge of law." Thus at least five of the fifteen justices at any one time have spent their entire professional lives, usually from their mid-twenties, as judges. Between 1947 and 1992, for example, 107 persons served as justices. Excluding the first appointments in 1947, which included three former Great Court of Cassation justices and one former Councillor of the Administrative Court, of these 107, 35 held a high judicial post at the time of their appointment, and all but one of the 35 were in fact career judges. Four others had begun their professional lives as judges.

Equally significant are the career paths of the justices selected from the judiciary. Of the 35 judges who have been appointed to the Supreme Court, 32 were serving as chief judge of a high court at the time of appointment: 15 from the Tokyo High Court, 10 from the Osaka High Court, 4 from the Nagoya High Court, and 2 from the Fukuoka High Court, with the most recent appointment from the Sapporo High Court. A justiceship is thus the highest rung of a career ladder that has been consistently determined first by the judge's seniors and at the finish by his or her judicial peers, not agencies, political or otherwise, outside of the courts.

The relative lack of ruling party or other political influence on Supreme Court appointments is also indicated by the non-career judge appointees. Since the appointments of the first justices in 1947, 29 lawyers, 10 prosecutors, 9 legal scholars, 4 diplomats and only 5 administrative officials have been appointed. Of the lawyers, a third (10) were bar presidents and 3 were vice presidents at the time of their appointment. In addition, Shunzō Kobayashi, who was serving as Chief Judge of the Tokyo High Court at the time of his appointment, had spent most of his professional life as a practicing attorney, having also served as president of the Second Tokyo Bar Association. The predominance of former bar officials exemplifies the influence of the bar itself, rather than political leaders, on which attorneys are selected to become justices. One of the nine legal scholars and two of the five former administrative officials were also former judges, and one of the legal scholars was a former attorney. Moreover, all of the five former administrative officials were serving in one of Japan's most politically neutral administrative posts as head of the Cabinet Legislation Bureau or its Diet equivalent at the time of appointment. Even in the case of the four diplomats appointed to the Supreme Court, all of whom were former ambassadors who rose through the ranks of the Foreign Affairs Ministry, political considerations appear to have been secondary to a purely bureaucratic concern to reward members who have served well.

One of the most striking features of the composition of Japan's Supreme Court is the age of the justices. Since 1952 only two persons under sixty years of age have ever been appointed to the court, Jirō Tanaka and Kenichi Okuno, both of

[58] KENSHŌ SAIKŌSAIBANSHO, *supra* note 49, at 265.

whom were 58. Only one justice was sixty. No one born after 1929 has ever served on Japan's highest court, and all but three of the 108 postwar justices have served less than ten years. Not until 1990 was anyone appointed who received legal education in postwar Japan.

Japan's career judges staff all of Japan's district and high courts as well as the principal administrative offices necessary for the management of the entire judicial branch. In addition, about thirty *chōsakan* (or research judges) are appointed from the senior ranks of the career judiciary to assist the Supreme Court. As a result, the influence of Japan's career judges extends throughout the judicial system from the Supreme Court through the summary courts. No governmental organ in Japan enjoys such extensive autonomy or freedom from political control or influence.

Socialization of the Career Judiciary

This is not to say, however, that judges in Japan have the sort of individual autonomy common in the British and American traditions or even the French civil law tradition. To the contrary, judges in Japan are intentionally denied such independence. Many Japanese scholars, such as Setsuo Miyazawa, criticize this lack. They tend to neglect, however, the benefits of both certainty and uniformity that such independence would preclude.

In order to maintain as much uniformity and certainty in the law as possible, the Japanese judiciary is structured to ensure the greatest possible cohesion and conformity. In the words of former Chief Justice Hattori, although "the Supreme Court is not allowed to order a judge to do or not do something in connection with a case before him upon the pretext of administrative supervision, it may issue general instructions to judges with regard to the disposition of judicial business as a whole."[59] By continual rotation, collegial decisionmaking, seminars, and periodic conferences, particularly among judges of a single district or high court, Japan's judges seek to avoid inconsistency in all aspects of the judicial process from the initial filing of a lawsuit through the final decision on appeal.

The socialization of young assistant judges is given the highest priority. Again in the words of the late Chief Justice Hattori:

> The most important task of the judiciary is the training of younger, inexperienced assistant judges. In addition to the daily training of junior members of a three-judge bench through hearing and trying cases, the training for assistant judges is roughly divided into five programs. The first is a comparatively short introductory course given to assistant judges immediately after their appointment. Its purpose is to provide them with a general idea of their future work and to aid them in preparing for judicial service. The other four training programs are seminar-type programs given in the first, third, fourth, and ninth years after their appointment.[60]

The objective of such training, as explained by the judges in the Legal Training and Research Institute who carry it out, is to ensure the highest degree of

[59] Hattori, *supra* note 4, at 82–83.
[60] *Id.* at 81.

competence. The emphasis is technical—to enable soon-to-become full judges who will for the first time be able to decide cases as a single judge to resolve the cases before them appropriately. In-service training sessions for full judges tend to focus on court administration, such as how to deal with an enormous caseload in the most expeditious manner, and on new developments in the law.

Judicial training is more about case management than ideology. The caseload of Japanese judges is staggering by nearly any standard. Without any discretionary appeals, Japan's Supreme Court justices must decide over 4000 cases each year, either en banc or as a petty bench. This means that each justice is generally responsible for reviewing about 1,300 cases annually. Although procedures for summary disposition have been introduced, the number of appeals the court must decide remains a major problem that reduces the quality of its decisions. The caseload for lower court judges is similar. On average Japanese district court judges dispose of over 1500 actions per judge each year, of which about 300 involve litigated lawsuits. No summary judgment procedures exist in Japan. Therefore, all lawsuits filed are either settled or pursued through trial to judgment. And all judgments must include both the judges' findings of fact and application of law. Under such circumstances, judicial management and the efficient disposition of cases are given considerable priority over other matters, including any thought over the appropriate direction of any particular legal doctrine or nationwide uniformity of judgments in like cases. Such issues, along with the social consequences of the courts' interpretation of particular legal rules and principles, are of course considered by judges, but these are rarely more than minor concerns.

Uniformity is not even a stated goal. It is nevertheless a product of the process and structure for judicial training. Intended or not, the emphasis on three year rotation to a wide variety of courts nationwide for assistant judges, and their service on three-judge panels, in combination with periodic training programs prior to reappointment with promotion, above all else represent a process of socialization through which the values, expectations, and underlying assumptions of senior judges are passed down. Younger judges learn—and are intended to absorb—the standards and expectations that will be applied to them for promotion and assignment. Judicial cohesion and uniformity are the result.

Such uniformity is strengthened by the remarkable homogeneity of Japan's career judges. The vast majority are graduates of the law faculties of only four universities—two public and two private—the University of Tokyo, Kyoto University, Chuo University and Waseda University. Among all graduates of the Legal Training and Research Institute appointed as assistant judges between December 1947 and April 1955, over 28 percent were graduates of the University of Tokyo, followed by Kyoto graduates (15%), and Chuo graduates (13%). In fourth place were graduates of Tohoku University (2%), followed closely by Kyushu and Waseda (1.7% each).[61] These percentages have been remarkably consistent for the entire postwar period with only a slight decrease in the number and

[61] A total of 587 new career judges were appointed between 1947 and 1955, of whom at least 166 were Tokyo graduates, followed by 98 Chuo, 89 Kyoto, 14 Tohoku, 10 Kyushu and 10 Waseda graduates. The almanac does not list the university from which 177 entering judges graduated, about 30 percent of the to[illegible] for this period. ZENSAIBANKAN KEIREKI SŌRAN, *supra* note 46, at 16–212.

percentage of Tokyo graduates and corresponding increase in the percentage (but not the number) of Kyoto and Chuo graduates through the early 1960s.[62]

Several conclusions can be drawn from the educational background of Japan's contemporary judiciary. First, in addition to a common socializing experience in the Legal Training and Research Institute, the majority of Japan's judges also share common undergraduate experiences. Although they lived from childhood in various parts of Japan, more than half spent their formative years as university students in metropolitan Tokyo. They were taught and presumably influenced by a handful of elite legal scholars, who also probably graduated from the same universities. Especially in the case of University of Tokyo graduates, their classmates and closest university friends, both radical and conservative, are most likely to have either become government officials or joined one of Japan's major financial or industrial companies, if they have not also passed the national legal examination and become either a procurator or lawyer. In other words, Japan's judges are members of the small, cohesive economic and political elite that dominates both conservative and radical politics in Japan.

The relative stability of the judiciary is another one of its predominant characteristics. Of the 77 judges appointed in 1960, for example, 45 (58.5%) were on the bench thirty years later in 1990, two serving as summary court judges after having retired. One had reached mandatory retirement age and three were deceased. Of the others who had left the bench before mandatory retirement age, three resigned within the first five years, one to join a law faculty, the other two to enter private practice. Eight resigned after serving twenty-five years as a judge, four to become notaries and four to enter practice. All of the remaining 17 resigned to enter private practice, six having served five to ten years, six, ten to twenty years, and five, twenty to twenty-five years.

The career path of Japanese judges is equally stable. Take, for example, the careers of two judges selected at random from those serving on the Tokyo High Court in 1990. One was born in Tokushima Prefecture on Shikoku in September 1937. A graduate of Chûo University, she passed the national legal examination in September 1962, entered the Legal Training and Research Institute in April 1963, and graduated with the 17th class in 1965. In April of that year she was appointed assistant judge and posted to the Osaka District Court. Three years later she was transferred to the Kanazawa Family Court. And three years later she was assigned to the Ministry of Justice, where she served for seven years (1971–1978). In April 1978 she was transferred to the Urawa Family Court and in 1980 to the Tokyo District Court. A year later she was appointed as a *chōsakan*. In 1984 she returned to the bench as a judge of the Tokyo District Court and was assigned general administrative responsibilities for that court in 1986. In April 1990 she was posted to the Tokyo High Court.

The second judge was also appointed in April 1990 to serve on the Tokyo High Court. Born in Aichi Prefecture in March 1941, he also graduated in the 17th class of the Legal Training and Research Institute and was initially posted to the Tokyo

[62]Between 1956 and 1960, 65 out of 392 new assistant judges were Kyoto graduates and 62 were Chuo graduates, as compared to only 82 listed Tokyo graduates (120 judges had no listed university affiliation). There were only 7 Tohoku graduates and 11 Waseda graduates. *Id.*

District Court as an assistant judge. Three years later in 1968 he was assigned to the Hachinohe branch of the Aomori District Court. In 1971 he became an instructor at the Institute and three years after that was appointed to the Naha District Court on Okinawa, becoming a full judge in 1975. He too was appointed *chōsakan*, in 1976, and was transferred to an administrative post with the Tokyo High Court in 1977. In 1980 he was transferred to the Tokyo District Court and a year later to the Osaka District Court. In April 1984 he returned to the Tokyo District Court, first to the bench and then from 1986 until his appointment to the Tokyo High Court in general administration.

Conclusion

Evaluation of judicial independence in postwar Japan should be made within the broader comparative context of other civil law systems. To consider any aspect of Japanese law or legal structure solely from an American perspective risks the imposition of uniquely American premises and cultural values on a system organized within a very different legal tradition. Japan's postwar jurisprudence—especially the constitutional rules and principles that define the allocation and scope of law-making and law-enforcing authority—rests on fundamental values broadly shared within the civil law tradition as well as more specific understandings held by Japan's judges regarding their role and their powers.

In Japan these values combine to produce a remarkably cohesive but cautiously conservative judiciary that permits legal change but only at a carefully managed and gradual pace in keeping with the judges' sense of community values and their felt need for a consistent corpus of judicially articulated legal rules and principles. The personal conservatism of senior judges who have dominated the administrative offices of the judiciary need not be questioned. Their particular political values are less significant, however, than the broader collective institutional concerns for freedom from outside direction and the long-term influence of the courts within Japan's governmental structure. That autonomy and influence ultimately rest on public trust.

Absent public confidence in the professional neutrality of the career judiciary, Japan's judicial system would lose its capacity to influence and persuade. To a great extent this is true for any career judiciary within the civil law tradition. The Italian experience is a telling reminder. Without the institutional controls over individual judges so vehemently criticized in Japan, the Italian judiciary experienced a dysfunctional political polarization. For Japan the judiciary's experience in the early 1970s was quite different. Internal controls perhaps preserved the institution's conservatism, and for many this experience represented a lost opportunity to transform the judiciary into a more politically responsive and reforming institution. In retrospect, however, judicial caution and careful concern for community consensus may have also preserved its autonomy and influence. Had Japan's senior judges not been able to continue to impose their values on younger judges as in Italy, direct political intervention might have resulted. Absent parliamentary trust and public confidence, Japan's judges might not have been able to adjudicate as effectively the increasing number of criminal actions brought against leading political figures that began in the mid 1970s. Nor perhaps would

other decisions that have profoundly affected Japanese politics have been politically possible.

One conclusion is certain. The Japanese judiciary has in fact maintained a remarkable degree of cohesion and autonomy within the shadow of potential political control. Those who argue to the contrary that politicians in Japan direct the courts and its decisions distort the facts and profoundly mislead.

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BUILDING CLINICAL LEGAL EDUCATION PROGRAMS IN A COUNTRY WITHOUT A TRADITION OF GRADUATE PROFESSIONAL LEGAL EDUCATION: JAPAN EDUCATIONAL REFORM AS A CASE STUDY

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Japan is transforming its justice system and the way in which it educates lawyers. As a major part of its reforms, Japan recently established graduate professional law schools, largely based upon the model of legal education in the United States. This article examines the roles of the new professional law schools – focusing on clinical legal education – within the broader context of the overall reforms of the Japanese justice system. Japan's efforts are very significant inside and outside of the country, and other nations are watching with interest. This article treats Japan's experience as a case study of the issues and challenges in instituting clinical legal education in a country that has not previously had professional graduate legal education, much less professional instruction in lawyering skills and professional values. The authors seek to identify the types of issues that are likely to emerge as more countries consider incorporating clinical legal education into the training necessary to become a lawyer. The issues the authors examine include the role of local culture and institutions, the history of educational institutions, and the nation's existing legal structure. The authors also examine the various approaches to clinical education in Japan, and they assess the promise of and difficulties faced by clinical programs in Japan. They observe that successfully establishing clinical legal education in Japan will require greater support from judges, prosecutors and the bar. The authors conclude that clinical legal education is integral to meeting the goals of the law reform movement in Japan, but that the future of clinical legal education in Japan is far from certain.

