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## Beyond Litigation: Legal Education Reform In Japan And What Japan's New Lawyers Will Do

George Schumann

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# BEYOND LITIGATION: LEGAL EDUCATION REFORM IN JAPAN AND WHAT JAPAN'S NEW LAWYERS WILL DO

*George Schumann \**

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### Introduction

Legal education in Japan is in the midst of a radical transformation. Until 2004, formal legal education in Japan had been the province solely of undergraduate law programs.<sup>1</sup> Undergraduate law classes are primarily large lecture courses that present rules of substantive law and theories of interpretation of Japanese legal codes, with little actual case analysis or class participation.<sup>2</sup> Students who actually want to become lawyers have generally regarded these classes as distractions,<sup>3</sup> and most of the graduates of these undergraduate programs do not, and do not ever fully intend to, become lawyers.<sup>4</sup> Instead, those

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<sup>1</sup> See, e.g., Mark Thompson, *Taking Law at Chūo: Japan's Approach to Legal Education is Different. But is it Better?*, in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 41 (Curtis J. Milhaupt et al. eds., 2001 ); Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, 2 ASIAN-PAC. L. & POL'Y J. 16, 32 (2001).

<sup>2</sup> Kohei Nakabo, *Judicial Reform and the State of Japan's Attorney System: A Discussion of Attorney Reform Issues and the Future of the Judiciary*, 10 PAC. RIM L. & POL'Y J. 623, 638 (2001) (Yohei Suda trans.) (2001). This is not to say that Japanese undergraduate law students do not learn the law. See discussion *infra* Part VI.C. Rather, in contrast to the case method used in American law schools, the law is taught in the Japanese classroom as “an abstract body of legal principles that are not closely tied to the actual cases in which those principles are applied.” James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303, 309 (2004).

<sup>3</sup> Most students quickly discover that law faculties offer only a series of mass-produced, impersonal lectures with enrollments that exceed 500 students. Students cannot pass the National Bar Examination by attending these lectures. So students who want to become lawyers go to preparatory cram schools and do not bother attending university classes.

Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 S. TEX. L. REV. 419, 432 (2002)

<sup>4</sup> HIROSHI ODA, JAPANESE LAW 101 (2d ed. 1999) (explaining that the most popular career paths for graduates are either the civil service or business). The law schools' own promotional materials state that graduates go on to “participat[e] in key decision-making processes within our society” [University of Tokyo materials] and “can truly contribute to society from any position,” [Waseda University materials] implying that students may major in law and still safely plan careers beyond the traditional legal professional categories of judge,

who aspire to become lawyers, prosecutors, or judges, while majoring in law as undergraduates, also devote years of study to national bar exam preparation in specialized cram schools.<sup>5</sup> Passing the extremely rigorous national bar exam is the sole means of entry into a Legal Research and Training Institute (LRTI) apprenticeship, which in turn is the sole gateway into the legal profession.<sup>6</sup> The bar passage rate has remained extremely low for the past twenty years, averaging less than 3% of all applicants.<sup>7</sup> As a result, the ratio of citizens for each practicing attorney in Japan in 2003 was 6,748 to 1,<sup>8</sup> one of the lowest ratios in the

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prosecutor, and private attorney (*bengoshi*). Yukio Yanagida, *A New Paradigm for Japanese Legal Training and Education—In Light of the Legal Education at Harvard Law School*, 1 ASIAN-PAC. L. & POL'Y J. 1, 15 (2000).

<sup>5</sup> The top universities, with the exception of the University of Tokyo, run their own cram schools (*yobiko*, or “extracurricular schools”) to help law students who plan to take the bar examination. See Edward I. Chen, *The National Law Examination of Japan*, 39 J. LEGAL EDUC. 1 (1989), reprinted in JAPANESE LEGAL SYSTEM 298 (Meryll Dean, 2d ed. 2002) [hereinafter Dean]; see also Setsuo Miyazawa, *Education and Training of Lawyers in Japan—A Critical Analysis*, 43 S. TEX. L. REV. 491, 493 (2002) (“While they are university law students, their legal education actually takes place at cram school.”).

<sup>6</sup> Most successful applicants must try at least four times before they pass the National Bar Examination. Kawabata, *supra* note 3, at 432. The LRTI is controlled by the Supreme Court and the Japanese Bar, and fully funded by the government. Eric A. Feldman, *Mirroring Minds: Recruitment and Promotion in Japan’s Law Faculties*, 41 AM. J. COMP. L. 465 (1993), reprinted in Dean, *supra* note 5, at 301. The twenty-four month LRTI training program consists of rotations between civil and criminal sections of district courts as well as offices of private attorneys. Chen, *supra* note 5, at 299.

<sup>7</sup> Over 30,000 law graduates take the bar exam each year, but only about 1,000 are allowed to pass the exam and enter the LRTI, making the LRTI “[t]he bottleneck in the system.” Gerald Paul McAlinn, *Reforming the System of Legal Education: A Call for Bold Leadership and Self-Governance*, 2 ASIAN PAC. L. & POL'Y J. 15, 17-18 (2001); see also Kawabata, *supra* note 3, at 428 (finding that the low bar passage rate “is responsible for the insufficient number of people in the legal profession.”).

<sup>8</sup> The number of practicing attorneys in Japan in 2003 was 18,851. Japan Federation of Bar Associations at <http://www.nichibenren.or.jp/en/about/index.html> (information as of April 1, 2004). The population of Japan is approximately 127,214,499. The World Factbook at <http://www.cia.gov/cia/publications/factbook/geos/ja.html> (last updated February 10, 2005). See also *infra* note 135 (regarding estimates of the number of “lawyers” in Japan).

developed world.<sup>9</sup> In April 2004, sixty-eight new graduate law schools opened across Japan.<sup>10</sup> Rather than teaching test-taking tactics for the bar exam, these schools will emphasize both academic training in legal reasoning and professional training in practical legal skills, as is the practice in American law schools.<sup>11</sup> In addition, the National Bar Examination is being revised, and the number of successful bar applicants is to increase to 3,000 per year by 2010.<sup>12</sup>

But why this sudden change in a country renowned for its administrative bureaucracy and conservatism? Some fundamental questions will naturally occur to anyone seeing these changes from the outside: Why now? Why to this degree? And what sort of work are all these new Japanese lawyers going to be doing?

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<sup>9</sup> The number of licensed attorneys in the United States in 2003 was 1,058,662. American Bar Association at <http://www.abanet.org/marketresearch/2002nbrolawyersbystate.pdf> (on file with the University of Miami International & Comparative Law Review). The population of the United States in 2003 was approximately 290,342,554. The World Factbook at <http://www.cia.gov/cia/publications/factbook/geos/us.html> (yielding a citizen/attorney ratio of 274/1) (on file with the University of Miami International & Comparative Law Review). The ratio of citizens to attorneys in France is 1476/1; in Germany, 708/1; in Sweden, 2323/1; in the United Kingdom, 384/1; in the Netherlands, 1324/1. See Council of the Bars and Law Societies of the European Union at [http://www.ccbe.org/doc/stat\\_avocats.pdf](http://www.ccbe.org/doc/stat_avocats.pdf) (last updated January 2003); The World Factbook at <http://www.cia.gov/cia/publications/factbook/index.html> (last updated January 1, 2004).

<sup>10</sup> Ichiko Fuyuno, *Japan Grooms New Lawyers*, WALL ST. J., April 13, 2004, at A18.

<sup>11</sup> Eriko Arita, *Sixty-Six Institutions Win Approval to Open U.S.-Style Law Schools*, THE JAPAN TIMES, Nov. 22, 2003, available at 2003 WL 8610293 at \*1. Two additional law schools were subsequently approved and allowed to open in April 2004, bringing the total to 68. See Fuyuno, *supra* note 10.

<sup>12</sup> *Shihou seido kaikaku shingikai ikensho: nijuuissseiki no nihon wo sasaeru shihou seido* [Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century], June 12, 2001, available in English at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (last visited March 17, 2005) [hereinafter JSRC Report].

While litigation rates in Japan may be on the rise, this comment proposes that a great many of Japan's new lawyers will be called upon to serve the needs of corporate Japan in roles beyond those of litigators. Part II of this comment explains the broader context of the recent reforms in Japanese legal education, including shifts in the economic, bureaucratic, and political landscape that are forcing Japan to rethink the role of lawyers in Japanese society. Part III examines changes in litigation rates in Japan, as well as administrative reforms related to litigation, all of which may, at first glance, seem to account for the recent changes to the Japanese legal education system. Part IV of this comment, however, proposes roles that new Japanese lawyers will play that go beyond litigation, particularly advising and aiding corporate clients in their business dealings, an area of law in which relatively few Japanese lawyers now practice. Part V examines some of the major entities behind the calls for reform. Part VI discusses the likely difficulties that legal education reform may present, as well as the effects that legal education reform will have on the practice of law in Japan and on broader Japanese society.

## **I. Japan's Economic Travails and the Re-Shuffling of Power**

### **A. Economic Recovery and the Response to Globalization**

Japan has been in a serious economic slump for over ten years, so it is perhaps natural to view current administrative reforms, including judicial and legal education reforms, as elements of ongoing political efforts to stimulate the beleaguered Japanese economy. Prime Minister Junichiro Koizumi came to office in April 2001 promising to implement the structural reforms needed to revitalize Japan's economy, including a cleanup of bad bank loans, increased privatization and deregulation of government services, and administrative reform of Japan's bureaucracy.<sup>13</sup> Part of these reforms includes making the Japanese legal system larger, more transparent, and more responsive to the needs of Japanese citizens and of foreign investors.<sup>14</sup>

The ongoing economic recession has exposed the vulnerability of Japanese businesses to the most significant international business phenomena of the past decade: increased global competition and

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<sup>13</sup> *A Dashing Disappointment: Japan's Stalled Reforms*, THE ECONOMIST, July 13, 2002, available at 2002 WL 7246792 at \*1.