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INTRODUCTION

Until 2004, Japan did not have a system of graduate professional legal education. But professional law schools and clinical legal education have now arrived, part of far-reaching reforms of Japanese legal institutions. These reforms, which follow the 2001 recommendations of the government-created Justice System Reform Council,[1] respond to major societal factors, including globalization,[2] the collapse of the "bubble economy,"[3] and increasing demands for both domestic and international legal services in Japan.[4] Among its many recommendations, the Justice System Reform Council called for a complete overhaul of legal education in Japan and the creation of new "professional" law schools that would "bridge . . . theoretical education and practical education"[5] and provide law students with the op-

[1] The Japanese government created the Justice System Reform Council under the Cabinet of the Prime Minister of Japan in 1999 for the purpose of

> clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system.

Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century, *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited June 3, 2005) (quoting Article 2, Paragraph 1 of the Law concerning Establishment of the Justice System Reform Council) [hereinafter *Justice System Reform Recommendations*]. Part of the reforms began before the Council's recommendations were made public in 2001.

[2] *See* Takao Suami, *Clinical Legal Education and the Foundation of Japanese Law Schools in the Context of Judicial System Reform*, 25 WASEDA BULL. COMP. L. (forthcoming Mar. 2007).

[3] *See* Robert F. Grondine, *An International Perspective on Japan's New Legal Education System*, 2 ASIAN-PACIFIC L. & POL'Y J. 1, 1 (2001).

[4] *See id.* Japan has also made "a conscious move toward more transparent mechanisms of governance based in law." Curtis J. Milhaupt & Mark D. West, *Law's Dominion and the Market for Legal Elites in Japan*, 34 LAW & POL. INT'L BUS. 451, 454-55 (2003). This has increased the internal demand for legal services and for lawyers who are better able to adapt to societal and cultural changes. In addition, much of the pressure on the Japanese government to increase the number of and training for attorneys has come from Japanese corporations doing business in the United States. *See* Koichiro Fujikura, *Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission*, 75 TULANE L. REV. 941, 943 (2001). The corporations have found that few Japanese attorneys are able to compete with American lawyers when litigation arises, and the firms have been unhappy with the high legal fees they have had to pay when they have retained U.S. lawyers. *See id.*

[5] *Justice System Reform Recommendations*, *supra* note 1, at ch. III, pt. 2.

portunity to acquire the specialized legal knowledge, lawyering skills, and professional values "necessary for solving actual legal problems."[6] As part of the Justice System Reforms, sixty-eight new Japanese professional law schools opened their doors in April of 2004,[7] and there were seventy-four new law schools by April of 2006.[8] The new law schools are largely based on the graduate professional law school model of the United States.

This article examines the roles of the new professional law schools – focusing on clinical legal education – within the broader context of the overall reforms of the Japanese justice system.[9] Japan's efforts are very significant inside and outside the country, and other nations are watching with interest. South Korea, for example, now plans to establish professional law schools,[10] and delegations from South Korea have visited Japan. We treat Japan's experience as a case study of the issues and challenges in instituting clinical legal education programs in a country that has not previously had professional gradu-

[6] *Id.*

[7] *See New Law Schools Struggling to Fill Space*, DAILY YOMIURI, Apr. 16, 2004, at 4. In July of 2003, the Ministry of Education received seventy-two applications for approval to open U.S.-style graduate law schools. Fifty applications were for private law schools, twenty for state-run law schools, and two for law schools to be run by local governments. *See 72 New Law Schools Eyed in Reform Drive*, ASAHI SHIMBUN, July 2, 2003. Although the Justice System Reform Council had recommended that the new law schools be distributed throughout the country, the applications were concentrated in major cities, including twenty-five in Tokyo, and there were no applications for twenty-four of Japan's forty-seven prefectures or districts. *See id.* The Ministry of Education initially approved sixty-six of the applications, denied four for failing to meet standards, and postponed decisions on two. *See* Eriko Arita, *66 Institutions Win Approval to Open U.S.-Style Law Schools*, JAPAN TIMES, Nov. 22, 2003.

In addition, Japan continues at present to have over 120 faculties of law at the undergraduate level. *See* Fujikura, *supra* note 4, at 942. Of these undergraduate law programs, twenty-six are publicly supported and ninety-seven are private. *See id.*

[8] *See* Ministry of Education, Culture, Sports, Science, and Technology, *Hokadaigakuin*, http://www.mext.go.jp/a_menu/koutou/houka/05071101.htm (last visited Sept. 14, 2006).

[9] The reforms in Japan, although often called "judicial" reforms, refer to reforms of the entire justice system and legal profession and not just reforms associated with the judiciary and court system. The Council identified "three pillars" of justice system reform, including making the judicial system easier to understand, reforming the legal profession (and legal education), and introducing mechanisms for public participation in legal proceedings. *See Justice System Reform Recommendations*, *supra* note 1, at ch. I, pt. 3.

[10] The President of Korea and the Chief Justice of the Supreme Court of Korea formed a committee in 2003 to examine initiatives to reform the courts and the system of legal education. *See Judiciary Reform Still Has a Long Way to Go*, KOREA TIMES, Nov. 1, 2004. The first step identified for reform was a recommendation to introduce U.S.-style graduate level law schools starting in 2008. *See id.* In April of 2005, the Judicial Reform Committee adopted recommendations to open U.S.-style law schools starting in 2008. *See First US-Style Law School to Debut in 2008*, KOREA TIMES, Apr. 22, 2005. The starting date has now been pushed to 2009. *See* Chung Ah-young, *Law School Opening Delayed to 2009*, KOREA TIMES, July 3, 2006.

ate legal education, much less professional instruction in lawyering skills and professional values. We seek to identify the types of issues that emerge as more countries consider incorporating clinical legal education into the training necessary to become a lawyer. The issues we examine in this article include the role of local culture and institutions, the history of educational institutions, and the nation's existing legal structure.

As scholars explore ways to enrich already-established models of clinical legal education, it may be useful to study a system that is newly-designed and not merely re-tooled. Many Japanese reformers examined American and Canadian law schools and legal professions quite carefully as they designed professional schools for Japan. One might ask what law schools in the United States would look like today if rich clinical programs had been contemplated as professional schools were first established in the U.S. It is interesting to reflect on the aspects of clinical legal education that have (or have not) been incorporated into the design of the new Japanese law schools.

Before we begin our discussion of the new law schools in Japan, there is an important point to note. Although the Justice System Reform Council stated that "in order to build a bridge between theoretical and practical education, participation of practitioner-teachers is indispensable,"[11] the Council did not explicitly require the new law schools to include clinical courses within their curricula. The Council left it to each new law school to develop its own curriculum, provided that the schools adopt a practical focus that will foster the development of "highly specialized professionals with social responsibility."[12] In our view, however, clinical courses play a critical role in the reform efforts in Japan. The overarching goals of the reforms are "to reinforce and strengthen the justice system."[13] The Council started from the premise that "it is indispensable to achieve a legal profession that is rich both in quantity and quality."[14] The Council concluded that building new professional law schools and implementing new teaching methodologies are necessary preconditions to expand the number of

[11] *Id.* The "Requirements Regarding Professional Graduate Schools," issued by the Ministry of Education and Science, specify that the ratio of the practitioner-teachers on the law school faculty should be 20 per cent. Bulletin Notice No. 53 (Mar. 31, 2003). With regard to the focus on educating students, the Justice System Reform Council stated; "Needless to say, it is incumbent on universities with the intention of establishing law schools to make considerable efforts to change themselves by shifting their principle from the traditional one focusing on research and study to a new one truly focusing on education of students." *Justice System Reform Recommendations*, *supra* note 1, at ch. III, pt. 2

[12] *Id.* at ch. III, pt. 2.

[13] *Id.* at introduction.

[14] *Id.*

lawyers and increase their skill level upon entry into the profession.[15] We view clinical programs as integral to this effort. Clinical legal education can help Japan transform its legal profession by training law students in the lawyering skills and professional values necessary for the delivery of high-quality legal services into the 21st century.

In Part I of this article, we begin by describing the history of the legal profession and legal education in Japan, thereby providing a context to understand the role of the new law schools and the growth of clinical legal education. In Part II, we examine the development of the various approaches to clinical programs in Japan, with a particular focus on the new courses being implemented at Waseda Law School. This school is one of the first new professional law schools with a commitment to using clinical legal education to bridge theory and practice. In Part III, we assess the promise of and difficulties faced by clinical programs in Japan. As we explain, to succeed, clinics will require greater support from judges, prosecutors and the bar. Finally, we conclude that clinical legal education is integral to meeting the goals established by the Justice System Reform Council, but the future of clinical legal education in Japan is far from certain.

I. The History of Legal Education in Japan, and Challenges to Implementing Clinical Legal Education Programs

To appreciate the challenges to implementing clinical legal education programs in Japan, one must first understand the history and development of the Japanese legal profession.

A. The Legal Profession in Japan

Prior to 1868, the legal profession did not exist as a distinct occupational group in Japan.[16] Government administrators performed some judicial functions.[17] Litigants were denied representation in court.[18] As the Meiji Government seized power in place of the Tokugawa shogunate in 1868, the Government began to create a centralized legal system modeled after the German legal system, including a court system throughout the country and prosecutors and judges who were distinct from officials in other branches of government.[19] The Ministry of Justice, which controlled both prosecutors and the judiciary, established its own law school in 1871.[20] In 1877, the Ministry of Education founded the University of Tokyo,[21] which included a Faculty of Law that educated prosecutors and judges as well as teachers for other schools in Japan.[22]

In 1872, formal legal representation for litigants in civil matters was recognized, and representation for the accused in criminal cases was authorized by 1882.[23] The distinct grouping of professionals providing representation in court was recognized by 1876, when the Ministry of Justice issued regulations for legal practitioners, including a requirement of passing an exam.[24] Qualifications to become an attorney, known as "*bengoshi*" in Japan,[25] were established with the passage of the first *Bengoshi ho* ("Practicing Attorney Law") in 1893.[26] The key qualification was passing an examination covering knowledge of the law, although graduates from Imperial Universities and the Ministry of Justice law school were exempt from taking the qualifying exam until 1926.[27] No formal academic training or graduation from a university or law school was required. Licensed attorneys had exclusive province in civil and criminal matters in "ordinary courts." There was no explicit prohibition against the unauthorized practice of law.[28]

From the adoption of the Practicing Attorney Law in 1893 through the early 1920s, the formal status of attorneys improved. As

15 It is beyond the scope of this article to evaluate the work of the Justice System Reform Council and its conclusions. For the purposes of this article, we accept its findings and use them as a starting point for exploring the changes to Japanese legal education.

16 *See* Kahei Rokumoto, *The Present State of Japanese Practicing Attorneys: On the Way to Full Professionalization?*, *in* Lawyers in Society: The Civil Law World 160, 160 (Richard L. Abel & Philip S. Lewis eds., 1988)

17 Although there was no formal representation of individuals in court, "certain innkeepers and their clerks (called *kujishi*) were authorized to offer their knowledge of procedure and of the location of various offices to guests coming to Edo for litigation." *Id.* at 160. Edo is the former name for Tokyo, and it was established as the seat of government in Japan in 1603.

18 *See* Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 Harv. L. Rev. 61, 62 (1956). The prohibition against representation in court could be waived in instances "such as infancy, advanced age, or illness," provided there was some special relationship between the litigant and the representative such as "kinship, vassalage, common area of residence, or incumbency in an identical status in the four-class feudal hierarchy." *Id.*

19 *See* Rokumoto, *supra* note 16, at 160-61.

20 *See* Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education in Japan: Legal Education and the Reproduction of the Elite in Japan*, 1 Asian-Pacific L. & Pol'y J. 2, 3 (2000).

21 *See* The University of Tokyo, *History*, http://www.e.u-tokyo.ac.jp/english/enkaku-e.html (last visited June 3, 2005). The University of Tokyo was known as the Imperial University from 1886-1897 and the Tokyo Imperial University from 1897-1947.

22 *See* Miyazawa & Otsuka, *supra* note 20, at 4.

23 *See* Rabinowitz, *supra* note 18, at 64-67.

24 *See id.* at 65.

25 "*Bengoshi*" is a translation of the English word "barrister" and refers to legal professionals who perform all manner of legal representation of clients, including representing clients in court. For the purposes of this article, the word "attorney" will be used interchangeably with "*bengoshi*."

26 *See* Rokumoto, *supra* note 16, at 161.

27 The exemption was repealed in 1923, effective 1926. *See* John Owen Haley, Authority Without Power: Law and the Japanese Paradox 101 (1991).

28 *See id.* at 100.

attorneys began to fill government positions, their social status rose as well.[29] The Ministry of Justice continued to control the examination process for admission to practice, as well as the organization and discipline of the legal profession. By the late 1920s, however, the number of legal practitioners had increased dramatically, and a survey of attorneys found that more than half were failing to meet living expenses.[30] In part, the poor economic conditions were attributable to the lack of regulation over the unauthorized practice of law. In response to these developments, proposals emerged throughout the 1930s for limiting the number of persons admitted to the practice of law, greater regulation of the practice of law, and other measures to improve the economic conditions for attorneys. A law requiring a period of apprenticeship before becoming an attorney was passed in 1933, but budgetary shortfalls prevented the Ministry of Justice from implementing the apprenticeship program until 1946.[31]

The legal profession in Japan was in decline during the 1930s, and not simply because of the poor economic conditions. The press commonly "portrayed the lawyer with notable contempt," and "bengoshi accused of bribery, embezzlement, extortion, and other disreputable conduct were common fare."[32]

The status of attorneys dramatically improved starting in the late 1940s, in large part due to two new developments. First, the apprenticeship program was fully implemented in 1946, and a key feature of the new program was combining attorney training with training for prosecutors and judges through the creation of the Legal Training and Research Institute (Institute) under the control of the Supreme Court of Japan.[33] Second, the passage of the *Bengoshi ho* ("Practicing Attorney Law") in 1949 made the legal profession self-governing, subject to Supreme Court supervisory authority.[34] Autonomy had long been a goal of attorneys in Japan,[35] and the Practicing Attorney Law of 1949 achieved autonomy by shifting regulation of the legal profession away from the Ministry of Justice. The Practicing Attorney Law also made clear that *bengoshi* alone had the authority to represent clients in judicial and administrative proceedings and to provide legal counseling, and that others who represented clients would be subject to criminal

[29] *See* Rabinowitz, *supra* note 18, at 71-74.

[30] A survey by the Japan Bar Association found that "more than 2,400 lawyers out of 4,100 reporting indicated that they failed to meet living expenses, and 240 had not even managed to pay ordinary office expenses." *Id.* at 73.

[31] *See id.* at 77.

[32] HALEY, *supra* note 27, at 104.

[33] *See* Rabinowitz, *supra* note 18, at 74-77.

[34] *See* HALEY, *supra* note 27, at 106 (citing the *Bengoshi ho*, Law No. 205, 1949).

[35] *See id.* at 100-112.

prosecution for unauthorized practice of law.[36]

Because judges and prosecutors have long had high social status in Japan, the consolidation of training of attorneys with that of judges and prosecutors improved the status of attorneys. The Institute also had the effect of reinforcing cohesiveness in the legal profession, as all attendees experienced a uniform socialization into the practice of law. Although the Institute was designed to provide better training for all legal professionals, entry to the Institute was based solely on the National Bar Examination and there were no formal academic qualifications for admission. As a result, the National Bar Examination has been the key barrier to practice for would-be attorneys in Japan. Graduates of the Institute must take a final exam before becoming an attorney, prosecutor, or judge, but virtually all attendees of the Institute pass that exam.

From the creation of law faculties at universities in the 1870s until 2004, university attendance and the study of law have not functioned primarily as training for legal professionals but rather have served chiefly as training for entry into government or business.[37] Obtaining a graduate degree in law also has been the path for becoming a law professor in a university law department.[38] As a result of this disconnect between university law training and legal practice, the sole source of training for the practice of law until 2004 has been the Legal Training and Research Institute.

As discussed previously, admission to the Institute from 1946 through 2005 was based solely on passing the National Bar Examination, although it is important to note that most who passed the admissions examination attended one of the undergraduate law courses of study in Japan.[39] Training at the Institute has consisted of a combina-

[36] Article 72 of the Practicing Attorney Law of 1949 stated:

> A person other than a practicing attorney shall not, for payment, and as an occupation, engage in the practice of law by giving legal advice, providing legal representation, arbitrating, settling disputes amicably or performing any like acts in respect to lawsuits, non-contentious matters, or appeals filed with administrative agencies such as requests for investigation, the raising of objections, requests for the review of dispositions or similar matters, or act as an intermediary in such matters as are specified in this article as constituting the practice of law: Provided that this shall not apply in such cases otherwise specified in this Law.

Practicing Attorney Law (Law No. 205 of 1949).

[37] "Japan's undergraduate law faculties have been a very important source for Japan's government and business leaders for decades, not just a training-ground for future lawyers and judges." Grondine, *supra* note 3, at 2. *See also* Miyazawa & Otsuka, *supra* note 20, at 4-8, 13-15.

[38] *See* Eric A. Feldman, *Mirroring Minds: Recruitment and Promotion in Japan's Law Faculties*, 41 AM. J. COMP. L. 465, 469-71 (1993).

[39] Most of those who pass the National Bar Examination "are graduates of undergraduate law faculties of prestigious universities, such as Tokyo, Keio, and Waseda. It is not

tion of lectures and apprenticeship-like rotations through judicial, prosecution, and law offices. The period of attendance at the Institute was originally two years, but was shortened to eighteen months in 1999.[40] In 2006, Institute training was further shortened to twelve months and the lecture portion was reduced to two months, as Japan has begun to rely upon the new professional law schools as the principal preparation for those seeking admission to the practice of law.[41]

The Institute's apprenticeships differ significantly in at least two respects from the clinical experiences available to students in the United States and other countries. The apprenticeships have been described by one commentator as "learning by seeing" rather than "learning by doing," because attendees commonly observe the lawyering tasks that clinic students in other countries commonly perform, such as conducting hearings or providing legal advice to clients.[42] Moreover, in contrast to the clinical approach of encouraging students to reflect upon their own work, legal practice, and the legal system,[43] the Institute teaches trainees that they must learn, understand and follow present legal practice. Notably several of the new clinics in Japan follow the classic clinical methodologies of "learning by doing" and promoting critical reflection on legal practice.[44]

necessary, however, to be a college graduate, and, on occasion, widespread media attention has been placed on non-traditional persons passing the examination, such as housewives with no college education." Sabrina Shizue McKenna, *Proposal for Judicial Reform in Japan: An Overview*, 2 ASIAN-PACIFIC L. & POL'Y J. 121, 124 n.7 (2001). Professor Dan Rosen notes that of the 994 persons who passed the National Bar Examination in 2000, two-thirds graduated from five universities: 198 from University of Tokyo, 140 from Waseda University, 116 from Keio University, 108 from Kyoto University, and 102 from Chuo University. *See* Dan Rosen, *Schooling Lawyers*, 2 ASIAN-PACIFIC L. & POL'Y J. 66, 67 n.5 (2001).

[40] *See* Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 562 n.4 (2001).

[41] *See* Supreme Court of Japan, *Shin-Shihoshushu nitsuite* (on the New Program for Legal Trainees), http://www.courts.go.jp/saikosai/sihokensyujo/sin_sihosyusyu.html (last visited Sept. 3, 2006).

[42] *See* Takashi Takano, *Making a Criminal Justice Clinic in Japan*, 25 WASEDA BULL. COMP. L. (forthcoming Mar. 2007).

[43] *See, e.g., Report on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 517 (1992) ("No other learning experience in law school combines the extraordinarily varied and dramatic context of real cases and problems with the opportunity for intensive teaching, supervision, growth, and reflection."); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 340-42 (1982) (describing the experiential learning component of clinical legal education); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981) (describing clinical teaching theory); Stephen Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 328-33 (2001) (explaining that clinical methods lead students to perceive and understand broader social justice issues).

[44] *See, e.g.*, Nobuo Kojima, *An Experiment of the Civil Law Clinic at Waseda Law School*, 25 WASEDA BULL. COMP. L. (forthcoming Mar. 2007). ("[s]eeking new legal practices based on the critical reflection of the past practice"); Takano, *supra* note 42, at 3 (describing a goal of knowing the problems in the legal system).

The longstanding system of undergraduate education followed by training at the Institute has severely limited the growth of Japan's legal profession. Bar passage rates (and, hence, admission rates to the Institute) have been very low: approximately 2 to 3 per cent of the total number taking the exam throughout the 1980s and 1990s.[45] As a result, there are a relatively small number of full attorneys, or *bengoshi*, currently numbering 21,983 for a population of over 127 million people.[46] Although this small number of *bengoshi* does not include judges or prosecutors or specialized legal professionals (such as the more than 67,300 tax attorneys (*zeirishi*), 5600 patent attorneys (*benrishi*), 17,600 judicial scriveners (*shiho shoshi*), and 37,700 administrative scriveners (*gyosei shoshi*)),[47] it is a remarkably modest figure. By contrast, there is an average overall bar passage rate in the United States of 64 per cent, with an average passage rate of 76 per cent for first-time test-takers,[48] and an eventual passage rate of 94.8 per cent

[45] *See Applicants and Acceptance Statistics for Japan's Legal Training and Research Institute: 1949-1998*, http://www.tuj.ac.jp/newsite/main/law/lawresources/TUJonline/Japan'sLegalProfession/lrtistajJapan-BarPassStats.html (last visited June 3, 2005). "In 2002 only 1,183 passed the exam, out of 41,459 who took the exam, a passage rate of 2.85%." Roderick H. Seeman, *2003 Japan Law: Legal Profession*, http://www.japanlaw.info/law-2003/2003_LEGAL_PROFESSION.html (last visited June 3, 2005). *See also* HALEY, *supra* note 27, at 107 tbl 5-5 (reporting the entrance exam passage rates and the number of applicants taking and passing the entrance exam from 1949-1986).

[46] The number of attorneys is as of September 1, 2006, obtained from the website of the Japan Federation of Bar Associations (JFBA) at http://www.nichibenren.or.jp/ja/jfba_info/membership/index.html (last visited Sept. 3, 2006). Practicing attorneys are automatically members of the JFBA. *See Outline of the Japan Federation of Bar Associations (JFBA)*, http://www.nichibenren.or.jp/en/about/index.html (last visited Sept. 3, 2006). Japan's projected population in April 1, 2006 was 127,720,000. *See* Statistics Bureau and Statistical Research and Training Institute, Ministry of Internal Affairs and Communications, *Population Estimates*, http://www.stat.go.jp/english/data/jinsui/tsuki/index.htm (last visited Sept. 3, 2006). This is approximately one lawyer for every 5810 people.

[47] *See* Japan Federation of Bar Associations, *Japanese Attorney System*, *available at* http://www.nichibenren.or.jp/en/about/system.html (last visited Sept. 3, 2006).

[48] *See* THE BAR EXAMINER 32 (May 2006), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2005stats.pdf (last visited Sept. 4, 2006) (Ten-Year Summary of Bar Passage Rates 1996-2005). The United States does not have a national bar exam; rather, each jurisdiction administers its own examination. Average passage rates among the States range from a high of 86 per cent for overall test takers (Utah) and 90 per cent for first-time test takers (North Dakota and Utah) to a low of 46 per cent for overall test takers (California) and 61 per cent for first-time test takers (New Hampshire). *See id.* at 23-34 (Persons Taking and Passing the 2005 Bar Examination); *id.* at 27-28 (First-Time Exam Takers and Repeaters in 2005).

California's passage rate is depressed by the high number of test-takers from unaccredited law schools. The National Conference of Bar Examiners has reported a 2005 California bar passage rate of 54 per cent for all California test-takers from law schools approved by the American Bar Association (ABA). The passage rate for test-takers from non-ABA-approved law schools was 16 per cent. *See id.* at 25 (Persons Taking and Passing

for those who retake the bar exam.[49] The State Bar of California has over 140,000 active members who reside in California, a state with a total estimated population of over 36 million people.[50] The City of San Francisco alone, with an estimated population of 739,436, has 15,352 active members of the California Bar, more than two-thirds of the number of *bengoshi* in all of Japan.[51]

The Justice System Reform Council concluded that the legal profession in Japan is far too small, and is not sufficiently equipped to meet the legal needs of Japan in the 21st century.[52] Accordingly, the Council recommended a bar passage rate of approximately 70 to 80 per cent,[53] and set a goal of "securing 3,000 successful candidates for the national bar examination annually" as soon as possible, but in any event by the year 2010.[54] Significantly, the Council specified that "this number does not signify the upper limit."[55]

The Justice System Reform Council also recognized that the old system of undergraduate education, combined with a difficult National Bar Examination, failed to provide a sound education for those entering the legal profession. Because admission to the Institute did not require an undergraduate degree and prior formal legal studies, the undergraduate study of law has been disconnected from the education of legal professionals. Those seeking to pass the National Bar Examination commonly prepare by attending "cram schools" – year-long programs devoted to memorization of the material likely to appear on the National Bar Examination.[56] Even with such a "cram" course, exam takers might need as many as five tries in order to pass the annually-administered exam.[57] As a result, there has been unemployment and under-employment of would-be legal professionals who fail to gain entrance to the Institute.[58]

Because the primary path to legal practice has been through rote memorization in cram schools rather than through serious professional school study, the Justice System Reform Council acknowledged that exam-takers focus on "acquiring techniques for passing the examination" rather than a sound education.[59] As the Council put it, this has led to the "'double school phenomenon' (trend of going to two schools, the university and the preparatory school) or the 'phenomenon of leaving universities' (*daigakubanare*; the tendency to ignore university classes and focus only on preparatory schools)."[60]

The Council's recommendations seek to increase the number of lawyers in Japan, especially in grossly underserved rural areas, as well as to instill better preparation for practice. The creation of professional law schools and, we believe, the use of clinical methodology, are key to the success of the reforms. But, as the next section of this article discusses, there are institutional and cultural impediments. Some of the most difficult obstacles relate to the divergence between the worlds of academia and practice, the low bar passage rate, and the lack of certain institutional structures necessary for reform, such as a student practice rule or a common understanding of an accepted role for a clinical student.

the 2005 Bar Exam by Source of Legal Education).

One State, Wisconsin, admits a significant percentage of lawyers to practice by "diploma privilege" and not by examination. *See id.* at 33 (2005 Admissions to the Bar by Examination, on Motion, and by Diploma Privilege).

[49] *See* Linda F. Wightman, LSAC National Longitudinal Bar Passage Study viii, 2 (1998) (reporting on the results of a longitudinal study that tracked students who entered law school in the fall of 1991 through three years of law school and up to five administrations of the bar examination).

[50] As of September 4, 2006, there were 154,594 active members of the State Bar of California, a figure that excludes judges, inactive lawyers, and attorneys who are no longer eligible to practice. *See* State Bar of California, *Member Demographics*, http://members.calbar.ca.gov/search/demographics.aspx (last visited Sept. 4, 2006). Of these active lawyers, 13,666 reside out-of-state, *see id.*; thus 140,928 active members of the California Bar live in California. The latest U.S. Census Bureau population estimates are as of July 1, 2005. The Census Bureau has estimated California's population on that date as 36,132,147. *See* U.S. Census Bureau, *Annual Estimates of the Population for Counties in California: April 1, 2000 to July 1, 2005*, tbl. 1, *available at* http://www.census.gov/popest/counties/tables/CO-EST2005-01-06.xls (last visited Sept. 4, 2006). This is approximately one lawyer for every 256 residents of California.

[51] *See* State Bar of California, *supra* note 50. It is sometimes said that it is harder to find a plumber than a lawyer in San Francisco.

[52] *See Justice System Reform Recommendations*, *supra* note 1, at ch. I, pt. 2.

[53] *See id.* at ch. III, pt. 2.

[54] *Id.* at ch. III, pt. 1.