<sup>14</sup> Heather Smith, *Wanted: More Lawyers*, THE AMERICAN LAWYER, Nov. 2003, at 83.

technological change. Japanese companies have initiated a number of responses: shifting manufacturing and financial bases overseas,<sup>15</sup> developing products to accommodate new consumer tastes,<sup>16</sup> internationalizing management teams,<sup>17</sup> and decreasing foreign investments.<sup>18</sup> Most of these measures, however, only worsen unemployment and do little to fight deflation.<sup>19</sup> Conventional means of corporate governance, such as the organization of companies into groups of *keiretsu*, are also proving ineffective in the face of competition from abroad.<sup>20</sup> Deregulation has been widely propounded by the business

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<sup>15</sup> Kojima Akira, *The Japanese Economy Amid Fears of Global Deflation*, JAPAN ECHO, Aug. 1, 2003, available at 2003 WL 19196257 at \*5. Additionally, Japanese companies appear to be cutting costs by reducing maintenance at domestic manufacturing facilities, accounting for a recent rise in industrial accidents. Yasuhiro Goto, *Is 'Made in Japan' Losing Steam?*, NIKKEI BUS. DAILY, Sept. 16, 2003, available at 2003 WL 56893143 at \*1.

<sup>16</sup> Digitalization of consumer electronics is one example. Sharp is expected to outpace electronics giant Sony in television sales by developing new flat screen televisions. *Corporate Fortunes Depend on Response to Structural Changes*, NIHON KEIZAI SHIMBUN, Jan. 5, 2004, available at 2004WL 55610180 at \*2.

<sup>17</sup> Toyota Motor Corp. appointed three non-Japanese to its domestic management team in 2003. *Id.* Sony appointed Welsh-born Howard Stringer as its CEO in March of 2005. See *Recharging Sony*, WASH. POST, March 12, 2005, available at 2005 WLNR 3867312.

<sup>18</sup> Since at least late 2003, in expectation of an economic recovery, Japanese companies have begun to trim overseas investments and transfer capital into domestic concerns, including manufacturing and telecommunications. *Japan's Manufacturers Plan Big Boosts in Capital Spending*, NIKKEI WKLY., Oct. 27, 2003, available at 2003 WL 10477347 at \*1-2.

<sup>19</sup> See Hideo Tsuchiya, *Japan Should Tackle "Global Deflation" with Deregulation*, NIHON KEIZAI SHIMBUN, June 30, 2003, available at 2003 WL 56890131 at \*2-3.

<sup>20</sup> [D]omestic recession, unwinding of cross-shareholdings, and competition in an increasingly global economy are pressuring Japan to change [its corporate governance practices]. Japan's ongoing recession has led to an unwinding of cross-shareholding patterns, which has both opened the door to more activist foreign shareholders and forced more Japanese firms to compete directly with foreign firms for capital. Since global investors increasingly view corporate governance as a key investment criterion, Japan is being pushed to reassess the viability of its conventional model.

community, on the premise that giving private companies more freedom to act within the market will spur entrepreneurship, increase demand for products and services, and create jobs.<sup>21</sup>

Under the diminished bureaucratic apparatus that necessarily results from deregulation, companies can no longer count on benevolent government agencies to protect their interests. Now, after years of watching the role American lawyers play in protecting the interests of American companies doing business abroad and at home, Japanese businesses now appear eager to foster a similar legal environment in Japan.<sup>22</sup> For example, up to this point, only large international law firms operating in Japan have generally had the wherewithal to handle the complex, multi-jurisdictional transaction work that increased global competition and economic liberalization has brought about.<sup>23</sup> As expectations of increased foreign capital investment in Japan rise,<sup>24</sup> Japan appears eager to handle higher inflows of foreign investment by using Japanese lawyers. Increasing the number of Japanese lawyers will strengthen the ability of Japanese businesses to respond to the demands of foreign investors, who will look to invest not only in Japanese stocks, but also more directly in Japanese businesses, including through mergers and acquisitions, partnership agreements, asset securitization, and other

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Matthew Senechal, *Reforming the Japanese Commercial Code: A Step Towards an American-Style Executive Officer System in Japan?*, 12 PAC. RIM L. & POL'Y J. 535, 545 (2003).

<sup>21</sup> Tsuchiya, *supra* note 19, at 3; *see also* Okuda Hiroshi, *A Business Leader on the Offensive*, JAPAN ECHO, Apr. 1, 2003, available at 2003 WL 19196228 at \*6.

<sup>22</sup> Tohru Motobayashi, president of the Japan Federation of Bar Associations, has said that "[t]he role of lawyers is becoming increasingly important for companies, who now face the need to take business risks on their own responsibility as a result of deregulation." *Lawyers Set To Play Greater Corporate Role*, NIHON KEIZAI SHIMBUN, Feb. 9, 2004 (on file with the University of Miami International & Comparative Law Review); *see also infra* Part V.A (describing *Keidanren's* role in pushing for reform of the legal system, including legal education reform).

<sup>23</sup> R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269, 301 (2002).

<sup>24</sup> *See, e.g., Japan is Flying Again - Japan's Sustainable Recovery*, THE ECONOMIST, Feb. 14, 2004, available at 2004 WL 62016839 at \*1.



business transactions.<sup>25</sup>

Collaboration between Japanese lawyers and foreign lawyers (*gaiben*) is strictly regulated by the Japanese Bar,<sup>26</sup> which has hindered Japanese law firms' ability to handle complex international transaction work.<sup>27</sup> However, as a part of recently adopted reforms, foreign law

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<sup>25</sup> After the bubble burst in the early 1990s, there was a great shift in the type of legal services required by global Japanese companies. In the bubble period all investment activities were outbound, whereas after the bubble collapsed overseas companies started to invest in Japan, seeing great opportunities to expand. That requires Japanese legal expertise. We can't service our overseas clients without the assistance of excellent Japanese lawyers.

Yumiko Suzuki, *International Law Firm Looks to Cash in on Restructuring*, NIKKEI WKLY., Dec. 2, 2002, available at 2002 WL 25815445 at \*2 (statement of Dale Araki, co-head of O'Melveny & Myers LLP's Tokyo office); see also Jerry Crimmins, *Record Crowd Knocks at Law School Doors*, CHI. DAILY L. BULL., Jan. 13, 2004, at 1.

<sup>26</sup> Foreign lawyers who wish to work in Japan "are required to register as foreign legal consultants (*gaikokuho jimu bengoshi*, or *gaiben*), and foreign firms may neither advise on matters of Japanese law nor employ local lawyers (known as *bengoshi*). In addition, *gaiben* cannot represent clients before a court or other public body." *Japanese Lawyers Scramble to Protect Their Walled Garden*, ASAHI SHIMBUN, Dec 22, 2002 (on file with the University of Miami International & Comparative Law Review); see also Neil Boyden Tanner, *The Failure of International Law to Internationalize the Legal Profession*, 17 J.L. & COM. 131, 136 (1997):

Technically, any foreigner is eligible to become a *bengoshi* in Japan. However, a foreigner must meet the same requirements as a Japanese national and go through the same rigorous testing and interview process in the Japanese language. These requirements limit the original 25,000 Japanese nationals seeking admittance each year to the approximately 600 actually admitted. Yet, most foreigners do not seek *bengoshi* status because they are either unable to meet the necessary requirements to obtain the status or because the work they intend to perform does not require *bengoshi* status. Most foreigners wishing to practice in Japan attempt to acquire status as a *gaikokuho jimu bengoshi* or "foreign legal consultant.

<sup>27</sup> The Japanese Bar (*Nichibenren*) passed a measure in 2002 that penalized Japanese firms that enter into joint ventures with American firms. Misasha

firms with offices in Japan may soon be allowed to hire Japanese staffers licensed to practice law in Japan.<sup>28</sup> Moreover, in what may be a significant trend, graduates of the most elite law programs in Japan have recently been choosing the practice of law over positions in the bureaucracy.<sup>29</sup> This could well signify that Japanese law firms will soon be in a position to handle the international legal work that, until now, they have not had the expertise or manpower to do, and may also signify that concentrations of power are shifting away from the bureaucracy and toward the legal system.

## B. The End of the Iron Triangle?

### 1. Outline of the Iron Triangle

The “Iron Triangle” refers to the system of high-level cooperation among Japanese businesses, politicians, and government bureaucrats. Since the end of World War II, Japanese politicians have protected domestic companies from foreign competition by providing subsidies and tax exemptions for those businesses deemed likely to foster Japan’s economic growth.<sup>30</sup> In return, these businesses have contributed to political campaigns, especially to members of the Liberal Democratic Party (LDP), which has held sway in Japan from the 1950s to today.<sup>31</sup> Further, companies have strengthened their ties with the very government agencies and ministries that regulate them by offering highly-paid *amakudari* (“descent from heaven”) executive positions to

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Suzuki, *The Protectionist Bar Against Foreign Lawyers in Japan, China, and Korea: Domestic Control in the Face of Internationalization*, 16 COLUM. J. ASIAN L. 385, 397 (2003).

<sup>28</sup> Fuyuno, *supra* note 10, at A18.

<sup>29</sup> The number of Kyoto University law graduates who chose legal careers over careers in the bureaucracy increased from 13% in 1992 to 42% in 2002. Curtis J. Milhaupt & Mark D. West, *Law’s Dominion and the Market for Legal Elites in Japan*, 34 LAW & POL’Y INT’L BUS. 451, 474 (2003).

<sup>30</sup> See, e.g., Barbara Wanner, *Economic Problems, Political Changes Challenge Japan’s Cozy Business-Government Ties*, JAPAN ECON. INST. REP. NO. 22, June 9, 2000, available at <http://www.jei.org/Archive/JEIR00/0022f.html#Heading3> (last visited March 17, 2005).

<sup>31</sup> The LDP lost its Lower House (*sangi-in*) majority power for a period in the mid-1990s, but has always been a dominant member of the ruling coalition. See J.A.A. STOCKWIN, *DICTIONARY OF THE MODERN POLITICS OF JAPAN* 148 (2003).

retiring bureaucrats.<sup>32</sup> The *amakudari* system has insured that companies hiring retired bureaucrats have ready access to regulatory authorities, and that those same authorities will have a voice in the corporate boardroom.<sup>33</sup> Further still, most ex-bureaucrats who run for political office do so in affiliation with the LDP.<sup>34</sup>

## 2. The Iron Triangle and the Legal System

The Iron Triangle has played a direct hand in keeping the Japanese legal system small. The Japanese government, through both political leaders and bureaucrats, has consistently encouraged channeling disputes away from litigation and toward informal bureaucratic mediation settings.<sup>35</sup> More importantly, policies that generously concede to the Japanese Bar's strict quotas on the number of successful applicants to the bar exam and to the Legal Research and Training Institute have proven successful in limiting access to legal counsel, and thereby in insuring the bureaucracy's retention of power through bureaucratic

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<sup>32</sup> RICHARD A. COLINGON & CHIKAKO USUI, *AMAKUDARI: THE HIDDEN FABRIC OF JAPAN'S ECONOMY* 3 (2003).

<sup>33</sup> Purnendra Jain, *The Mythology of Japanese Bureaucracy*, *JAPAN TODAY*, March 7, 2002, available at <http://www.japantoday.com/e/?content=comment&ID=160> (last visited March 17, 2005).

<sup>34</sup> *JAPANESE GOVERNANCE: BEYOND JAPAN INC.* 7 (Jennifer Amyx & Peter Drysdale eds., 2003) [hereinafter Amyx & Drysdale].

<sup>35</sup> [U]sing various doctrinal and institutional devices and with varying degrees of success, the Japanese government has attempted to prevent the development of litigation into an effective and ongoing vehicle for social change.

One consistent Japanese response to social conflict in any form is the creation of institutional mediation. Although recent empirical work casts doubt on its accuracy, the conventional wisdom has been that disputes are usually resolved by the informal intervention of a trusted third party, most typically an older person of higher status. Whether or not such spontaneous intervention occurs successfully on a regular basis in contemporary Japan, the continuing belief that it does makes it politically easier for the government to establish bureaucratically controlled mediation schemes whenever informal means fail to prevent serious social conflict.

FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 18 (1987).

mediation of disputes.<sup>36</sup> However, the government deregulation discussed above is diminishing the power of Japan's bureaucratic ministries, and the famed "Iron Triangle" of Japanese businesses, politicians, and government bureaucrats may be rusting through. This comment contends that lawyers may be called upon to fill the structural gap.

### 3. Fragmentation of the Iron Triangle

Japan's ongoing economic troubles, coupled with increased competition from abroad, have eroded consensus in both the political and corporate worlds in Japan. Because both Japan's political and corporate communities are not as unified as they once were, continued alliances between these two larger groups appear to be less certain than ever before in the post-war era.

On the one hand, business interests have split in many sectors.<sup>37</sup> Throughout the post-war boom, both large and small businesses generally agreed about the policies the LDP should follow, including strict limits on imports and generous, bureaucratically-driven development programs for domestic interests.<sup>38</sup> However, under recent economic reforms that relax import quotas, encourage inflows of foreign capital, and liberalize restrictions on big discount stores, there are now "new requirements in the private sector for information and action that Japan's lumbering bureaucracy cannot provide quickly enough."<sup>39</sup> At the same time, these economic reforms have caused smaller, less efficient businesses that have traditionally turned to the LDP for help, such as rice

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<sup>36</sup> Until recently, the number of applicants allowed to pass the bar (and thereby gain admission to the Legal Research and Training Institute, a prerequisite for practicing law) was limited by the Japanese Bar to approximately 1,000 per year. Kelemen & Sibbitt, *supra* note 23, at 294. Even with the new bar exam being implemented under the recent reforms, the number of successful applicants will still be limited to under 3,000 per year until at least 2010. Fuyuno, *supra* note 10, at A19.

<sup>37</sup> Barbara Wanner, senior political analyst with the now-dissolved Japan Economic Institute of America, notes that "[t]he twin pressures of recessionary conditions at home and growth and technological advancement abroad have splintered and differentiated corporate Japan's interests and priorities, [insiders] say." Wanner, *supra* note 30.

<sup>38</sup> Peter Landers, *Does Japan's Ruling Party Want What It Voted For?*, WALL ST. J., April 25, 2001, available at 2001 WL-WSJ 2861430, at \*2.

<sup>39</sup> Wanner, *supra* note 30.

farmers, mom-and-pop stores, and construction companies, to feel that they can no longer depend on the LDP to protect them from the outside world and from losing their livelihoods.<sup>40</sup> Prime Minister Koizumi, rather astonishingly, has even said as much.<sup>41</sup>

Similarly, political authority has become more fragmented since the surprise, although temporary, ousting of the LDP from majority power in 1993, and politicians have increasingly chosen to run on platforms in opposition to traditional LDP policies.<sup>42</sup> In turn, this political fragmentation has had its effect on the third leg of the Iron Triangle, the bureaucracy. Lawmakers, in order to protect their policies against later, unfavorable manipulation by bureaucrats, have begun to draft legislation, such as the Administrative Procedure Law (described in Part III.B.2, *infra*), that is less susceptible to bureaucratic manipulation.<sup>43</sup> Furthermore, as Japanese government begins to reflect a U.S.-like "separation of powers" through political fragmentation, modes of dispute resolution in Japan have begun to shift away from informal bureaucratic models and toward adversarial legalism, judicialization, and formalization.<sup>44</sup>

The Iron Triangle played a significant role in Japan's "economic miracle" of the 1950s, 60s and 70s.<sup>45</sup> Politicians, companies, and

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<sup>40</sup> Landers, *supra* note 38, at \*1-2.

<sup>41</sup> In a campaign speech, Mr. Koizumi said, "If we are fearful of unemployment and postpone measures, we will never see the recovery of the Japanese economy." *Id.* at \*2.

<sup>42</sup> This includes many former bureaucrats. Amyx & Drysdale, *supra* note 34, at 6, 7.

<sup>43</sup> As the fragmentation of political authority increases (i.e., as the number of veto players increases), assembling the political coalitions necessary to reign in the bureaucracy (i.e., to pass new legislation) becomes more difficult. Recognizing the likelihood of political gridlock and the durability of legislation, lawmakers have an incentive to draft legislation in a manner that will insulate their regulatory policies against potential manipulation by the bureaucracy ("bureaucratic drift") or by political forces that may come to power in the future ("political drift").

Kelemen & Sibbitt, *supra* note 23, at 280.

<sup>44</sup> *Id.* at 280, 281; see also *infra* note 206 (discussing the term "adversarial legalism" as used by Robert Kagan).

<sup>45</sup> Wanner, *supra* note 30.

bureaucrats benefited from the arrangement, but not everyone enjoyed these benefits. Taxpayers ended up footing the bill for government awards of expensive and often wasteful projects to favored businesses.<sup>46</sup> A cozy relationship between government and large business interests not only kept regulation informal and policymaking secret, but also limited the formation and influence of groups that might represent differing interests,<sup>47</sup> such as smaller businesses and consumer and environmental groups. It is just such groups that have found themselves empowered through recent administrative reforms.<sup>48</sup>

Political fragmentation has also created more points through which interest groups can present their cases to the political establishment.<sup>49</sup> These multiple entry points may well encourage complex lobbying and litigation strategies as interest groups seek to make their positions known to lawmakers who have become both less homogeneous and less constrained by traditional bureaucratic loyalties.<sup>50</sup>

There are some trends that could call into question whether the Iron Triangle is truly rusting away. Movement between the bureaucratic and political worlds appears to have remained stable between 1953 and the present.<sup>51</sup> Further, legislation that called for greater transparency of the *shingikai* (secretive “deliberation councils” that have formulated many of Japan’s policies) by requiring that written transcriptions of council meetings be made public, appears to have lacked enough teeth to have had any significant effect.<sup>52</sup> Finally, business contributions to

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<sup>46</sup> Jain, *supra* note 33.

<sup>47</sup> UPHAM, *supra* note 35, at 6.

<sup>48</sup> See discussion *infra* Part III. These groups are among those contributing to increases in litigation.

<sup>49</sup> Kelemen & Sibbitt, *supra* note 23, at 281.

<sup>50</sup> Governments since the 1993 upsets “have paid more attention to broad consumer needs than ever before,” and “for subsequent LDP governments, this kind of behavior can be attributed to electoral uncertainty, the party’s tenuous hold on Diet proceedings, and the concomitant need to co-operate more closely with the more ‘pro-citizen’ opposition parties.” PATRICIA L. MACLACHLAN, CONSUMER POLITICS IN POSTWAR JAPAN: THE INSTITUTIONAL BOUNDARIES OF CITIZEN ACTIVISM 243 (2001).

<sup>51</sup> COLINGON & USUI, *supra* note 32, at 160.

<sup>52</sup> The resolution requiring published transcripts contains two loopholes: first, only “general” *shingikai* (which discuss policy) are required to publish transcripts, while those *shingikai* that are “special bodies dedicated to dealing with specific and sensitive administrative matters such as personnel issues and

politicians are down, but far from out of the picture.<sup>53</sup>

Whether its power is truly diminished or not, by the 1990s, the metaphor of an "Iron Triangle" of business, political, and bureaucratic interests operating in unison as "Japan Inc." began to fall out of favor, replaced by a more nuanced understanding of differentiation and even competition among these interests.<sup>54</sup> The Iron Triangle has proved especially, perhaps fatally, vulnerable not only to ongoing economic recession and the threats of global competition, but also to public outcry against bureaucratic and political corruption.