[55] *Id.*

[56] *See, e.g.*, Setsuo Miyazawa, *Education and Training of Lawyers in Japan – A Critical Analysis*, S. TEX. L. REV. 491, 493 (2002) (stating that most applicants are undergraduate law students who "spend most of their time at cram schools" that are "full-time yearlong programs"); James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y 303, 310 (2004) (successful exam takers likely attend cram schools focusing on the Institute's entrance exam). One journalist has stated: "More than five years of study – at cram schools, not universities – has been the norm to pass Japan's extremely competitive bar exam." Eriko Arita, *U.S.-Style Law Schools to Offer Practical Approach*, JAPAN TIMES, July 2, 2003.

[57] *See* Maxeiner & Yamanaka, *supra* note 56, at 310.

[58] Professor Rosen has observed:

> Bar Exam *ronin*, those who never pass the Exam even after multiple attempts, often end up working at jobs far below their real skill level. This is both a personal and social waste. Even those whose stories have happy endings may devote many years of their lives to cram school study and self-study, getting by on part-time jobs after graduation before finally passing the Exam. A substantial number of applicants do not pass until they are into their thirties and sometimes forties. Is this truly the best and highest use of their talents? Is this really the best way of producing lawyers?

Rosen, *supra* note 39, at 73.

[59] Justice System Reform Recommendations, *supra* note 1, at ch. III, pt. 2.

[60] *Id.*

B. Institutional and Cultural Issues Affecting the Development of Clinical Legal Education in Japan

A central goal of Japan's new professional schools is to "bridge theory and practice." The Justice System Reform Council expects Japan's new professional law schools to provide law students with "the specialized qualities and capacity required for legal professionals to take direct responsibility for the 'rule of law'."[61] The schools should afford students "specialized knowledge as well as foster their creative thinking ability to critically review and develop such knowledge and their capacity for legal analysis and legal discussion necessary for solving actual legal problems according to the facts."[62] Further, the new law schools should provide opportunities for students to develop a "basic understanding of cutting-edge legal areas[,] . . . a broad interest in various problems arising in society and . . . a sense of responsibility and morals as legal professionals," and should afford students "opportunities for actually contributing to society."[63] Although the prime objective of the new law school system is to provide professional legal education at the graduate level, the new system also seeks to "bridge theory and practice" in legal scholarship. Yet Japan faces significant challenges in achieving both goals. Schools must find faculty who are familiar with the practice of law and the new law schools must foster a model of legal scholarship that is more closely related to law practice and law reform.

A principal difficulty is that the career of Japanese law professors has, at least until now, been distinctly separate from that of law practitioners. Though both scholars and lawyers studied law at the undergraduate level, their training and career paths diverged after graduation and the two worlds rarely overlapped. Those who sought to be legal scholars proceeded to graduate school without taking the bar examination, while those who wished to practice law continued their study on their own and/or by attending a cram school that focused narrowly on passing the bar examination. Would-be scholars usually took up one particular area of law as a research field of concentration. In contrast, would-be practitioners studied a wide range of law in order to pass the bar examination and became a general practitioner of law.

With these divergent paths, mobility has been limited. Once those with legal training are appointed as law professors or admitted to the bar, there have been very few opportunities to move from one

61 *Id.*
62 *Id.*
63 *Id.*

sphere to the other.[64] The majority of law professors teaching in the new law schools in Japan do not have practical experience in law. Practice training at the Institute would not have been counted as an academic credential to become a law professor in the pre-justice-reform-style undergraduate and graduate law departments. Indeed, law practice was often prohibited by the terms of the employment contract with the university. University administrations expected law professors to dedicate their time and efforts to research and education and not to participate in litigation, except perhaps as a consultant who renders an expert opinion. Prior to 2003, Japanese law also prohibited practicing lawyers from assuming any paid public post, with narrow exceptions.[65] The rigidity of career paths in the legal profession also generally reflects the low level of job mobility that prevails in Japan.

The separation between these two sectors of the legal profession has affected legal scholarship. There have been few opportunities for interaction between scholars and practitioners. Scholars pursue research related to their academic interest, which may not reflect the current state of law practice. Research themes that are important for law practice may be ignored by scholars. In international human rights law, for example, research themes such as the judicial applicability of international treaties to domestic violations of human rights have only recently gained academic attention. The chasm dividing scholars and practitioners has also resulted in a dearth of courses on professional ethics or lawyering skills at the undergraduate faculty of

64 Even within legal academia, there are a limited number of universities that produce legal scholars. More than 40 per cent of all law faculty members of the nine major national universities (Hitotsubashi, Hokkaido, Kobe, Kyoto, Kyushu, Nagoya, Osaka, Tohoku, and Tokyo universities) in Japan are graduates of the University of Tokyo and nearly 20 per cent are graduates of Kyoto University. *See* Miyazawa & Otsuka, *supra* note 20, at 25.

65 Prior to 2003, article 30, paragraph 1 of the former Practicing Attorney Law provided:

> A practicing attorney shall not concurrently assume any paid public post; provided, however, that this shall not apply in cases where he/she assumes the post of the President or Vice President of the House of Representatives or the House of Councilors, Prime Minister, Minister of State, Deputy Chief Cabinet Secretary, Deputy Chief Cabinet Secretary for Crisis Management, Assistant Chief Cabinet Intelligence, Special Public-Relations Secretary, Director of Cabinet Intelligence, Special Advisor to the Prime Minister, Senior Vice-Minister (including Vice-Director of each agency, in cases where the law provides that the Minister of State shall be assigned as Director of such agency), Parliamentary Secretary of each ministry (including the Parliamentary Secretary of each agency), Secretary to the Prime Minister, or Secretary to Minister of State, or where he/she becomes a member of the National Diet or assemblies of local public entities, or a chief of a local public entity, or assumes any other elected public post, or where he/she becomes a public employee with a fixed term . . . , a self-defense official with a fixed term . . . , or in which he/she becomes a public servant of whom full-time service is not required, or performs functions relating to any specific matter at the request of the government or a public office.

Practicing Attorney Law (Law No. 205 of 1949) (amended 2002).

law in university. Because scholars are insulated from the practice of law, professors cannot readily teach these courses to law students. Some scholars are even unaware of their importance. The new professional schools, which are bringing together legal scholars and law practitioners, may facilitate the development of a model of scholarship that bridges theory and practice. The pedagogy of clinical legal education provides a particularly suitable vehicle for these interactions and for integrating theoretical studies of law and practical training of lawyering skills and values for students.

The longstanding disjuncture between those who teach and those who practice law also complicates and impedes the threshold task of finding professional school faculty members. Not all law faculty members are familiar with or interested in the actual practice of law. Accordingly, the new law schools need to identify, recruit, and retain experienced attorneys to become professors, especially for courses that instill lawyering skills and professional values. Because professors generally earn less than attorneys in Japan, the recruitment and retention issue has prompted the government to subsidize judges and prosecutors to take leaves of absences to teach.[66] No such subsidies or programs exist for private attorneys who elect to teach.

Although one can certainly find distinctions in training and background between practitioners and academics in the United States, the divergences are not nearly as substantial as in Japan. Most tenured or tenure-track law school faculty members in the United States have earned at least a J.D. degree, the same basic law degree as practitioners, and the majority have earned their degrees from one of twenty elite law schools.[67] A 1991 study found that 79 per cent of full-time,

[66] The Ministry of Justice and Supreme Court of Japan implemented a system to permit prosecutors and judges to teach at law schools for terms of three years, with the government supplementing their salaries so that there is no loss in income. *See* Maxeiner & Yamanaka, *supra* note 56, at 325-26.

[67] There have been two substantial empirical studies of tenure or tenure-track law professors and their educational backgrounds in the last twenty-five years, though both studies are now fairly dated. One study, published in 1980, is based upon the 1975-76 *Directory of Law Teachers*, published by the Association of American Law Schools (AALS). *See* Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 503 (1980). The other article, published in 1991, is based upon a sample of 872 of the 5528 assistant, associate and full professors (15.8 per cent) profiled in the 1988-89 *AALS Directory of Law Teachers*. *See* Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J. L. REFORM 191, 194 (1991). Some commentators lament that there is still very little known about law teachers. *See* James R. P. Ogloff, David R. Lyon, Kevin S. Douglas & V. Gordon Rose, *More than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 129 (2000).

Although neither of the two studies provides data on tenured or tenure-track faculty who possess *only* an advanced degree other than a J.D., both studies emphasize that law

permanent U.S. law professors had at least some experience in the practice of law prior to teaching.[68] Of course, many faculty members (other than clinicians) only practice for a short time.[69] Moreover, even with this practical experience, the work of many legal scholars is sometimes characterized as removed from the practice of law.[70] Nevertheless, there is still far more mobility between law teaching and practice in the United States than in Japan. Law schools in the United States do not face the same difficulties in recruiting clinical and non-clinical faculty members who are well-grounded in legal practice.

A different issue, but one that is absolutely critical to the success of the new Japanese professional schools – and to clinical legal education in Japan – is the bar passage rate. The low passage rate not only has contributed to a very small number of lawyers per capita, but has led to an extreme shortage of lawyers in some areas of Japan, principally the rural jurisdictions which may have no attorneys or only a single attorney.[71] The justice system reforms seek to increase the overall number of attorneys and foster wider dispersion of attorneys

faculty members are J.D. graduates "in disproportionate numbers of a small, select group of law schools." Fossum, *supra* at 507. "[B]y far the most important credential for law teachers . . . [is] a J.D. degree from one of 20 producer law schools." *Id.* at 527-28. Fossum reported that 59 per cent of the faculty members received their J.D. degrees from one of twenty elite law schools, which is fewer than 15 per cent of the accredited law schools. *See id.* A decade later, Borthwick and Schau made an almost-identical finding. *See* Borthwick & Schau, *supra* at 226 ("the nation's twenty top-ranked law schools produced nearly 60 per cent of all sampled professors").

[68] *See* Borthwick & Schau, *supra* note 67, at 213. This was an increase in the percentage of law professors from Fossum's 1975-76 data. She reported that 67 per cent of tenured or tenure-track faculty had some practice experience prior to teaching. *See* Fossum, *supra* note 67, at 510-11.

[69] Borthwick's and Schau's 1991 study reports that only one-fourth of all professors had more than five years of practice experience. *See* Borthwick & Schau, *supra* note 67, at 219. Faculty members at the most elite schools were least likely to have had substantial practice experience. *See id.* (finding that faculty sampled at the "top seven" schools had 2.7 mean years of experience, versus 4.3 mean years of experience among sampled faculty at all schools). Fossum found a median length of time of five years spent in career activities prior to teaching. *See* Fossum, *supra* note 67, at 511-12.

[70] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (criticizing the "impractical scholar" who "produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner"); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1655 (1993) ("The law faculties of our universities now produce a formidable quantity of scholarship intended mainly to be read by other scholars rather than by lawyers and judges."); Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L. J. 659, 679-81 (1998) (criticizing, from a comparative perspective, the relative lack of real-world relevance of American law review writing); United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) ("many of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members").

[71] *See* Arita, *supra* note 56.

so that they are more accessible throughout Japan. Yet, at this point, there is significant uncertainty about what the bar passage rate will be over the long term.

As explained above, the 2001 Justice System Reform Report called for a passage rate of approximately 70 to 80 per cent for the new National Bar Examination,[72] the exam given to graduates of the new professional law schools.[73] The Council recommended a phased increase in the number of successful candidates for the bar examination each year, targeting 3000 new lawyers annually by the year 2010, which was not intended as an upper limit.[74] However, the numbers of approved new law schools and admitted students were both greater than originally expected. It has now begun to appear that some officials within the Ministry of Justice and others view the annual targets as rigid caps. If the targets are treated as fixed upper limits, with a higher-than-expected number of students in the pipeline, the bar passage rate would drop substantially below 70 to 80 per cent. Thus, even by early 2004, many people began projecting a low bar passage rate.[75]

The projections of continued low bar rates, and accompanying concerns about the effects on law students in the new law schools, have become widely-known. In October 2004, a major Japanese newspaper, *Asahi Shimbun*, reported that the passage rate would be approximately 34 per cent, much lower than the Justice System Reform Council had originally recommended.[76] Bar Examination Committee officials did not contradict these rumors, and speculation about new lower bar passage rates continued to persist.[77] Acting on these wide-

[72] *See Justice System Reform Recommendations*, *supra* note 1, at ch. III, pt. 2.

[73] The new bar examination requirements limit an applicant to taking the bar exam no more than three times within a five year period. *See* Japan Federation of Bar Associations, *supra* note 47. Bar applicants who have not graduated from a new law school may continue to take the old exam if they pass a preliminary test. *See id.* The old bar examination will be phased out in 2011. *See* Kaho Shimizu, *New Bar Exam System Explained*, JAPAN TIMES, May 20, 2006; *see also Number Allowed to Pass New Bar Exam Upped*, DAILY YOMIURI, Mar. 2, 2005, at 4 (stating that the number of persons permitted to pass the old exam is projected to be lowered in 2006 to no more than 500 to 600 persons, and to no more than 300 persons in 2007).

[74] *See Justice System Reform Recommendations*, *supra* note 1, at ch. III, pt. 1.

[75] *See, e.g.*, Yasutaka Abe, *Law School Setchi ni Koredakeno Mondaiten* [*Problems on the Establishment of Law Schools*], Causa No. 11, 28, 32 (Feb. 2004); Hiroyuki Kabashima, *Shihoshiken wo meguru Saishin no Jyokyo* [*Current Situation on Bar Examination*], Causa No. 11, 49, 51-52 (Feb. 2004); Hiroyuki Kabashima, *Mietekita "Shin-Shihoshiken"*, *in* HOKADAIGAKUIN PERFECT GUIDE [PERFECT GUIDE TO LAW SCHOOLS] 47, 48-49 (Kawaijyuku License Center & Kyodo Editing Center eds., Dec. 2003).

[76] Kanako Ida, *Hokadaigakuin no Ikkisei, Shihoshiken Gokaku 34%, Toshokoso 7, 8 Wari to Taisa* [*34% Projected Passage Rate of the New Bar Exam for the First Graduates of Law Schools; Big Diversion from the Originally Projected Passage Rate, 70-80%*], ASAHI SHIMBUN, Oct. 8, 2004, at 1.