### C. Corruption and the Call for Reform

The bureaucratic elite have traditionally enjoyed a position of high regard in Japanese society. Those who run Japan's powerful ministries, almost invariably graduates of the most prestigious universities, are considered to be among Japan's most intelligent, hard-working, and loyal citizens.<sup>55</sup> Importantly, those at the very top of their respective ministries are generally law graduates of the University of

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petitions by particular parties against administrative decisions" are exempt. Second, the less formal (and uncouneted) *kondankai* ("discussion groups"), which can spring up more or less spontaneously (as at social gatherings), but nevertheless reach decisions that have consequences as real as *shingikai* decisions, are also exempt from having to publish transcripts of their proceedings. Gregory W. Noble, *Reform and Continuity in Japan's Shingikai Deliberation Councils*, in Amyx & Drysdale, *supra* note 34, at 118.

<sup>53</sup> Business contributions to political parties have sagged since 1994, a trend that the media has attributed to recession-related belt-tightening. However, insiders link these cutbacks to the private sector's rising disillusionment with the LDP's ability to solve the nation's economic problems and to address the increasingly diverse agenda of big business.

Wanner, *supra* note 30; *see also* Hiroshi, *supra* note 21, at \*6. ("[T]here ought to be a system by which *Keidanren* can collect money from member corporations not for a particular political party but for selected legislators who will implement policies that the business community considers useful, cutting across party lines. This would signal a shift from party-oriented to policy-oriented contributions.").

<sup>54</sup> COLINGON & USUI, *supra* note 32, at 135.

<sup>55</sup> SUSAN CARPENTER, SPECIAL CORPORATIONS AND THE BUREAUCRACY: WHY JAPAN CAN'T REFORM 67 (2003).

Tokyo (*Tōdai*).<sup>56</sup>

Corruption among bureaucrats was not unheard of prior to the bursting of the bubble economy in the early 1990s, but public confidence in the benign governance of Japan's ministries has been shaken by a seemingly unending series of scandals over the past decade. The Ministries of Construction, Finance, Labor, and even the venerable Ministry of Foreign Affairs have all been embroiled in scandals, mostly involving embezzlement and bribery.<sup>57</sup> The National Police Agency covered up drug use by police officials.<sup>58</sup> The Ministry of Health and Welfare allowed H.I.V.-tainted blood to be imported into Japan, resulting in hundreds of people becoming infected through transfusions.<sup>59</sup> These scandals provoked a public outcry for political response, including the administrative reforms discussed below.

Japan's best and brightest, i.e., *Tōdai* law graduates, by increasingly choosing careers in law over careers in the bureaucracy, may have sensed that the center of power is shifting away from the bureaucracy and towards the legal system.<sup>60</sup> Without government bureaucracies to protect them, ordinary citizens are likely to seek other means of redress for ills that befall them, including petitioning the courts.<sup>61</sup> Similarly, as the protective power of government bureaucracies diminishes, Japanese businesses will increasingly turn to lawyers for help and guidance.<sup>62</sup>

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<sup>56</sup> *Id.* at 74. In fact, *Tōdai* graduates of programs other than law, such as engineering, often claim that they are discriminated against for the very top ministerial positions, making a law degree particularly valuable for graduates with high aspirations but no interest in the actual practice of law. *Id.*

<sup>57</sup> Amyx & Drysdale, *supra* note 34, at 4.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Milhaupt & West, *supra* note 29, at 497.

<sup>61</sup> Administrative reform in Korea, which has occurred concomitantly with reforms in Japan, has led to increased litigation rates as citizens seek to take advantage of new procedural remedies made available through the court system. See Tom Ginsburg, *Dismantling the "Developmental State"?: Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 610 (2001).

<sup>62</sup> The role of lawyers is becoming increasingly important for companies, who now face the need to take business risks on their own responsibility as a result of deregulation, said Tohru Motobayashi, president of the Japan Federation of Bar Associations. The era in which the government makes all



## II. Aspects of Japanese Legal Education Reform Related to Litigation

### A. Changes in Litigation Rates

Japan continues to have one of the lowest rates of litigation in the industrialized world,<sup>63</sup> and is still less litigious than it was eighty years ago.<sup>64</sup> Nevertheless, it is likely that this low rate of litigation is more a result of institutional than of cultural constraints.<sup>65</sup> There are signs, however, that Japanese institutions are changing in ways that are leading to increases in litigation, and thus to increases in the need for lawyers, prosecutors, and judges. In particular, public calls for both speeding up the pace of the court system and increasing the judicial system's responsiveness to public needs will require that the judicial system increase its effectiveness.<sup>66</sup> To this end, law students at the new law schools will now receive more practical training in litigation and

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decisions for the corporate sector is over, with the authorities shifting focus to ex post facto inspection from regulation with a view to promoting competition . . . .

As a result, companies have a great deal of freedom running their businesses at present. In exchange for that, however, they have to deal with business risk on their own, and one of the ways to reduce that risk is to hire professionals, such as lawyers.

*Lawyers Set To Play Greater Corporate Role, supra* note 22, at \*1.

<sup>63</sup> Frank K. Upham, *Weak Legal Consciousness as Invented Tradition*, in MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN 48, 57 (Stephen Vlastos ed., 1998).

<sup>64</sup> *Id.*

<sup>65</sup> The debate over the reasons for the relatively low rate of litigation in Japan continues to this day, but the consensus now seems to favor an institutional explanation over a cultural one. See, e.g., Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC'Y REV. 219 (1987). The studies that sparked the debate are Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN 41 (Arthur Taylor von Mehren ed., 1963) (proposing a cultural basis for Japanese reluctance to litigate), and John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978) (proposing a political, institutional basis). *Id.* at 220.

<sup>66</sup> See discussion *infra* Part III.B.

opinion-drafting techniques, and classroom study will be coupled with moot court exercises and work in legal clinics.<sup>67</sup>

While court proceedings in Japan generally are not as lengthy as those in the United States, there have been public calls for quickening the pace of both civil and criminal litigation.<sup>68</sup> The duration of civil proceedings in district court averages 9.2 months, but cases involving any sort of complicated evidence, such as the questioning of witnesses, average over twenty months in length.<sup>69</sup> The number of civil cases coming before the courts has almost doubled since 1990: the total number of civil and administrative cases increased from 1,715,913 in 1990 to 3,298,354 in 2002.<sup>70</sup> The number of labor-related cases almost tripled,<sup>71</sup> as did the number of shareholder investment suits.<sup>72</sup> Japanese judges are spread thinly around the country: approximately 2,000 judges must oversee 953 summary, family, district, and high courts.<sup>73</sup> Some branch court positions are not permanently filled.<sup>74</sup>

In a somewhat surprising contrast to the increase in civil cases, the number of criminal cases in the period from 1990 to 2002 actually decreased slightly, from 1,693,734 to 1,654,770.<sup>75</sup> Criminal trials are also generally conducted in much less time than civil trials: only 0.4% of

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<sup>67</sup> Maxeiner & Yamanaka, *supra* note 2, at 318.

<sup>68</sup> JSRC Report, *supra* note 12, at ch. I, pt. 1.

<sup>69</sup> *Id.* at ch. II, pt. 1-1. These figures are from 1999. The average length of a civil trial (median processing time from filing to final verdict or judgment) in the United States in 1996 was 22.1 months for jury trials and 17.8 months for bench trials. U.S. Department of Justice, *Bureau of Justice Statistics Bulletin 1* (September 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctevlc96.pdf> (last visited April 1, 2005).

<sup>70</sup> *Shihou toukei nenhou* [Law Statistics Annual Report] (compendium of statistics maintained by the Japanese Supreme Court), available at [http://courtdomino2.courts.go.jp/tokei\\_y.nsf](http://courtdomino2.courts.go.jp/tokei_y.nsf) (last visited April 1, 2005) [hereinafter Law Statistics Annual Report].

<sup>71</sup> The number increased from 640 in 1989 to 1,802 in 1999. JSRC Report, *supra* note 12, at ch. II, pt. 4.

<sup>72</sup> See discussion *infra* Part III.B.1.

<sup>73</sup> John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust* 3, available at [http://law.wustl.edu/Academics/Faculty/Workingpapers/TheJapaneseJudiciary10\\_03.pdf](http://law.wustl.edu/Academics/Faculty/Workingpapers/TheJapaneseJudiciary10_03.pdf) (last visited April 1, 2005).

<sup>74</sup> *Id.*

<sup>75</sup> Law Statistics Annual Report, *supra* note 70.

criminal trials require more than two years to reach a verdict, as opposed to 7.2% of civil trials.<sup>76</sup> Nevertheless, criminal trials are often not conducted on consecutive days,<sup>77</sup> and criminal trials of prominent politicians and businessmen often take much longer than those of ordinary citizens.<sup>78</sup> In what is widely viewed as a model for future criminal prosecutions, Sendai District Court has recently increased the number of hearings in criminal trials from one per month to one every two weeks.<sup>79</sup>

Thus, part of the increased need for lawyers can be attributed to recent increases in civil litigation. But the increase in the number of civil cases, while dramatic, can only partly account for the even more dramatic reforms to the legal education system now being implemented.

## **B. Accommodating Recent Governmental Reforms**

Economic liberalization, global competition, industry deregulation, political scandal, and demands from the foreign and domestic business communities have led to a series of administrative and legal reforms over the past decade. Many problems of the present legal system are in fact outgrowths of institutional reforms that have increased or are likely to increase the need for lawyers, i.e., graduates of the new professional law schools.

### **1. The Revised Commercial Code**

In 1993, in the wake of the collapse of the bubble economy, the Japanese Commercial Code was amended to allow representatives of

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<sup>76</sup> *Aiming for Swifter yet Thorough Justice*, MAINICHI DAILY NEWS, Feb. 11, 2003, available at 2003 WLNR 2335207 (last visited April 17, 2005). Of course, speed must be balanced with thoroughness, and there are concerns that Japan's criminal trials compromise the latter for the former. *Id.*

<sup>77</sup> JSRC Report, *supra* note 12, ch. II, pt. 2-1(2). Holding trials on consecutive days would ease proposed lay participation in criminal trials.