[77] *See, e.g.*, Special Report, *Jyojyo ni Hokaisuru Riso no Kyoiku, Hokadaigakuin*

spread rumors, approximately 1900 law students submitted a petition to the government in November 2004, asking to increase the projected bar passage rate.[78] In the face of this criticism, Bar Examination Committee officials announced in March, 2005 that approximately 50 per cent (or between 900 to 1100 law school graduates) would be expected to pass the new bar exam in 2006.[79]

The new bar examination was administered for the first time on May 19, 2006, to 2091 graduates of the new law schools, and 1009 (48 per cent) passed the exam.[80] This first group of test-takers graduated from the new professional law schools after only two years of study, finishing early because of their prior education at the undergraduate level. The first class to graduate from the new law schools after three full years of study will sit for the new bar examination in 2007. The passage rate for this group remains uncertain – it may be as low as 20 to 30 per cent[81] – though the absolute number expected to pass the new bar exam in 2007 is projected to be approximately double the number in the preceding year because a larger cohort will be eligible to sit for the exam.[82]

Although the long-term bar passage rate has not stabilized, there is a widespread expectation that the rate will be low. This expectation has, in our view, led to a decline in law school applications from the schools' first year, and now threatens the success of graduate professional education in Japan. The passage rate means more to prospective law students than the absolute number of successful test-takers. When law schools were first established, many people enrolled with the expectation that they would have a realistic opportunity to pass the bar exam after incurring the time and expense of an additional two or three years of professional school education. Law school applications have now declined by more than 50 per cent from 2004 to

Ninenmeno Kiro [*Gradual Collapse of Ideal Education, A Crossroad of Law School in its Second Year*], *in* SHUKAN DAIAMONDO 132, 133-34 (July 2005).

[78] *See Law School Students Want Higher Success Rate in Bar Exam*, JAPAN ECON. NEWSWIRE, Nov. 25, 2004.

[79] *See '06 Bar Exam Pass Rates Raised*, ASAHI SHIMBUN, Mar. 2, 2005, *available at* http://www.asahi.com/english/nation/TKY200503020175.html (last visited Oct. 1, 2005). In 2005, only 3.19 per cent, or 1464 out of 45,885 exam takers, passed the old exam. Kaho Shimizu, *Boosting Legal Professional Ranks*, JAPAN TIMES, May 20, 2006.

[80] *See New Bar Exam Sees 48% Success Rate*, ASAHI SHIMBUN, May 20, 2006, *available at* http://www.asahi.com/english/Herald-asahi/TKY200609230137.html (last visited Sept. 23, 2006).

[81] *See Law School Meian* [*The Bright and Dark Sides of Law School*], ASAHI SHIMBUN, Sept. 22, 2006, at 2.

[82] *See '06 Bar Exam Pass Rates Raised, supra* note 79. Those who will be eligible to sit for the exam in 2007 will include both 2007 graduates of the new law schools and those who graduated in 2006 but either did not take the bar exam in 2006 or were unsuccessful in their first attempt.

2005.[83] One might attribute some of the drop to a lessening of pent-up demand, but that cannot be the major cause of the decline. Notably, the number of Japanese LSAT administrations has decreased among both university graduates and *current* university students, indicating that many people with an interest in legal practice have lost trust in the new law schools as a reliable gateway to the profession.[84]

It is difficult to overstate the importance of this problem. A prominent professor has predicted that if low bar passage rates persist, "the system of graduate law schools will collapse."[85] There are other less ominous, but still unattractive, possible outcomes. Law faculty at the professional schools may begin to emulate the cram schools by emphasizing memorization of the information needed for bar passage, rather than the legal analysis necessary to be an effective practitioner. Also, some of the law schools whose graduates have the lowest bar passage rates may be forced to close.

Even if the graduate professional schools survive a reduction in bar passage rates from the originally projected rates, low passage rates are likely to affect the students' education. Students will likely spend their time in cram schools once again, and focus less on courses that are unrelated to the new bar exam. Law faculty and students of the new law schools have already expressed this concern.[86] If clinics are perceived by students as solely preparing them for practice rather than directly helping them to pass the new National Bar Exam, there will be less student demand for clinical courses in the new professional schools, notwithstanding the importance of such courses in teaching students to be skilled and effective professionals and in helping them learn substantive law. Because the opportunity to practice law is still

[83] *See* Alan Brender, *Enrollment Plunges at Japan's American-Style Law Schools*, CHRON. HIGHER EDUC., Dec. 3, 2004, at 39.

[84] From 2004 to 2005, the number of university graduates taking the Japanese LSAT decreased by 3313 (19.4 per cent) and the number of current students taking the test decreased by 731 (11.6 per cent). *See* http://www.dnc.ac.jp (last visited Sept. 10, 2005). At Waseda Law School, the average age of the students in the entering class declined from 27.0 in 2004 to 25.7 in 2005, and further to 24.3 in 2006. *See* http://www.waseda.jp/law-school/topics/06result/20051013.htm (last visited Sept. 3, 2006). We believe that the low expected passage rates are preventing working people from leaving their jobs to go to law school.

[85] Brender, *supra* note 83 (quoting Professor Setsuo Miyazawa, then Vice President of Omiya Law School). As noted, South Korea has postponed – by one year – its plans to open graduate professional law schools. *See supra* note 10. A main reason for the delay is a continuing disagreement over the number of law schools and of students who may be enrolled. *See* Ah-young, *supra* note 10. Resolving this issue is critical to establishing a stable system of professional legal education.

[86] The November 2004 law students' petition stated: "With the expected low success rate in the bar exam, many students will focus only on examination studies, making it difficult for them to acquire a broad range of general as well as expert knowledge." *Law School Students Want Higher Success Rate in Bar Exam*, *supra* note 78 (quoting petition).

based principally on passing a National Bar Exam that focuses on legal doctrine alone and not on how to apply legal knowledge to solve client problems, entrance to the Institute understandably looms as the primary, if not the sole, focus of students in the new law schools.

An additional difficulty for those who seek to introduce clinical methodologies in Japan is the lack of direction from the top. The Justice System Reform Recommendations provide little guidance beyond calling for law schools to implement "bi-directional (with give-and-take between teacher and students) or multidirectional (with interaction among students, as well)" methodologies, rather than the "one-way lectures" that have previously been the norm.[87] The report also calls upon law schools to offer courses that go beyond legal theory and address skills such as fact finding and problem solving.[88] However, nothing in the report explicitly calls for the creation of clinical legal education programs.

By contrast, law schools that seek accreditation from the American Bar Association (ABA) in the United States are required to provide "substantial" instruction in "legal analysis and reasoning, legal research, problem solving, and oral communication," as well as "other professional skills generally regarded as necessary for effective and responsible participation in the legal profession."[89] These schools must afford "substantial opportunities" for "live-client or other real life practice experiences."[90] The law schools in Japan that include clinical courses within their curricula do so because they regard such programs as an excellent way of bridging theory and practice, and not because clinical methodologies are required.

Finally, Japan lacks certain institutional structures that have enabled clinics to flourish in the United States. A principal difficulty is the absence of a student practice rule or any accepted custom in the judicial system of having would-be *bengoshi* "learn by doing." As already noted, even trainees at the Institute are usually relegated to observing rather than participating in legal work. For that reason, a number of people have asked why clinic students – who have not yet passed the National Bar Examination – should be permitted to do more legal work than Institute trainees – who have already passed the exam. In addition, some courts and government officials in the Justice Ministry have raised privacy concerns and have precluded law stu-

[87] *Justice System Reform Recommendations*, *supra* note 1, at ch. III, pt. 2.

[88] *See id.*

[89] American Bar Association, Standards for Approval of Law Schools, std. 302(a)(2), (4) ("Curriculum") (2005).

[90] *Id.*, std. 302(b)(1).

dents from accessing court files,[91] or even accompanying attorneys as they interview clients in jail,[92] even when the client has given informed consent to student participation, and even when the students have signed a confidentiality oath that includes expulsion from law school as a sanction for breaching confidentiality. Practices vary, but some law students have been told that they may not attend closed court proceedings, such as those in family court.[93] In other courts, such as the Tokyo District Court, students may attend closed proceedings with consent of the opposing party. No court in Japan thus far permits students to sit at counsel table; rather, they are relegated to the public parts of the courtroom.

Again, by contrast, the ABA promulgated a Model Student Practice Rule over thirty-five years ago to facilitate the growth of clinical courses in American law schools.[94] All fifty states, plus the District of Columbia and Puerto Rico, now have adopted student practice rules,[95] which legitimize clinics and facilitate their operation. Japanese bar associations do not have a clear position on the role of students in court. The lack of a student practice rule in Japan is not necessarily fatal to the development of clinics – just as there is no rule that affirmatively *requires* courts to permit student practice, no rule

[91] A public prosecutor at the Tokyo Appellate Division of the National Prosecution Agency wrote an article, in his individual capacity, arguing that the use of materials disclosed by a prosecutor to a defense attorney at pre-trial criminal proceedings for the educational purpose of law students is prohibited because these materials are disclosed solely for the purpose of the administration of justice. Hideo Takasaki, *Kaijishoko no Mokutekigaishiyo no Kinshi to Hokadaigakuin niokeru Kyoiku tono Kankei [The Relationship between the Prohibited Use of Disclosed Evidence for Non-Judicial Purposes and the Education in Law School]*, 69 KENSHU 31 (2006).

[92] *See* Takano, *supra* note 42.

[93] *See id.* at 11.

[94] *See Proposed Model Rule Relative to Legal Assistance by Law Students*, A.B.A. REP. 290, 290 (1969) [hereinafter *Proposed Model Rule*]. The ABA Model Student Practice Rule states that its purpose is to assist the bench and bar "in providing competent legal services for . . . clients unable to pay for such services and to encourage law schools to provide clinical instruction." *Id.* Prior to the ABA's adoption of the Model Student Practice Rule, only fifteen jurisdictions had their own student practice rule. *See* Michael D. Ridberg, *Student Practice Rules and Statutes*, *in* CLINICAL LEGAL EDUCATION AND THE LAW SCHOOLS OF THE FUTURE 223, 231-64 (Edmund W. Kitch ed., 1970). Six additional states adopted student practice rules in 1969. *See id.* at 235-61.

[95] *See* Joan W. Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, 63 B. EXAMINER, No. 3, at 40, 40-41 (1994). In addition to Kuruc's and Brown's article discussing the features of the various state student practice rules, other commentators have compared the requirements, privileges, and responsibilities under the student practice rules throughout the United States. *See, e.g.*, David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, app. A, at 1546-54 (1998) (citing each state's student practice rule and the supervisory obligations for attorneys); Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, S. TEX. L. REV. 815, 825-28 (2004) (discussing the ethical obligations of law students certified under state student practice rules).

expressly *prohibits* such practice. But that leaves it to clinical faculty to advocate for the greater participation of students in courts, jails, and other settings where lawyers do their work.

The next section is a more detailed examination of the beginning of clinical legal education in Japan.

II. "BRIDGING THEORY AND PRACTICE": THE NEW CLINICAL PROGRAMS IN JAPAN

Despite the many challenges, clinical legal education is becoming rooted in a number of Japan's new professional schools. Waseda Law School has developed the most extensive clinical program to date. The first two parts of this section describe the new programs at Waseda Law School and highlight their essential features. We then report on developments at other professional schools in Japan.

A. Clinical Legal Education at Waseda Law School

In 2002, Waseda law faculty members visited approximately ten American and Canadian law schools to learn about clinical legal education. What most impressed the Waseda faculty about clinical legal education in North America was the diversity of the clinical programs. The Waseda faculty found that there are alternative models of clinical programs as well as critical, indispensable features to clinics.

One question for Waseda was whether to build a general legal clinic that is oriented towards preparing students to be general practitioners or to create a specialized legal clinic that serves a specific population of clients, such as neglected children, persons with disabilities, or refugees. The faculty decided that the school, which has an entering class of 300 students and 70 full-time faculty members, is large enough to house both a general clinic and specialized clinics. The faculty settled upon a general civil law clinic and a criminal law clinic, and made plans for clinics in family, labor, gender, intellectual property, constitutional, and refugee and immigration law. In the fall of 2003, the school initiated pilot programs to try out the civil law clinic, the criminal law clinic, and the refugee and immigration law clinic. Beginning in the spring of 2006, the school began to offer clinical courses to law students for credit.

From the start, the Waseda faculty set out to integrate clinical and academic components into the clinical pedagogy. What follows is a description of the pilot programs of clinical legal education at Waseda Law School, which endeavor to "bridge theory and practice."[96] Un-

[96] An overview of the Waseda Law Clinics appears in Peter A. Joy, The Birth of the Waseda Law Clinics: Bridging Theory and Practice, Keynote Address at the Opening Cele-

like the Legal Training and Research Institute, where trainees engage in "learning by seeing," the overriding approach in Waseda's clinics is "learning by doing."

1. The Civil Law Clinic

The Civil Law Clinic, which is taught by teams of academic faculty members and practicing attorneys who are new to the faculty, seeks to allow law students to do as much as possible in the representation of clients. After scheduling a new client for an appointment, the law student works with the supervising attorney to outline a plan for the client interview. The student conducts research on the type of legal problem and consults with the supervising attorney prior to the client interview. The student takes the lead in interviewing the client, and the faculty supervisor only asks questions if it is necessary. After the interview, the student discusses the legal issues with the faculty supervisor and then the student explains the legal options to the client. At each step in this process, the faculty supervisor provides the student with feedback, designed to help the student understand how to improve and to become a more effective practitioner.

From June of 2004 until March of 2005, sixty-six students handled seventy-nine cases. Students worked in four-person teams over a period of two months. Each team of students handled approximately five cases, including, for example, landlord/tenant disputes, inheritance matters, divorce or custody, real estate, employment, accident, and money problem cases. Some cases were in litigation; others were involved in negotiation, mediation, or family court procedures.

One of the faculty supervisors reported that clients sent him seven thank-you letters in the preceding ten months. These are the only thank-you letters he has received in twenty-one years as an attorney! The comprehensive and excellent representation of students working with faculty led to this high level of client satisfaction.

When the Civil Law Clinic students reflected on their experiences, they commented most frequently on the difficulties of communicating effectively with clients. This is a lesson that can only be learned in real practice. The second most common student comment was the realization of how important the legal theories learned in the classroom course are to understanding and solving concrete client problems. Finally, students observed that their experiences showed them the importance of critical thinking, and the need to evaluate the merits of each client's case in light of the actual evidence and the operation of the legal system. These are lessons that a law student can neither learn inside the traditional classroom, nor fully appreciate through simulation courses.[97]

bration for the Waseda Law Clinics at Waseda University (May 22, 2005) (on file with authors).

2. The Criminal Justice Clinic

The Criminal Justice Clinic is a course that started in the summer of 2004. It is taught by two clinical faculty members who have roughly twenty years of criminal defense practice experience. Prior to April 2005, when the clinic was made part of the formal curriculum, thirteen students worked on five cases in teams of three or four students per group. The faculty supervisors acquired the cases through the duty attorney system.[98] Since the spring of 2005, sixteen students have worked in groups of four on four more cases. Three cases came through the duty attorney scheme and one came through a referral from a client. The nine cases accepted through the duty attorney system were taken at the pretrial stage, and the one referral case was taken at the appellate stage.

There are four goals of the Criminal Justice Clinic: to provide basic skills instruction in criminal law advocacy; to use experiential learning techniques to convey how the criminal justice system works; to show the treatment that clients receive in the criminal justice system; and to provide assistance of highly skilled counsel to clients who are unable to afford attorneys.

Although there are barriers to students' participation, they truly engage in "learning by doing." Whenever permitted by the police, students attend confidential interviews in the station house with their faculty supervisors. In the interviews, students are encouraged to participate. Students also work on pretrial motions and take action on behalf of clients to seek their release.

The results for the clients have been remarkable. In two of the nine cases taken at the pretrial level, the judge dismissed the prosecutors' warrant requests. This is a dismissal rate of 22 per cent, which is over seventy-three times greater than the average dismissal rate of approximately 0.3 per cent. Even though the sample is very small, the clinic students and faculty are providing legal representation that is equal to or exceeds the representation of the most respected criminal defense attorneys in Tokyo.

[97] *See* Kojima, *supra* note 44.

[98] The duty attorney system provides free legal advice for criminal suspects detained at detention sites by participating attorneys. The system is operated by the prefectural bar associations in Japan. *See* Masayuki Murayama, *The Role of the Defense Lawyer in the Japanese Criminal Process*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS 42, 47-48 (Malcolm M. Feeley et al. eds., 2002).

Clinic students do all of the out-of-court work, including, for example, witness interviews and drafting arguments. Students are not permitted to conduct trials, because there is no student practice rule in Japan authorizing law students to handle court appearances. Thus far, judges have not permitted law students to sit at counsel table at trial. Instead, students must observe trials from the spectators' seats.

Almost all of the clinic students have described the clinic experience as the best method to learn criminal law and procedure. Most are surprised by the gap between what they read about the law in books and how law is actually practiced. Meeting with their clients motivates them to work harder than they have ever worked before. The students also develop the sense of ethical values imbedded in the legal profession. One student recounted that she found herself looking at every case from the client's point of view and thereby came to appreciate the importance of even ostensibly routine matters.[99]

3. *The Refugee and Immigration Law Clinic*

The Refugee and Immigration Law Clinic is jointly offered by an academic faculty member who specializes in this field of law and an attorney with roughly fifteen years of law practice in this field who joined Waseda Law School as a visiting professor. Third-year law students provide legal services to refugees and non-citizens.

A prerequisite for the clinic is a classroom course on refugee and immigration law that the clinic's teachers jointly teach. This course introduces students to not only the current theories concerning domestic immigration law and international human rights law but also a variety of legal practice issues and lawyering skills, such as legal drafting and communication with foreign clients. With this preparation, students provide legal services for clients.

One year before the start of the new professional law school, the Refugee and Immigration Clinic had a graduate student "try out" a clinical course. He was assigned to interview a political dissident from Burma about leaving his country and seeking refugee status. This interview required an interpreter. Based on the interview, the student prepared a draft, for faculty review, of written testimony for submission to the court. The student's central task in preparing the testimony was to reconstruct the client's story to make it as persuasive as possible to a Japanese judge. In pursuing this goal, the student found himself facing language barriers in trying to communicate with the client and cultural barriers in reformulating the client's story for the judge. Such student experiences in cross-cultural communication have

[99] *See generally* Takano, *supra* note 42.

benefits extending far beyond an individual case or course. Law students become sensitized to foreigners' varied assumptions, expectations and perspectives about the legal process, and, as a result, are in a better position to serve foreign clients not only in human rights cases but also in other types of matters.

The Refugee and Immigration Law Clinic also seeks to imbue students with academic curiosity. With the establishment of the new law school system, the training of legal scholars will shift from the existing graduate schools of law where academic research is emphasized. By exposing students to the reality of legal practice through legal clinics and externships with non-governmental organizations (NGOs) and international organizations, advocates of the new law school system hope that students will pursue research relevant to the legal problems they have seen first-hand. The student who participated in interviewing the refugee applicant wrote a case note for publication on the subject of the endless detention of non-citizens who, after being issued a deportation order, have been denied re-entry by their home country.

In creating the Refugee and Immigration Law Clinic, a group of law practitioners, scholars, and NGO staff members helped the teaching team in many ways, such as providing externship opportunities for students and giving advice on the course. As a result of this collaboration, the group published a textbook for students who take the Refugee and Immigration Law Clinic and similar clinical courses at other law schools.[100] This textbook distinguishes itself from existing law school textbooks because of the interdisciplinary perspectives offered by the authors, who include an authority on refugee law, an expert on international human rights law, a long-term member of the United Nations Human Rights Committee, an interpreter, and experienced attorneys in the field of refugee and immigration law. This group literally represents the ideal of "bridging theory and practice."[101]

4. *Externship Program*

Most of the newly established professional law schools, including Waseda, make effective use of externships in law offices. Waseda, which provides over sixty slots for externships, differs from other Japanese law schools by encouraging students to go to sites other than law offices. Placements include NGOs, central government ministries and agencies, municipal governments, and domestic regional offices of

[100] *See* GAIKOKUJINHO TO LAWYERING [ALIEN LAW AND CHALLENGES IN LAWYERING] (Shigeo Miyagawa ed., 2005).

[101] *See* Shigeo Miyagawa, *Bridging Theory and Practice: The Waseda Refugee Law Clinic Pilot Program*, 25 WASEDA BULL. COMP. L. (forthcoming Mar. 2007).

international organizations, where traditionally few lawyers are employed (due to the small number of lawyers in Japan) but a considerable demand exists for legal professionals. Lawyers can play a key role as autonomous actors who are relatively insulated from pressures and constraints. It is also possible that lawyers who become involved in advocacy may embrace the work as a career and thereby contribute to the professionalization of NGOs.

The Refugee and Immigration Law Clinic takes responsibility for externships with NGOs and international organizations. Every year since 2004, one student has been sent to the office of a refugee-related NGO where all staff were non-lawyers. Such offices provide a variety of services to refugees, including assistance in filling out application forms for refugee status and researching the likelihood that the refugee would face persecution if forced to return to his or her home country. By working at an NGO and providing such services to refugees, students found themselves reflecting upon the role of lawyers in non-litigation settings and the unique contributions that a lawyer can make at an NGO with non-legal staff. This experience helped students appreciate what it means to be a lawyer and what kinds of training are essential for the role. An externship experience of this sort broadens the horizons of law students in ways that have been unavailable to lawyers trained in the government's Legal Research and Training Institute. Thus, the revamping of legal training and the shift from a governmental to an academic setting carries the potential for significant transformation of the role of lawyers in society.

B. Three Approaches to "Bridging Theory and Practice," and Values Inherent in the Clinical Pedagogy

Three features of the Waseda Law Clinics are important to highlight here as means of "bridging theory and practice." First is the formation of a teaching team with academic and clinical faculty members. Academics and practitioners work together in teaching courses and supervising students. The second feature concerns the relationship between doctrinal and clinical courses in the law school curriculum. There are issues of timing of clinical courses and prerequisites. The third feature involves teaching values, skills, and reflection. In Waseda Law Clinics, students not only learn lawyering skills but engage in self-reflection about the role of the lawyer in society and professional responsibility.

The legal academics and practitioners who work together in teaching teams tend to come to the task with different perspectives on clinic cases. Students benefit from the dynamic tension between teachers from such different professional backgrounds, which, among

other things, facilitates reflection about the legal profession.

Before taking clinical courses in the third year, Waseda students take doctrinal courses such as constitutional law, contracts, torts, civil procedure, criminal law, and criminal procedure, and some of the lawyering skills courses on civil trial advocacy and criminal defense advocacy. The subsequent clinical courses provide good opportunities for students to integrate doctrinal aspects of legal studies and practical training of skills and values in the context of actual cases. For those students who seek to enroll in specialized clinical courses such as the Refugee and Immigration Law Clinic, Waseda requires foundational courses that provide instruction on the theoretical context and the lawyering skills needed for the particular field. Waseda is currently considering whether to offer clinical courses earlier in the curriculum by, for example, incorporating clinical components in the first-year survey course on the judicial process. This idea stems from the belief that clinical pedagogy provides students with a strong incentive to learn doctrine and helps them acquire a better grasp of the procedural aspects of cases.

The Waseda clinics seek to instill ethics and values that will improve the legal profession and make lawyers more aware of their social responsibilities. Although the number of cases the clinics have handled is small, each case provides multiple opportunities to apply ethical obligations such as, for example, the obligation to maintain client confidences. An example of the impact on students' awareness of professional responsibility can be seen in the above-described student statement about coming to look at cases from the viewpoint of the client and the importance of the case to the client. The foregoing accounts of the letters of appreciation from Civil Law Clinic clients and the Criminal Justice Clinic's success in opposing detention warrants demonstrate that students are inculcating the fundamental value of providing high-quality legal services for clients.

The externship program at Waseda provides good opportunities for students to reflect upon the role of the lawyer in society. It is particularly true of externships at NGO offices where lawyers traditionally are not involved. In these settings, students can explore the broader potential of the legal profession and bring their skills to bear in new fields.

The values underlying the Waseda Law Clinics are inherently clear in the program's pedagogy. The fulfillment of these values – including but not limited to the collaboration of academics and practitioners, the reinforcement of students' understanding of law with clinical experiences, the improvement of legal practice, the critical self-reflection on the role of the lawyer and professional responsibility

– all are essential to the program's "bridging of theory and practice."

C. Clinical Programs at Other Japanese Law Schools

According to a 2006 study of the seventy-four new Japanese law schools, as many as fifty-two schools claim to offer clinical courses.[102] Though some of these law schools have only externship programs, a majority of the law schools offering clinical courses have adopted a combination of legal clinics, simulation courses, and externships. Among these, there are ten law schools that are known to have established in-house law offices on campus.[103] The method of clinical teaching, particularly the involvement of students in attorney-client relationships, varies from school to school. Legal clinics at some law schools let law students provide legal services for clients with close supervision by faculty members who have many years of law practice, while other law schools only provide students with opportunities to observe attorney-instructors in legal counseling settings.[104]

A number of schools have already started clinics, or plan to begin them shortly. The next part of the article describes some of these clinical programs.[105] As the summary shows, there is already great diversity and experimentation.

1. Shibuya Public Law Office: A Collaboration of the Tokyo Bar Association, Dokkyo, Kokugakuin, Meiji Gakuin, and Tokai University Law Schools

One approach to implementing clinical legal education in Japan is a joint initiative of the Tokyo Bar Association, the largest bar association in Tokyo, and four Tokyo professional schools: Dokkyo, Kokugakuin, Meiji Gakuin, and Tokai University Law Schools. The Tokyo Bar Association provided the funds to convert space in the Kokugakuin University Law School into a law office, called the Shibuya Public Law Office. Kokugakuin University contributes the space rent-free and provides the utilities. The other law schools in the collaboration provide some support.[106] Clients of the Office are charged fees, which go towards the attorneys' salaries and the office's operating expenses. The Shibuya Public Law Office is located in the Shibuya district of Tokyo, and is close to major rail and subway connections.

The Office is the site of two practice experience courses for law students from the four law schools. The first experience is a simulation course called "Beginners' Legal Clinic." In this course, students participate in simulations involving various aspects of client representation. The second course is the Advanced Legal Clinic, in which law students work with attorneys in the Office and help to provide legal representation to Office clients.

In the Advanced Legal Clinic, students work in teams of two, observing the attorneys practice law and participating in some aspects of client representation. For example, students participate in client interviews and consultations, analyze the relevant facts and identify legal issues, conduct legal research, and assist with the preparation of pleadings.[107]

This model of clinical legal education faces some challenges, however. At the present time, students participating in the Advanced Legal Clinic are required to spend only two hours per week working on client matters. Attorneys in the Office find that this is not enough time for the students to be fully engaged in client representation, and that there is not much that students are able to do in such a short amount of time.[108]

Payment of attorneys' salaries with client fees creates another structural problem because the time that attorneys devote to teaching detracts from the time they could allot to earning fees. The monetary contributions of the participating law schools are not sufficient to compensate the attorneys for the time spent teaching, and the Tokyo Bar Association does not supplement the attorneys' salaries to compensate for the student supervision. This situation places the full responsibility, and most of the cost, for clinical legal education directly on the attorneys in the Office.

The limitations on student time and the financial structure for

[102] Kazuhiro Nakanishi, *Hokadaigakuin niokeru Rinshohogakukyoiku* [*Clinical Legal Education at Japanese Law Schools*], 1 HOSOYOSEI TAISAKUSHITSU HO 1, 6-7 (2006).

[103] The authors believe the ten law schools with in-house law offices on campus to be Chuo, Hosei, Kumamoto, Kyushu, Okayama, Omiya, Senshu, Tsukuba, Waseda, and Yamanashi Gakuin.

[104] Though fifty-two law schools claimed to offer clinical courses, it is not clear how many of these courses in fact employ established clinical teaching methodologies. At a number of the schools, students simply observe lawyers in practice. In this article, we seek to report on the development of clinics that offer true experiential learning experiences.

[105] A complete description of all of the clinical programs in Japan is beyond the scope of this article. The authors regret that not all of the new programs can be included here. We look forward to future scholarship on the clinical legal education movement in Japan.