<sup>78</sup> For example, former Construction Minister Kishiro Nakamura was found guilty of accepting bribes, but he was allowed to retain his seat in the Diet for the nine years that elapsed before his conviction. *Aiming for Swifter yet Thorough Justice*, *supra* note 76, at \*1.

<sup>79</sup> *Trial: A Step Toward Faster Litigation*, YOMIURI SHIMBUN, Nov. 29, 2003 (on file with the University of Miami International & Comparative Law Review).

individual shareholders to sue corporate executives.<sup>80</sup> Litigation filing fees were fixed at the relatively low, uniform amount of 8,200 yen, which has greatly increased the number of shareholder representative suits brought in Japanese courts.<sup>81</sup> A further amendment to the code in 2002 was designed to increase the accountability of corporate executives to shareholders by giving Japanese corporations the option of adopting an “American-style” executive officer system as a means of increasing the efficiency and reliability of corporate governance systems.<sup>82</sup>

The results of the change have been notable. In September 2000, the executive officers of Daiwa Bank were ordered to pay \$775 million in damages for losses sustained by its New York branch, one of the largest shareholder compensation suits ever awarded in Japan.<sup>83</sup> This large award, the small uniform filing fee, and the Osaka District Court’s surprising willingness to find causation between the executives’ acts and a foreseeable shareholder loss, all suggest that many more such suits will follow.<sup>84</sup> And it is not only shareholders who are seeking the aid of lawyers: corporations themselves are increasingly using lawyers to argue the legitimacy of their transactions, or to fight administrative agencies that have taken action against them.<sup>85</sup>

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<sup>80</sup> In Japan, both corporations and their executives, including directors, can be the subject of shareholder lawsuits for security loss compensation. ABE NAOBUMI & TED TAKAHASHI, *ZEN-ZUKAI NIHON NO SHIKUMI: SEIJI, KEIZAI, SHIHOU-HEN* [THE COMPLETE ILLUSTRATED GUIDE TO JAPANESE SYSTEMS: POLITICS, ECONOMICS, LAW AND ORDER] 125 (2001).

<sup>81</sup> *Id.* Before the code revision, the filing fee was based on the amount that the shareholder-plaintiffs were seeking in the suit. See Carl F. Goodman, *The Somewhat Less-Reluctant Litigant: Japan’s Changing View Toward Litigation*, 32 *LAW & POL’Y INT’L BUS.* 769, n.128 (2001).

<sup>82</sup> Senechal, *supra* note 20, at 536.

<sup>83</sup> Bruce E. Aronson, *Reconsidering the Importance of Law In Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case*, 36 *CORNELL INT’L L.J.* 11, 12 (2003).

<sup>84</sup> *Id.* at 33.

<sup>85</sup> ‘At a time when shareholders seem ready to file derivative lawsuits to hold board directors accountable for any loss that the company has suffered, business corporations will find it increasingly necessary to protect themselves by filing lawsuits to fight back against administrative actions,’ said a top executive at a European investment bank in Tokyo. ‘If companies want to battle administrative authorities, they need

## 2. The Administrative Procedures Law (APL)

“Administrative guidance” (*gyousei shidou*) is a term of art that encompasses bureaucratic suggestions, encouragement, warnings, and even threats to withhold approval from proposed business activities. Administrative guidance has been an important means of management of the post-war Japanese economy, on the one hand praised as a force behind Japan’s “economic miracle,” but on the other hand criticized as both undemocratic and an obstacle to foreign trade.<sup>86</sup> Previously, Japanese corporate defendants had often used the administrative guidance they received in informal bureaucratic mediation settings as an excuse to engage in behavior that would otherwise lead to civil or criminal liability.<sup>87</sup> Although bureaucratic officials have dubious legal authority to actually enforce the directives they issue through administrative guidance, such directives have nevertheless proven difficult to challenge, especially for foreign business interests.<sup>88</sup>

Implemented in 1994, the APL was designed to increase the transparency of Japanese administrative agencies, and has, at least marginally, made agencies more accountable to those whom they

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the help of a large law firm.’

*M&As Give Law Firms the Business*, NIKKEI WKLY., July 7, 2003 (on file with the University of Miami International & Comparative Law Review).

<sup>86</sup> STOCKWIN, *supra* note 31, at 1.

<sup>87</sup> Aronson, *supra* note 83, at 32. The Daiwa Bank case, *infra* Part III.B.1, strongly indicates that using poor administrative guidance as a defense for corporate misbehavior may no longer be available to corporate defendants.

<sup>88</sup> The bureaucracy’s backbone has long been ‘administrative guidance,’ a realm of extralegal directives issued by officials who have no legal authority to issue or enforce the instructions. This ostensibly ‘cooperative’ approach frequently results in the issuance of threats, express and implied, to parties deemed insufficiently cooperative. Since many threats have no basis in law, they are difficult or impossible to oppose.

David T. Johnson, *American Law in Japanese Perspective*, LAW & SOC. INQUIRY 771, 787 (2003) (reviewing ROBERT A. KAGAN, *ADVERSARIAL LITIGATION: THE AMERICAN WAY OF LAW* (2001)).

regulate.<sup>89</sup> Under the APL, application, notification, and hearing procedures have been formalized, requiring agencies to produce in writing the reasons for any refusal to grant approval or a license to a party, and requiring inclusion of recommended changes for a party re-submitting an application.<sup>90</sup> The APL was passed under considerable pressure from foreign business interests, who viewed Japan's opaque administrative agencies as a barrier to competition.<sup>91</sup> These same interests will now, along with their attorneys, have greater access to formalized proceedings, where previously only Japanese firms with the requisite connections were able to challenge directives they did not like.<sup>92</sup>

### 3. The Products Liability Act

Passed in 1995, this act obviated the need for consumers to prove a manufacturer's negligence; proof that the product is defective is now sufficient to recover damages.<sup>93</sup> Although class action suits are still not allowed in Japan, Japanese consumers are slowly beginning to assert claims against companies in the court system.<sup>94</sup> Not only has consumer awareness regarding the safety and quality of the products they buy increased, but Japanese consumers are now also more aware that unfair business practices and breaches of consumer contracts may be actionable.<sup>95</sup> Product liability lawsuits, with their inherent human drama,

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<sup>89</sup> Ken Duck, Comment, *Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 FORDHAM INT'L L.J. 1686, 1729 (1996).

<sup>90</sup> *Id.* at 1735.

<sup>91</sup> *Id.* at 1726.

<sup>92</sup> Japanese agencies nevertheless retain a great deal of authority and discretion, and challenges to agency decisions are very rarely given a welcome reception in the courts. Merely obtaining standing to sue remains difficult. *See id.* at 1706. Further, the APL, "which was designed by the very agencies it is supposed to control, is itself the product of a non-adversarial lawmaking process. Not surprisingly, it has a narrow scope, loopholes galore, and no express sanctions by which to ensure agencies' compliance." Johnson, *supra* note 88, at 787.

<sup>93</sup> Nancy L. Young, Comment, *Japan's New Product Liability Law: Increased Protection for Consumers*, 18 LOY. L.A. INT'L & COMP. L. J. 893, 896 (1996).

<sup>94</sup> *Id.* at 918.

<sup>95</sup> MACLACHLAN, *supra* note 50, at 243. Some scholars believe that an increase in consumer litigation is unlikely because the Revised Civil Procedure Code does not make standing any easier for consumers to obtain. *See id.* at 248.

have garnered a great deal of media attention, including lawsuits concerning contaminated school lunches, a defective tea container, a baby crib, a boat safety harness, an accounts receivable software program, tainted orange juice, and even the tobacco industry.<sup>96</sup> As Japanese consumers become more aware of the power of strict liability lawsuits, manufacturers are taking greater precautions to prevent such suits, including educating employees in matters of product liability law<sup>97</sup> and instituting attorney review of product warning labels.<sup>98</sup> Wider implementation of such measures will require more attorneys.

#### 4. The Revised Civil Procedure Code

Revisions in 1998 and 2001 have expanded procedures for collecting evidence and have strengthened the court's ability to order the production of documents.<sup>99</sup> This reform is meant to increase the availability of discovery documents to opposing parties.<sup>100</sup> While Japanese judges still have somewhat limited ability to force compliance from an opposing party that refuses a discovery request,<sup>101</sup> the reform grants judges the authority to accept as fact allegations as to the contents of a document withheld after an order to produce.<sup>102</sup> The new Code also granted the Tokyo and Osaka District Courts concurrent jurisdiction for cases related to intellectual property rights, which have seen notable increases.<sup>103</sup>

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<sup>96</sup> See Phil Rothenberg, *Japan's New Product Liability Law: Achieving Modest Success*, 31 LAW & POL'Y INT'L BUS. 453, 483-490 (2000).

<sup>97</sup> *Id.* at 501.

<sup>98</sup> Kelemen & Sibbitt, *supra* note 23, at 320.

<sup>99</sup> JSRC Report, *supra* note 12, at ch. II, pt. 1-1.

<sup>100</sup> Goodman, *supra* note 81, at 801.

<sup>101</sup> An opposing party is expected to respond to an order to produce documents, but there is no formal sanction, such as contempt, against non-compliance. ODA, *supra* note 4, at 401.

<sup>102</sup> Goodman, *supra* note 81, at 801.

<sup>103</sup> The percentage of patent rights cases filed in those two district courts increased from 66.9% in 1997 to 84.3% in 1999 and to 87.5% in 2000. For utility model rights cases, the percentage increased from 47.1% in 1997 to 63.9% in 1999 and to 81.4% in 2000. JSRC Report, *supra* note 12, at ch. II, pt. 1-3(1). "Utility model" patents are available for machines in some countries. Such patents are shorter in term than ordinary patents and have less stringent search requirements.

### 5. The Information Disclosure Law (IDL)

The IDL, similar in spirit to the Freedom of Information Act in the United States, was passed in 1999 after twenty years of lobbying from domestic and foreign business interests and from the United States government.<sup>104</sup> While Japanese government agencies are usually given judicial deference in cases alleging an agency's failure to accommodate citizen requests for information, such requests have nevertheless increased, and agency refusals are increasingly disputed in the courts.<sup>105</sup> Coupled with the Administrative Procedure Law, the IDL insures that potential litigants have access to written information regarding bureaucratic interactions with regulated entities. The IDL also weakens a private sector actor's ability to rely on informal "administrative guidance" as a defense for irresponsible actions.<sup>106</sup>

### 6. The Equal Employment Opportunity Law (EEOL)

The EEOL was enacted in 1985, and was strengthened with several new provisions in 1997. Although some of these provisions do not provide convincing means of enforcement,<sup>107</sup> Article 21 of the amended EEOL recognizes sexual harassment as a legal claim.<sup>108</sup> Such claims had previously been allowed only under a tort theory, relying not on the EEOL but on the Civil Code.<sup>109</sup> In recent years, the number of sexual harassment cases brought to court has increased, as have the damage awards from such cases.<sup>110</sup>

### 7. The Securities and Exchange Act: Some New Regulatory Agencies

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<sup>104</sup> Ginsburg, *supra* note 61, at 603.

<sup>105</sup> *Id.*

<sup>106</sup> Amyx & Drysdale, *supra* note 34, at 5.

<sup>107</sup> For example, employers who show discrimination in recruitment, hiring, promotion or termination may have their non-compliance "publicized" by the Labor Ministry, but no further penalty is stipulated. Robbi Louise Miller, *The Quiet Revolution: Japanese Women Working Around the Law*, 26 HARV. WOMEN'S L.J. 163, 207 (2003).

<sup>108</sup> *Id.* at 205.

<sup>109</sup> *Id.* at 192.

<sup>110</sup> A noteworthy example occurred in 2000, when a woman who sued the Governor of Osaka for sexual harassment was awarded \$146,000, the largest award ever in a sexual harassment suit in Japan. Goodman, *supra* note 81, at 799.



Insider trading is being taken more seriously in Japan than it has been in previous decades.<sup>111</sup> The creation of the Securities and Exchange Surveillance System in 1992 and the Financial Services Agency in 2000 has led to increased market surveillance, and suggests that the government is becoming more serious about enforcing the original 1948 Securities and Exchange Act.<sup>112</sup> The Japanese government has in fact shown an increased willingness to prosecute bureaucrats who provide inside information to those whom they regulate, most famously in 1998, when a Ministry of Finance (MOF) official was arrested in his office for disclosing the times and locations of MOF inspections.<sup>113</sup> In a satisfying twist that ties these administrative reforms together, prosecutors in the MOF case were able to collect the evidence they needed to indict the MOF officials by using the expanded information collection procedures available to them through the Revised Commercial Code and the Revised Civil Procedure Code.<sup>114</sup>

While the above reforms appear to have contributed to an increase in litigation in Japan, this increase has not been so drastic as to require thousands of new lawyers or a revamping of the Japanese legal education system. To understand what many of these new lawyers will be doing, therefore, one must also examine changes in the business and social climate of Japan over the past two decades.

### III. Beyond Litigation: Added Value Provided by Lawyers

#### A. The Added Value of Transaction Cost Engineering

Twenty years ago, Professor Ronald Gilson wrote a seminal article analyzing how lawyers— particularly business lawyers — add value to transactions.<sup>115</sup> Rather than viewing lawyers as presenting an inevitable, and perhaps regrettable, transaction cost in themselves, Gilson proposed that lawyers are in fact “transaction cost engineers” who manage the costs and risks that are present whenever two or more parties

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<sup>111</sup> Richard Small, *From Tatemaie to Honne: A Historical Perspective on the Prohibition of Insider Trading in Japan*, 2 WASH. U. GLOBAL STUD. L. REV. 313, 342 (2003).

<sup>112</sup> *Id.* at 351.

<sup>113</sup> Kelemen & Sibbitt, *supra* note 23, at 312.

<sup>114</sup> *Id.*

<sup>115</sup> Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239 (1984).

who wish to deal do not share the same information and expectations relevant to that deal.<sup>116</sup> Gilson observed that reducing information asymmetries between parties represents a primary transaction cost of any deal: using due diligence and negotiation skills, lawyers can both facilitate the transfer of information between parties and minimize the cost of acquiring new information, including avoiding duplication.<sup>117</sup> By structuring agreements and drafting contracts that provide the best deal not only for their particular client, but for the deal as a whole, a lawyer's involvement can allow deals to go forward that otherwise might not ever have occurred.<sup>118</sup> Furthermore, lawyers act as third-party information producers whose particular legal analytical skills add a unique value to many business transactions.<sup>119</sup>

Risk management is a second type of transaction cost that lawyers can engineer. When a party might be reluctant to deal because of the risks involved, a lawyer's due diligence can manage those risks, not only providing the parties with a comforting assurance that the deal can safely go forward, but also increasing the price a party is willing to pay to go through with a deal. Lawyers thus aid economic efficiency by providing a better idea of the underlying value of a good or

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<sup>116</sup> "Lawyers function as *transaction cost engineers*, devising efficient mechanisms which bridge the gap between capital asset pricing theory's hypothetical world of perfect markets and the less-than-perfect reality of effecting transactions in this world." *Id.* at 255.

<sup>117</sup> *Id.* at 270, 271. "Reducing the cost of acquiring information needed by either party makes both better off." *Id.* at 272.

<sup>118</sup> *Id.* at 264.

<sup>119</sup> For example, "the seller will know whether it has been cited for violation of environmental or health and safety legislation in the past, but it may require legal analysis to determine whether continued operation of the seller's business likely will result in future prosecution." *Id.* at 274. Legal analysis will also be required to determine whether existing contracts are assignable or assumable:

The continued validity of the seller's leasehold interests will depend on whether a change in the control of the seller operates-as a matter of law or because of the specific terms of the lease-as an assignment of the leasehold; and the status of the seller's existing liabilities, such as its outstanding debt, will depend on whether the transaction can be undertaken without the creditor's consent.

*Id.*

transaction.<sup>120</sup>

A third transaction cost that parties who wish to deal will face consists of verification costs, i.e., determining (a) whether the other party's information is misleading, (b) how hard to look for such information, and (c) how much to spend on its acquisition. The verification techniques that the parties can practice themselves are inevitably cumbersome and imperfect,<sup>121</sup> but a lawyer, as a transaction cost engineer, knows best how to create a "hierarchy of search effort" in determining verification costs.<sup>122</sup>

### **B. Additional Roles Lawyers Play that Add Value**

In addition to the roles of transaction cost engineer and risk manager, there are numerous other parts that lawyers may play that add value for investors, businesses and clients. It will be useful to bear these roles in mind while considering Japan's legal education system reforms.

Lawyers can act as "reputational intermediaries" who "rent out" their reputations to facilitate transactions between parties who do not know each other well.<sup>123</sup> A lawyer acting as a third-party intermediary

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<sup>120</sup> "[T]he tie between legal skills and transaction value is the business lawyer's ability to create a transactional structure which reduces transaction costs and therefore results in more accurate asset pricing." *Id.* at 255.

<sup>121</sup> For example, such techniques often do not eliminate the incentive of the other bargaining party to mislead, particularly the seller:

Even the more direct verification technique associated with the sale of a private company-indemnification arrangements backed by the withholding of a portion of the purchase price will not be completely effective. . . . If the reduction in value resulting from complete disclosure exceeds the limit on indemnification, then indemnification operates not as bond, but as bait; a piece of the proceeds is given up in order to increase the net take. Most troubling to a potential buyer, the balance of incentives facing owner-managers of a private seller favors misrepresentation or nondisclosure in precisely those situations where the information in question would result in the greatest downward adjustment in the purchase price. Verification fails in the situation where it is most needed.

*Id.* at 288.

<sup>122</sup> *Id.* at 279.

<sup>123</sup> *Id.* at 290-91.

has a strong incentive to discover and disclose all relevant information at minimal cost because, “[u]nlike the seller, the intermediary expects future transactions in which it again will pledge its reputation.”<sup>124</sup> This same dynamic comes into play when lawyers design novel negotiation strategies, such as the creation of “hostages,” or latent contractual rights and duties.<sup>125</sup> These strategies not only serve to dissipate opportunism between contracting parties, but also highlight the use of the lawyer’s reputation as a valuable asset in business transactions, an asset that can decline sharply in value if the information or due diligence that the lawyer has provided proves to be wrong.

Perhaps most notably in the post-Enron era, lawyers can act as “gatekeepers” by certifying that their clients’ transactions comply with relevant legal standards.<sup>126</sup> By performing due diligence for, and by lending their reputations to, securities issuers, lawyers can assure investors that all material information that the attorney is aware of concerning the securities issuer has been properly disclosed, thus increasing the likelihood of investment.<sup>127</sup>

Lawyers can also identify and structure beneficial strategic alliances, such as joint ventures, franchises, and distributorships, and can advise companies on the legal and financial benefits and consequences of

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<sup>124</sup> *Id.* at 290.

<sup>125</sup> See generally Royce de R. Barondes, *The Business Lawyer as Terrorist Transaction Cost Engineer*, 69 *FORDHAM L. REV.* 31 (2000).

<sup>126</sup> Sean J. Griffith, *Afterward and Comment, Towards an Ethical Duty to Market Investors*, 35 *CONN. L. REV.* 1223, 1224 (2003); see also John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 *COLUM. L. REV.* 1293, 1297 (2003) (“Structurally, gatekeepers are independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status.”).