[106] *See* Katsumasa Hirabayashi & Eishi Misawa, *Shibuya Public Law Office's Approach to Clinical Legal Education: The Collaboration of the Tokyo Bar Association with Four Law Schools in the Tokyo Metropolitan Area*, 25 WASEDA BULL. COMP. L. (forthcoming Mar. 2007). The description of the clinical program at the Shibuya Public Law Office is drawn from a paper presented by Dean Hirabayashi and Eishi Misawa, as well as first-hand observations of the authors, and interviews with attorneys working at the Shibuya Public Law Office.

[107] *See id.* at 4-5.

[108] Interview with Eishi Misawa, Attorney with the Shibuya Public Law Office, in Tokyo, Japan (May 18, 2005).

paying attorneys' salaries stand in the way of creating an optimum learning environment. These aspects of the program tend to promote a use of a "learning by observing" style of instruction rather than the ideal "learning by doing" approach.

2. *Omiya Clinical Program*

Omiya Law School inaugurated its clinical program by opening two legal counseling centers in December of 2004. One center is located within the law school, which is in a suburb of Tokyo. The second is in the Shibuya district. These counseling centers are known as the "All Day Clinic" because they are open on evenings and weekends. They are designed to accommodate Omiya law students, many of whom attend the night program, and clients who may work or have other obligations during the work day.[109]

The counseling centers provide free legal advice and counseling. Although other forms of representation were not offered initially, clients who received advice could arrange for further representation by the attorney in charge of the counseling services. In January of 2006, Omiya Law School began to provide full representation in civil and criminal matters through the clinic office that is inside the law school.

Students who participate in the in-house clinic based inside the law school enroll in either a two or four credit course for a six month period. All of these students attend a two hour seminar class component. Students in the four-credit course work on behalf of clients for at least eight hours per week, and students in the two-credit course are expected to do client work for at least four hours per week.[110]

From December of 2004 through April of 2005, the counseling centers conducted over 200 counseling sessions. Because these activities were part of the pilot program, students received no credit for their work and the number of students who elected to participate was small. The students who took part indicated that the sessions provided them with a realistic view of law practice and thereby gave them a richer context for their studies. Students noted that the counseling sessions also provided insights into what may be redressed through the legal system, as well as the difficulty in effectively interviewing and counseling clients.[111]

[109] The description of the Omiya Law School clinical program is based on the observations of the authors as well as the article by Lawrence Repeta, *Omiya Law School and the "All Day Clinic,"* 25 WASEDA BULL. COMP. L. (forthcoming Mar. 2007).

[110] *See id.*

[111] *See id.*

3. *Hosei University Law School Clinic*

Hosei University, one of six major universities that form the oldest baseball league in Tokyo, has an enrollment of 100 students per class. It offers four-credit courses entitled "Clinic I" (for second-year students) and "Clinic II" (for third-year students). The Hosei clinical program is unique in that it is supported by two on-campus law centers: the Liaison Law Office, which began operation in the spring of 2003, a year before Hosei Law School was established, and which is entitled "Liaison" because it is designed to bridge the university's academic resources and the need for legal services for socially disadvantaged people; and the Center of Alternative Dispute Resolutions (ADR Center), which provides conciliation and arbitration services for a general clientele.

In the Liaison Law Office, six attorneys on the law faculty are available for legal counseling. In addition, about ten supporting private practice attorneys (alumni of Hosei University) provide a legal counseling session once a month on campus. Legal counseling is provided free of charge, and attorneys' fees are charged only when clients need legal representation. Students participate in legal counseling with the consent of the clients. In the ADR Center, students participate in conciliation and arbitration as observers, with the consent of the clients.

Clinic students are able to observe different styles of client-attorney communication and can sometimes ask supplementary questions of the clients. Although students can attend the legal counseling sessions of any attorney who is on duty, students are assigned in groups of three to seven to a particular faculty supervisor for any case that progresses to the point of legal representation. Roundtable case discussions are held every week. Students are expected to participate in these sessions, which are attended not only by faculty supervisors but also other professors in related academic fields.

One of the Liaison Law Office's specialties is representation of clients who have mental disabilities. Although the legal issues in these cases are often identical to those involving non-handicapped clients, there may be issues directly relating to the client's disability, such as, for example, questions about the client's competency to contract for consumer goods. The central difficulty in cases often concerns the social position of mentally disabled people and stereotypes mental disabilities. Students who participate in this practice typically gain a much deeper appreciation of the degree to which a lawyer must think about legal problems within the context of the client's entire life, and the lawyer's responsibilities as an advocate for socially disadvantaged people.

Because these programs are just in their inception, students thus far have been passive observers. The Hosei clinical program places a premium on exposing students to different types of client-attorney communication skills and giving students a basis for identifying infirmities of the current state of law practice. Such critical reflection on the legal profession is something that cannot be obtained in the apprenticeship training provided by the Legal Training and Research Institute.[112]

4. *Dokkyo University Law School Clinic*

Dokkyo University is in Soka City, Saitama Prefecture, on the outskirts of the Tokyo metropolitan area. The Law School's clinical program is operated in cooperation with the local city government and the prefectural bar association. Dokkyo Law School participates in the clinical program of the Shibuya Public Law Office but also offers a program of its own for students. "Legal Clinic I" is required for all second-year students. "Legal Clinic II" is an elective for third-year students. The Law School also offers an elective externship course for third-year students.

Dokkyo Law School offers "Legal Clinic I" as part of the legal counseling services program of Soka City, which the city offers to its citizens with the help of the Saitama Bar Association. Clients who consent to student participation are assigned to a team of a supervising attorney and two or three students. Although students are mostly limited to observing the attorney, they are sometimes allowed to ask questions. After the counseling session, students discuss legal matters with the supervising attorney. Students in the elective course, "Legal Clinic II," are trained in the supervising attorneys' law offices, the Shibuya Public Law Office, or the Kitasenju Public Law Office, which is in Tokyo.

Of the fifty students in each graduating class, roughly half take the required course "Legal Clinic I" in the spring and the other half do so in the fall. Because the clinical activities of this course are closely related to the legal counseling services of the local government and the prefectural bar association, the strong support and good will of these two bodies are indispensable. This close relationship may have the effect of limiting student involvement if the City and the bar

[112] The description of the Hosei Law School clinical program is based on the unpublished Japanese transcript of a speech by Yoshihiko Nakamura on the Hosei clinical program, presented at the Waseda Symposium, Comparison of the Clinical Legal Education and Medical Education (Dec. 4, 2004) (on file with authors), and information obtained from the website of Hosei Law School at http://www.hosei.ac.jp/pro1/law/index.html (last visited Sept. 1, 2006).

association insist that the primary goal of the program is to provide *pro bono* legal services, rather than to further the school's educational mission.[113]

5. *Ritsumeikan University Law School Clinic*

Ritsumeikan University is in Kyoto, the old capital of Japan, about 500 kilometers southwest of Tokyo. Ritsumeikan's undergraduate faculty of law has provided legal counseling to Kyoto citizens for many years; the faculty has supervised students who provide counseling as an extracurricular activity. The law school now offers a specialized clinical course in the field of women and law, called "Legal Clinic II (Women and Human Rights)," as well as "Legal Clinic I (Legal Counseling)." The school also offers an externship course. These three courses are for third-year students, who are required to take one of the three for graduation.

A practitioner-professor and non-practitioner professor teach the "Legal Clinic II (Women and Human Rights)" course. Students counsel victims of domestic violence, sexual harassment, and employment discrimination. The course is designed to teach the skills of counseling, negotiation, and identifying primary facts and legal issues of the case, and to instill professional values and professional ethics. The clinic makes good use of the university's academic resources. Ritsumeikan University is home to the Graduate School of Science for Human Services, which offers a course on therapeutic psychology and law, and the Counseling Center of Psychology and Education, which counsels victims of domestic violence sexual harassment and individuals with learning disabilities. The "Legal Clinic II" collaborates with the Graduate School and the Counseling Center in an interdisciplinary approach that offers learning experiences that are not available at the Legal Training and Research Institute.[114]

6. *Kagoshima University Law School Clinic*

Kagoshima University is located in the Kagoshima Prefecture, which occupies the southernmost area of the southwest island of the

[113] The description of the Dokkyo Law School clinical program is based on information presented by Dokkyo Law School at the Waseda Colloquium on Clinical Legal Education (Mar. 15, 2005) and the website of the Law School at http://www.dokkyo.ac.jp/lawschool/ (last visited Sept. 1, 2006).

[114] The description of the Ritsumeikan Law School clinical program is based on a speech by Shuhei Ninomiya at the Waseda Open Seminar on Clinical Legal Education (July 22, 2003) that is published in HOKADAIGAKUIN TO RINSHOHOGAKUKYOIKU [CLINICAL LEGAL EDUCATION IN LAW SCHOOL] 172-78 (Shigeo Miyagawa ed., 2003), and information obtained from the website of Ritsumeikan University at http://www.ritsumei.ac.jp/ (last visited Sept. 1, 2006).

four main islands of Japan. The Prefecture is one of the least well-served by attorneys. There are ninety-one registered attorneys in Kagoshima Prefecture for a population of 1,769,000, or one attorney for every 19,439 people. Tokyo, by contrast, has one registered attorney for every 1210 residents, or sixteen times the number of lawyers per capita in Kagoshima.[115]

Because of the scarcity of legal services in the Prefecture, Kagoshima Law School's clinical program emphasizes service, particularly to those living in the Prefecture's small islands. The Law School's clinical program consists of "Legal Clinic 1," "Legal Clinic 2," and "Externship." The first of these courses sends a group of supervising attorneys and students to a small island where they provide legal counseling to local residents. Because of the distance from campus and because of student workload, the course is intensively offered for approximately one week during the winter and spring recesses.

Before the law school began offering clinical courses for credit, the school conducted a pilot program in January 2005, using the format that would later be formally adopted in "Legal Clinic 1." Two practitioner-professors, two non-practitioner professors, and six students participated in the counseling for island residents. Although the counseling was mainly conducted by the practitioner-professors, students were allowed to ask supplementary questions and took turns taking notes of counselees' case stories to prepare materials for the later roundtable discussion with the faculty members and students. Notwithstanding the limitations on the role that students played, the experiences enabled students to gain greater appreciation of the difficulty of communicating with counselees and identifying primary facts for the application of law. The students' exposure to the reality of life in the isolated island community, where attorneys are not available, provided a compelling basis for reflecting on the essential role of attorneys to promote the rule of law and effect equal access to legal services.

Kagoshima Law School ambitiously requires "Legal Clinic 1" for graduation. The entering class is thirty students each year. The Law School plans to increase the number of supervising attorneys in order to effectuate a low student-faculty ratio. The school expects strong support from the Kagoshima bar association, which will recruit private

115 The statistical data on the population are as of October 1, 2004, obtained from the website of the Statistics Bureau at http://www.stat.go.jp/data/jinsui/2004np/index.htm (last visited Sept. 3, 2006). The numbers of attorneys are as of September 1, 2006, obtained from the website of the JFBA at http://www.nichibenren.or.jp/ja/jfba_info/membership/data/060901.pdf (last visited Sept. 3, 2006). Although the data for population and for the numbers of attorneys are provided for two different periods of time, the time differential does not grossly distort the general picture.

practice attorneys to supervise students. The Law School has also made good efforts to raise funds from the local bar association and business groups in order to send students and supervising attorneys to distant islands and to provide accommodations for them.

"Legal Clinic 2," which is an elective course, involves legal counseling in the city of Kagoshima. This course is offered in the same format as "Legal Clinic 1" with the support of the local bar association. The "Externship" course, which is also elective, is supported by not only the local bar association but also two other bar associations in neighboring prefectures.[116]

III. The Future of Clinical Legal Education in Japan

We should acknowledge, at the outset, that clinical legal education has a future in Japan only if professional graduate legal education has a future. Japan's law schools are only two and a half years old, and already there is uncertainty about their ability to survive – or at least about their ability to succeed with a model of professional education that can accomplish the ambitious goals of the Justice System Reform Council. One of the Council's goals, of course, was to increase the number of *bengoshi* and thus make legal services readily available to a far greater number of people. The Council also sought, however, to transform the ways in which lawyers are trained. Japan needs lawyers who are better attuned to cultural and societal changes, and better able to adapt to such changes in the future. The Council adopted the professional graduate law school model because of the need to go beyond teaching of doctrine and to teach new skills and values. In our view, the Council's goals will be thwarted if bar passage rates are set significantly lower than the 70 to 80 per cent originally recommended. Schools will have far fewer applicants, and some of the new professional law schools may be forced to close. Schools will begin merely "teaching to the test" instead of ensuring that students are well-grounded in skills and values. The net effect may simply be to replicate the "cram school" experience within a university setting. The next few years will reveal whether our concerns are well-founded.

Putting this issue partly to the side, we think that clinical legal education has a promising future in Japan – at least as long as graduate professional legal education continues to exist – but that there are very substantial challenges to implementing an effective model of clinical pedagogy. Many of these challenges are products of the current state of Japan's justice system and legal culture, including the lack

116 The description of the Kagoshima Law School clinical program is based on information provided by the Kagoshima Law School at an interview (July 7, 2005) and the website of the Law School *at* http://www.ls.kagoshima-u.ac.jp/ (last visited Sept. 1, 2006).

of a pool of legal educators with practice experience.

The story of the development of law school clinics in Japan is very different from that of the United States. In the U.S., professional graduate law schools were in place long before clinical methods were accepted as an important part of legal education. Although there was a limited movement to build clinics in the early part of the twentieth century, clinical legal education really did not begin to take root until the late 1960s and early 1970s as a result of seed funding broadly available from the Ford Foundation's Council on Legal Education for Professional Responsibility (CLEPR).[117] Many clinics were initially based on two well-established service delivery models: public defender and legal services offices. There is now a proliferation of different clinical models in U.S. law schools.

Before opening graduate professional law schools in Japan, many *bengoshi* and legal scholars visited law schools in the U.S., Canada, and other countries. They were exposed to a rich assortment of clinical models. Although it is perhaps disappointing that clinical legal education is not more firmly rooted in more of Japan's new law schools, it is encouraging that clinical methods are being employed in more diverse ways than when clinics first became well-established in U.S. law schools. Waseda Law School offers general civil and criminal clinics as well as specialized clinics in fields such as immigration and refugee law. Other unique programs include the Shibuya Public Law Office, which is a four-school collaborative, and clinics in such areas as alternative dispute resolution, representation of people with mental disabilities, and the provision of legal services to a remote island community. The best of the new clinical programs in Japan are being led by people who are thinking about clinics in a very sophisticated way.