<sup>127</sup> Coffee, *supra* note 127, at 1297. The gatekeeper function can have a very powerful effect on both investor and client behavior. “[I]n the vast majority of instances clients will not pursue a transaction if their lawyers say, ‘This transaction is inconsistent with our professional ethics and we cannot participate.’” Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 *RUTGERS L. REV.* 9, 26 (2003).

merging with or acquiring other companies.<sup>128</sup> Lawyers can add value as “option brokers” in deal-making, dispute-resolution, and regulatory negotiations by reducing the cost and maximizing the benefit of generating options for clients.<sup>129</sup> By using their legal skills to marshal and order facts, make complex judgments, and understand and communicate their clients’ objectives, business lawyers can help clients transform large quantities of “information” into useful “knowledge.”<sup>130</sup>

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<sup>128</sup> George Dent, *Lawyers and Trust in Business Alliances*, 58 BUS. LAW. 45 (2002). This skill is particularly relevant in twenty-first century Japan as businesses have increased their M&A activity. See discussion *infra*.

<sup>129</sup> Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiating*, 88 IOWA L. REV. 601, 639 (2003).

[L]awyer-negotiators, acting on behalf of clients, are more likely than non-lawyer-negotiators, acting on their own behalf, to maximize the benefits and minimize the costs of option generation in negotiation. . . . First, lawyers, in contrast to their clients, are likely to assess decision options according to rational principles of choice (and evidence suggests that principals want their agents to evaluate decision options in this fashion). Second, because lawyers can assess decision options rationally, they can help clients faced with multiple options make ‘better’ decisions at the bargaining table. Finally, and perhaps more controversially, sophisticated lawyers can use decision options strategically in negotiation to induce their counterparts to make desired concessions.

*Id.* at 606.

<sup>130</sup> Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 38 (2003).

To be optimally useful, information must be customized for the specific decisions a client must make. Customization requires isolating and refining only the information necessary to make the decision at hand and presenting the result in an understandable and relevant way. By reducing the quantity of information and by assessing its relevance, value and reliability, the business lawyer is especially well suited to perform such customization, which takes knowledge, skill and careful, meticulous work in the context of an intimate familiarity with a client's decision-making processes and capabilities.

*Id.* at 45.

Indeed, the list of roles that lawyers can be said to play, most of which add value in one way or another, is quite long.<sup>131</sup> The new Japanese lawyers can use all of the above strategies to add value to their clients' transactions.

### C. Why the New Japanese Lawyers Are Needed

The term for "lawyer" in Japanese is "*bengoshi*," but the functions of a *bengoshi* are much more limited in scope than the "lawyer" we think of in English.<sup>132</sup> *Bengoshi* are primarily litigators.<sup>133</sup> But many of the legal areas that are a routine part of litigation practices in the United States, such as personal injury, medical malpractice, and divorce and custody matters, are not normally part of a *bengoshi*'s practice in Japan.<sup>134</sup> More importantly, corporate transactions, especially

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<sup>131</sup> A lawyer, it has been said, is an agent, alter ego, alter id, artisan, business associate, colleague, conscience, free-lance bureaucrat, friend, rhetorician (or, less flatteringly, mouthpiece), statesman, technician, therapist, transaction cost engineer, and translator; and lawyers as a group, additionally, have been described as tricksters, heroes, helpers, champions, godfathers, gurus, and hired guns.

Robert J. Condlin, "*What's Love Got to Do With It?*" – "*It's Not Like They're Your Friend for Christ's Sake*": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 222-224 (2003).

<sup>132</sup> In addition, the more general English word "attorney," which can include prosecutors and public defenders as well as private lawyers, is usually translated into Japanese as *bengoshi*, which further adds to the confusion about how "lawyers" differ from *bengoshi*.

<sup>133</sup> "[T]he practice of Japanese *bengoshi* is relatively pure, technically narrow legal work involving court-related disputes with a fair amount of money at stake. Medium-sized industrialists and those involved in a limited range of real estate transactions are the overwhelming beneficiaries of the services of *bengoshi*." Michael K. Young, *Foreign Lawyers in Japan: A Case Study in Transnational Dispute Resolution and Marginal Reform*, 21 LAW IN JAPAN, 84, 102 (1988).

<sup>134</sup> *Id.* A great deal of "legal" work in Japan is carried out by non-*bengoshi* who specialize in tax, patents, and administrative or private document drafting. These professionals generally have their own examination and licensing practices and may often have undergraduate law degrees, but they are not included in calculations of the number of "lawyers" in Japan.

While the most current statistics show that there are only 15,933 *bengoshi* in Japan, there are also 3,829 *benrishi* [patent

international transactions, are not something in which a *bengoshi* will normally take part, whereas "lawyers" routinely take part in such transactions in the West.<sup>135</sup> The recent legal education reforms may signal a broadening of the traditional *bengoshi* practice that foreigners now often perform.<sup>136</sup>

Perhaps presciently, Professor Gilson concludes his 1984 article with a discussion of the relative dearth of lawyers in Japan, and it is here that twenty years of hindsight may serve to clarify part of the reason Japan is now eager to increase the number of practicing lawyers, and why these lawyers may practice law in a broader fashion than most present *bengoshi*.<sup>137</sup> Gilson notes that the lifetime employment system (*shuushin koyou*) in the Japanese business world, combined with seniority-based promotion (*nenkou joretsu*), creates conditions wherein the opportunism of individual actors is constrained by strong cultural and social ties.<sup>138</sup> Individual actors can be certain to continue to encounter the same people year after year in future dealings, and their prospects both for future business success and for promotion will depend on maintaining good relationships and trustworthy reputations.<sup>139</sup> In this

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agents] 62,280 *zeirishi* [tax agents], 16,981 *shiho shoshi* [private document drafters] and 35,659 *gyosei shoshi* [administrative document drafters]. Thus, the total number of attorneys in Japan, depending on the criteria used in the calculations, can vary from 15,933 to 134,682.

Tanner, *supra* note 26, at 135

<sup>135</sup> Young, *supra* note 134, at 103. There are, of course, Japanese international transactional lawyers, or *shogai bengoshi*, but they are relatively few in number:

[I]t is estimated that there are as few as 500 *bengoshi* specializing in international transactions [out of the 20,000 or so *bengoshi* in Japan]. Such an excess of demand over supply for the services of *shogai bengoshi* has caused many of the larger firms of corporate solicitors from America and England to try to establish practices in Japan.

Jason Comrie-Taylor, *The 'Appropriate' Role for Foreign Trainees in Japan*, 15 UCLA PAC. BASIN L.J. 323, 325 (1997).

<sup>136</sup> *Japanese Lawyers Scramble to Protect Their Walled Garden*, *supra* note 26, at \*2 ("[T]here are also plans to train *bengoshi* as facilitators of business and thus enable them to occupy the same territory as their Western counterparts.").

<sup>137</sup> Gilson, *supra* note 115, at 306.

<sup>138</sup> *Id.* at 309.

<sup>139</sup> *Id.* at 309-10.

context, the dense, complicated written contracts that characterize American business dealings, as well as the lawyers who draft them, are seen as unnecessary or even damaging to relationships based on trust.

In contrast, many business parties in the U.S. are well aware that they may never deal with, or even see, each other again. Hence, in a country where lifetime employment is a distant memory, and where promotion depends less on an individual's seniority than on his or her proven track record, opportunism (i.e., the potential for cheating of one kind or another) is constrained through lengthy, detailed contracts that spell out exactly what will happen if things go wrong. And legions of American business lawyers are happy to help spell out the details in writing.

In twenty-first century Japan, employment conditions have been changing, and with these changes, the Japanese may have come to see lawyers as a means of replacing social systems that are gradually eroding. Lifetime employment and seniority-based promotion are now on the decline in Japan.<sup>140</sup> Thus, the importance that reputation and "face" (*mentsu*) have traditionally played in Japanese business dealings may now be supplemented or replaced by the professional "reputations-for-hire" of lawyers and other professionals. The Japanese businesses that have promoted reform of the Japanese legal education system no doubt foresee that they will benefit from a broadening of "what a

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<sup>140</sup> See, e.g., David Pilling, *Japanese Industries Hire More Temporary Workers*, FIN. TIMES ASIA, May 5, 2004, available at 2004 WL 77448826 (finding that the use of temporary staff has been growing as companies have shifted from the lifetime employment model); Peter Rowe, *The Honeymoon May Be Over: In 'Japan Unbound,' John Nathan considers a cooling U.S.-Japan Relationship*, SAN DIEGO UNION-TRIB., March 14, 2004, available at 2004 WL 58986329 (book review) (stating that corporations are increasingly breaking the promise of lifetime employment); Suvendrini Kakuchi, *Economy-Japan: Some Good Figures Buoy Hopes for Recovery*, INTER PRESS SERVICE, March 1, 2004, available at 2004 WL 59282803 (quoting a professor of international economics at Tooin Yokohama University as saying "that the good old days of lifetime employment and high salaries are gone"); *Japan Risk: Labour Market Risk*, ECONOMIST INTELLIGENCE UNIT RISKWIRE, May 17, 2004 (on file with the University of Miami International & Comparative Law Review); see also Simon Learmount, CORPORATE GOVERNANCE: WHAT CAN BE LEARNED FROM JAPAN 99 (2002) ("Before, the age element [in the *nenkou* system] was far more important than the skill element, but now the skill/responsibility side is growing quickly.").



*bengoshi* does” to include more business law and more transaction cost engineering.<sup>141</sup>

This need for more Japanese business lawyers is particularly visible in the area of mergers and acquisitions (M&A), where foreign lawyers can no longer handle the workload by themselves.<sup>142</sup> M&A activity is on the rise in Japan,<sup>143</sup> and is likely to continue increasing now that the Commercial Code has been amended to allow a company to buy a target firm for cash or by paying with shares of another firm.<sup>144</sup> Not

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<sup>141</sup> Historically, “practice” in Japan has meant the activities of judges, prosecutors and litigators. “Practice” has not generally referred to providing counseling and drafting services. Many of the individuals behind the present reform are believed to adopt this narrow view of practice. However, other reformers—particularly those from industry—are more likely to find the benefits of practical legal education in advanced business law subjects, such as antitrust, intellectual property, and international business transactions.