Also encouraging is that the new law school clinics provide legal services to people who would otherwise have difficulty obtaining legal counsel, and that the legal assistance being provided is first-rate. The stories are poignant and ring true: the practitioner-professor who has received his first thank-you letters after many years in practice; the high rate of dismissals recorded in the cases of a leading criminal clinic; and the difficult and unique work done by students and faculty in the Kagoshima Prefecture, who bring legal services to residents of a remote island. Such programs increase the amount of legal services to needy people and, at the same time, establish a public service mission for the law schools.

And there are more good tidings still: Many of these programs

[117] *See generally* Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1 (2000) (describing the development of U.S. clinical legal education).

team traditional legal scholars with practicing lawyers hired as clinical faculty members. This approach integrates the teaching of theory and practice and should go a long way to fostering legal scholarship related to practice, thereby furthering the law reform goals of the Justice System Reform Council.

Nonetheless, as we have seen, there are substantial challenges. Some of the difficulties now faced by clinical programs are due to the current structure of the legal profession, and to resistance to change. First, there is an historical concern that a possible oversupply of attorneys may hurt the economic well-being and social status of *bengoshi*.[118] This underpins some of the resistance within the legal profession to a substantial increase in the number of attorneys.

Second, many of the clinical programs currently limit student participation to attending counseling sessions. The constricted view of a law student's capacity is grounded in part on the experiences of prosecutors, judges, and attorneys who were largely limited to "learning by watching" during their time at the Legal Training and Research Institute. The current members of the legal profession are all products of the Institute, which has been the sole locus of legal training and socialization into the legal profession prior to admission to practice. Having had no experience with professional law schools, much less clinical courses within law schools, members of the legal profession often approach the issue of clinical practice with skepticism and resistance. Some find it difficult to imagine that a student who has not even been admitted to the Institute can provide (or meaningfully participate in providing) competent legal representation to clients.

If there is to be a greater degree of experiential learning in Japan's new law schools, there must be more support from law faculty and members of the legal profession. When clinics began to flourish in the U.S. starting in the late 1960s, they had broad support from the American Bar Association and prominent players in the legal system. They also started within a system of stable (some might say entrenched) professional law schools. Although many law faculty members did not support clinical legal education in its formative years, respected faculty such as John Bradway, Jerome Frank, Karl Llewellyn, and Robert Storey advocated the teaching of lawyering skills and recognized the value of clinical legal education and nurtured its growth in the first part of the 20th century.[119]

It would be beneficial if some Japanese intellectual giants, comparable to historic American figures like Jerome Frank and Karl Llewellyn, would speak in favor of clinical legal education as have some of

[118] *See supra* notes 30–45 and accompanying text.

[119] *See* Barry, Dubin & Joy, *supra* note 117, at 6–16.

the pioneers of clinical education. This of course presupposes that an even larger number of prominent law faculty would support the new professional law schools. The continuation of the undergraduate old-style law faculties or departments perpetuates a certain divide between legal theory and practice. It is not uncommon to find law faculty not only skeptical of but resistant to the new law schools.

In addition, it is important for some prosecutors and judges, particularly some members of the Supreme Court of Japan, to advocate on behalf of the new professional law schools. Although clinical programs existed in the U.S. for a number of years, it was not until the late 1960s that members of the bench and bar in the U.S. began to emphasize the importance of lawyering skills training and clinical legal education.[120] By the early 1990s, the essential role of law school clinics in teaching fundamental lawyering skills and values of the legal profession was formally recognized by the ABA in its MacCrate Report.[121] If the new law schools are to grow, the legal profession in Japan must endorse these efforts within a matter of a few years.

In the U.S., a model student practice rule helped pave the way for students to practice law in a meaningful fashion under careful supervision. In some other countries, legislation permitting student practice,[122] or at least a willingness of the judiciary to permit law students to participate in many aspects of providing client representation, has spurred the development of clinical legal education. Without a student practice rule, legislation permitting student practice, or a willingness on the part of judges, prosecutors, attorneys, and bar associations to permit greater student involvement in legal representation, clinical legal education in Japan will not come close to meeting its potential.

[120] *See, e.g.*, Jordan v. United States Dep't of Justice, 691 F.2d 514, 522-23 (D.C. Cir. 1982) ("This [student intern] practice has been praised by members of the judiciary and encouraged by the Judicial Conference of the United States, and we have ample reason to extend our commendation." (footnotes omitted)); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts of the Judicial Conference of the United States, 83 F.R.D. 215, 222 (1979) (recommending support for "student practice programs" in law schools); Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 161, 164, 167-68 (1975) (recommending that law schools teach trial skills); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 233-36 (1973) (advocating more hands-on lawyering skills as a way to improve the quality of lawyering; Burger was Chief Justice of the Supreme Court of the United States from 1969 to 1987); Benjamin R. Civiletti, *Clinical Legal Education in Law School and Beyond*, A.B.A. J., May 1981, at 576, 576 (calling for more clinical legal education; Civiletti served as United States Attorney General from 1979 to 1981).

[121] SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992).

[122] *See, e.g.*, Richard J. Wilson, *Three Law School Clinics in Chile, 1970 – 2000: Innovation, Resistance and Conformity in the Global South*, 8 CLIN. L. REV. 515, 536 (2002) (citing Chilean law that permits law student practice in and out of court); Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve to do so Effectively*, 12 CLIN. L. REV. 615, 630 (2006) (stating that Russian law permits anyone to represent persons in civil court proceedings).

Greater participation in legal education by practicing attorneys is also critical to the success of clinical legal education. Unlike in the U.S. and many other countries, there is no established pool of experienced practitioners to serve as professors in Japan. It is unclear, however, whether the new law schools will develop policies to attract and retain the best practitioners available. Although many new law schools have recruited a corps of talented attorneys to join the faculty, these new members of the academy have not yet been fully integrated into the faculty. Nor have the new practitioner-teachers been given long-term commitments such as tenure or long term contracts. As one of the authors of this article commented with respect to U.S. clinical legal education, "equal treatment for clinical faculty" is essential if law schools are to "attract and retain attorneys who are sacrificing the opportunity to earn more money practicing law to become professors."[123]

It is difficult to assess whether the new law schools will overcome these challenges. The effort will surely take a substantial period of time, and it would be enormously helpful to gain support from educators, lawyers, prosecutors, and judges around the world who support clinical legal education.

Other difficulties faced by the new law school clinics in Japan seem endemic to the enterprise, replicating experiences in the U.S. and other countries. Japanese law schools face challenges in funding clinics. For example, some programs, such as the Shibuya Public Law Office, are expected to raise most of their own funding. Law schools also are addressing issues concerning integration of the clinical and non-clinical curriculum, sequencing of courses, student course credit, questions about quality of supervision in clinics and externships, status of faculty, and how to promote scholarship that integrates theory and practice. For these issues, clinical faculty in other countries may say, "Welcome to the world of clinical legal education." These are issues that are important to the success of law school clinics, but which are unlikely to be definitively resolved any time soon.

CONCLUSION

Japan's justice system is clearly in transition. The Justice System Reform Council set ambitious goals to expand the Japanese legal profession, both numerically and with respect to its capacity to cope with

[123] Joy, *supra* note 96, at 12.

modern legal practice domestically and internationally. In our view, the development of clinical legal education in Japan is vitally important if the new law schools are to help transform the legal profession, as envisioned by the Council. Yet, there are many hurdles. The new law schools must resist pressure to become university-based versions of cram schools due to extremely low bar passage rates. The law schools must also resolve internal issues such as awarding commensurate academic credit to clinical students and faculty and designing programs to hire and retain qualified attorneys to become clinical faculty. Clinical legal education in Japan also needs the support of the legal profession to permit student practice or at least greater participation of students in providing legal services. If these obstacles are not overcome, then the new law schools will fail to achieve the goals envisioned by the Council.

In many ways, the developments in Japan are a case study for other countries considering the reform of their legal professions. South Korea, for example, has been following developments in Japan closely as it has adopted a U.S.-style professional law school system effective in 2009.[124] In April of 2005, based in part upon the experience in Japan, South Korea's Judicial Reform Committee recommended that the number of new law schools in South Korea be limited to ten, that enrollments in the new law schools be limited to approximately 150 per class, and that the number of graduates passing the bar exam be limited to 1200, with a bar passage rate of approximately 80 per cent.[125] Thus, South Korea plans to limit the number of persons admitted to the new law schools in an attempt to avert pressures to institute a law bar passage rate, which in turn could lead to reliance on cram schools and rote memorization in the new law schools. Universities and law faculty in South Korea are opposed to the contemplated limits on the number of law students and new law schools.[126] The continued debate over enrollments has led the South Korean government to delay the opening of the new schools for one year. Yet, it is possible that the limited enrollment may prove beneficial to the development of innovative curricula, such as clinical legal education and other lawyering skills courses, in the few new law schools.

In Japan, there was resistance by university and law faculty to limiting the number of law students and new law schools. Ultimately,

[124] *See supra* note 10.

[125] *See Law School Measures Stir Controversy: Universities Oppose Panel's Decision to Limit Number of Students*, KOREA HERALD, Apr. 22, 2005; Alan Brender, *New American-Style Law Schools Face Obstacles in Japan and South Korea*, CHRON. HIGHER EDUC., Aug. 12, 2005, at 42.

[126] *See Law School Measures Stir Controversy: Universities Oppose Panel's Decision to Limit Number of Students*, *supra* note 125.

the Ministry of Education and Science in Japan approved every law school that satisfied the established criteria and qualification procedures, resulting in an approved capacity of approximately 6000 students per year – twice the projected limit of 3000 new attorneys per year. This approach places the burden on the new law schools to develop quality professional legal education programs and not to become university-based versions of cram schools. For this approach to succeed, we believe that either the bar passage rate has to be higher, or, as some have argued, evaluation or accreditation bodies will need to favor law schools that focus on "graduating legal professionals capable of meeting new demands" and able "to think independently as professionals" rather than graduates "good at answering questions on paper."[127] In either case, we believe that clinical education is essential to prepare attorneys to meet the challenge of today's legal profession and to reform the justice system in Japan.

As this article is written, we have had only two and a half years of experience with the new law schools and clinical education in Japan. There are many difficulties still to face in this transformation, even assuming that the Ministry of Justice, judges, bar associations, and attorneys eventually learn about and support clinical legal education. However, we are convinced that clinical legal education is highly effective in educating future attorneys about the practice of law. Only clinical programs afford an opportunity for students to learn the ethos and soul of legal practice by actually engaging in such practice under the close supervision of clinical faculty who are experienced practitioners. By representing real clients with legal problems, law students in Japan's clinical programs are beginning to learn how to analyze the legal issues presented by the clients, how to communicate with these clients, and how to solve their clients' problems. There is no substitute for this clinical training, even with the continued existence of the Legal Training and Research Institute.

[127] *Evaluation Organizations Is a Key for Reform*, INT'L HERALD TRIB. (HERALD ASAHI), Nov. 25, 2003.

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Contents

With the advent of a new era that marks the inauguration of the first legitimate civilian government in 1993, a number of important goals were projected: improved legal protection of human rights, normalized labor relations, eradication of corruption and crime, restoration of local autonomy, freedom of the press, university autonomy, the restructuring of electoral procedures to enhance their fairness and justice, and establishment of Korea's position in the international society as a responsible member.

Achievement of these objectives depends largely on commitment to democratic and international values within the legal profession. Tasks for constructive legal education, including comparative and international legal studies, are urgent and indispensable. In the past, there seems to have been little understanding that law has a major role to play in changing society, for the role of judges, prosecutors and lawyers was simply to see to it that the laws on the books were effectively enforced.

Whether this attitude will change, and whether the Korean people will come to view the judicial system as a positive and responsive part of the institutional picture largely depends on the younger legal professionals who will soon assume more responsible roles in our society.

Notes

1. This short note is based on the author's own experience of passing the national judicial service examination and the higher civil service examination, brief practice within and without Korea, and law-teaching experience for more than twenty years. Views expressed in this note are the author's own.

2. E.g., D.K. Choi, *Legal Education in Korea: Problems and Reform Efforts*, International Conference on Legal Education held on October 30-31, 1987 at Seoul National University; Kiljun Park, "Problems Concerning the Reform of Legal Education in Korea," 6 *Korean Journal of Comparative Law* 56-91 (1978).

3. See Jay Murphy, "Legal Education and the Development of Law in Traditional Cultures: Learning from the Korean Experience," 27 *Journal of Legal Education* 234-249 (1975); James West, *Education of the Legal Profession in Korea*, International Legal Studies, Korea University, 1991.

4. West, *supra* note 3, 25.

5. West, *supra* note 3, 27.

12

Legal Education in Japan

Yasuhei Taniguchi

Organization of Japanese Legal Education: An Outline

In the late 19th century Japan adopted a European style system of legal education.[1] Legal education within the university has since been primarily at the undergraduate level, but, except for certain periods, undergraduate legal education itself has not entitled graduates to pursue a professional legal career as a "full jurist", either as a member of the practicing bar, as a judge or as a prosecutor.[2] To become a full jurist, one must take a rigorous state examination. Administrative agencies, in central as well as local government, and private industries are eager to employ law graduates without the full jurist qualification. Therefore, only a small portion of law graduates become "full jurists" while others go into other fields which are not strictly legal. This basic pattern of Japanese legal education has remained unchanged for more than a century, although many important reforms took place after the Second World War.

Before the war, university education was a highly limited opportunity available only to a small portion of the population. After the war the so-called democratization wave also washed over the whole educational system. Along with primary and secondary education,[3] higher education underwent great changes, namely:

1. Compulsory liberal arts education was introduced into the university curriculum, and the period of university education was extended from 3 to 4 years. Under the pre-war system a university student took courses only within his or her chosen field. Students now entered a university normally at age 18 and the first 2 years were devoted to liberal arts subjects, namely 3 social science subjects, 3 humanities subjects and 3 natural science subjects, in addition to one or two foreign languages and physical