Maxeiner & Yamanaka, *supra* note 2, at 317.

<sup>142</sup> Hamstrung by red tape, the 100 or so foreign lawyers working in Japan complain that they are unable to fulfill much-needed business in such growth areas as mergers and acquisitions . . . . The shortage [of Japanese lawyers] is felt in far-reaching ways, resulting in too many companies chasing too few legal advisers, the experts said. “This shortage does have a profound adverse effect on the ability to complete sophisticated cross-border transactions in the Japanese market,” according to [Robert] Grondine. Lawyers are needed more than ever in Japan as international corporate deals explode after years of inactivity.

Francoise Kadri, *Lawyer Jokes No Laughing Matter for Japan*, AGENCE FRANCE PRESS, June 11, 2000, available at 2000 WL 2813909 at \*1.

<sup>143</sup> *Rehab at Heart of Mounting M&As by Investment Funds*, ASAHI SHIMBUN, Nov. 24, 2003 (on file with the University of Miami International & Comparative Law Review) (“The sudden rise in M&A activity is attributed to the growing popularity of rehabilitating struggling corporations, in which investors plunk down finances to reorganize a faltering firm’s operations with the aim of making the company, and therefore themselves, profitable.”).

<sup>144</sup> *Government Mulls Allowing Use of Foreign Shares, Cash For Corporate Buyouts*, NIKKEI REP., June 6, 2004 (on file with the University of Miami International & Comparative Law Review). The new law, which will go into

only are foreign firms looking to acquire both troubled and healthy Japanese companies,<sup>145</sup> but Japanese firms are increasingly initiating M&As in order to secure their places in industrial sectors undergoing realignment as a result of global competition.<sup>146</sup> As M&As become more widespread and complex, Japanese companies will need the expertise of outside professionals, including lawyers.<sup>147</sup>

The increases in the demand for lawyers means that graduates of the new Japanese law schools can look forward to acting as advisors or intermediaries in business deals, helping with the restructuring or resuscitating of companies under corporate or civil rehabilitation laws,<sup>148</sup> and working as intermediaries to help businesses acquire failing companies.<sup>149</sup> Much like their Western counterparts, but unlike their *bengoshi* predecessors, many of the new lawyers will likely be performing due diligence to assess the quality of prospective securities and other assets between two companies that wish to integrate operations. Even at Japan's largest law firm, there are not yet enough lawyers to handle requests for speedy work in this area.<sup>150</sup>

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effect in 2007, was approved after extensive lobbying by U.S. and Japanese business interests to ease rules on M&A deals in Japan, and can be viewed as part of Prime Minister Koizumi's commitment to increase foreign investment in Japan. *Id.*

<sup>145</sup> "With the economy recovering and listed Japanese firms expecting the third straight year of profit growth, the era in which only troubled firms were the target of foreign acquisitions is over. Instead, foreign companies are increasingly targeting blue-chip firms, particularly in the pharmaceutical, household goods and food sectors." *Japan Firms Brace for Spate of M&As by Foreign Giants*, NIKKEI WKLY., May 31, 2004, available at 2004 WL 65446116 at \*1.

<sup>146</sup> Such sectors include food, pharmaceuticals, electronics, and cosmetic goods. *Id.* at \*2.

<sup>147</sup> *Lawyers Set To Play Greater Corporate Role*, supra note 22.

<sup>148</sup> *Lawyers Expand Corporate Rehabilitation Services*, NIKKEI REP., July 3, 2003 (on file with the University of Miami International & Comparative Law Review).

<sup>149</sup> *Id.*

<sup>150</sup> In late 2003, eight lawyers from the law firm of Nagashima Ohno & Tsunematsu (itself the product of a merger of two firms, now having 159 lawyers) gave up their New Year's holiday in order to complete a request from Nissho Iwai Corp. and Nichimen Corp., two general trading houses, to evaluate the two companies' respective assets and financing plans. *M&As Give Law Firms the Business*, supra note 85, at \*2. "An executive of Nissho Iwai and Nichimen requested speedy work, saying: 'Our stock price will fall if the

Another area in which the new lawyers will be in demand is in the disposal of bad bank loans. Japanese banks are still swimming in bad loans made over the course of the last decade, and banks increasingly wish to dispose of these loans, often on the foreign market. Lawyers can provide the legal advice needed to sell such loans to foreign investors.<sup>151</sup>

Intellectual property rights represent yet another area in which the demand for legal help outstrips the supply.<sup>152</sup> Corporate Japan has come to see that in-house counsel cannot meet the needs of twenty-first century Japan in this area, and the laws concerning partnerships with foreign law firms are proving disadvantageous to efficient handling of not only intellectual property, but other business matters as well.<sup>153</sup> This

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process is delayed. Please get the work done in one month.” *Id.*

<sup>151</sup> Even foreign law firms operating in Japan need to hire Japanese legal help to provide banks with competent advice for disposal of bad loans.

Paul Hastings [a U.S. law firm] started Japanese law services from scratch in 1998 by setting up Taiyo Law Office. Riding on the current of bad-loan disposals by Japanese banks, the firm increased earnings through legal advice to U.S. investors who were buying bad loans. It now employs twenty-one Japanese lawyers.

Hajime Matsuura & Mariko Kodaki, *Lawyer Shortage has Law Firms Scrambling*, NIKKEI REP., Nov. 3, 2003, available at 2003 WL 65954273 at \*2.

<sup>152</sup> “We must rely on headhunters, because it’s too time-consuming for us to find our own specialists in patent, intellectual property rights and other promising areas,” said a senior partner of a large law firm.” *Id.*

<sup>153</sup> ‘Historically, Japanese companies have tended to look to their in-house legal departments,’ said Atsushi Naito, a Japanese copyright lawyer. ‘Because of so-called globalization, they have had to do a lot of deals with foreign companies,’ he said. ‘They are beginning to feel the need for lawyers and have acknowledged those needs.’ But those needs cannot be fulfilled under Japan’s ‘joint enterprise law,’ which limits foreign law firms’ practice to setting up a joint venture with a local partner, according to [Laurent] Dubois [a French lawyer practicing in Tokyo]. Non-Japanese lawyers are also forbidden from attaining the coveted rank of ‘*bengoshi*,’ which allows them to appear in courts. The law ‘has worked against Japanese lawyers because they cannot create proper partnerships with US companies, but Americans can learn in Japanese law firms and then handle a company even though they are not fully authorized to work,’ Dubois said. ‘The fact

is not a surprise for those who have noted that the market for business law services in Japan is now estimated to be approximately 100 billion yen per year, an increase of 100% since 1998.<sup>154</sup> In this context, the fact that sixty-eight new law schools opened in one year begins to make more sense.

Interestingly, it appears likely that many of these new lawyers will work in law firms rather than as in-house counsel. Japanese law firms are now constantly seeking lawyers to hire, even employing headhunting firms to seek out qualified lawyers, a very new development in Japan.<sup>155</sup> Japanese corporate legal departments have also been hiring more employees in recent years,<sup>156</sup> but most of these new hires continue to be non-*bengoshi*,<sup>157</sup> which presents a contrast with American corporate legal departments.<sup>158</sup>

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that Japanese firms are trying to protect themselves is working against them.’

Kadri, *supra* note 143, at \*2.

<sup>154</sup> *Law Firms Seek Mergers to Offer ‘One-Stop Service’*, NIKKEI REP., July 2, 2003 (on file with the University of Miami International & Comparative Law Review).

<sup>155</sup> See Matsuura & Kodaki, *supra* note 152.

<sup>156</sup> Recent survey data show that the average number of employees in the legal department per corporation [increased] from 5.2 in 1990, to 6.1 in 1995, to 6.4 in 2000. The same survey shows that the total number of legal employees hired by firms mid-career is increasing, from 181 persons at 115 of 888 surveyed firms in 1995 to 491 persons at 290 of 1,008 firms in 2000. Another survey showed that in the next five years, 47% of firms planned to increase the size of their legal staff, while only 4.2% planned to shrink it.”

Milhaupt & West, *supra* note 29, at 476-77.

<sup>157</sup> A 2004 Japan Federation of Bar Associations survey of *bengoshi* found only 1.3% responded “yes” to the question, “Are you an in-house *bengoshi* (employed by a corporation)?” Japan Federation of Bar Associations, at <http://www.nichibenren.or.jp/jp/katsudo/toukei/sensasu.html> (last visited April 3, 2005).

<sup>158</sup> See, e.g., Jason F. Cohen, *The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami Through Japan’s Corporate and Judicial Worlds*, 21 FORDHAM INT’L L.J. 108, n.89 (1997). (“Most Japanese companies have a department or section handling legal matters. Of the employees who staff these departments, 60% studied law as their undergraduate major, according to a survey. The survey also indicated that only 4% of the companies had a licensed

Nevertheless, law firm hiring continues apace, as does businesses' hiring of outside counsel,<sup>159</sup> and there are indications that companies will be hiring more *bengoshi* to work directly for them.<sup>160</sup> This marked increase in the hiring of legal help for business transactions appears to have arisen precisely because non-*bengoshi* with undergraduate law degrees are no longer adequate for the types of transactions in which Japanese corporations now wish to engage. Professionally-educated lawyers can provide the reputational capital, as well as the negotiation and due diligence skills, that Japanese corporations have come to recognize as necessary in the contemporary global marketplace.

Much as it did after World War II, Japan finds itself struggling to compete internationally, only now its ancient social mores (reliance on community reputation; an elite but admirable bureaucracy; the importance of "face") and post-war business practices (lifetime employment; seniority-based promotions; *keiretsu*; the "Iron Triangle")

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attorney working in their legal departments. In contrast, legal departments in the United States are almost completely staffed by attorneys.") (citations omitted).

<sup>159</sup> Law firm mergers are notably on the increase as well. Japanese law firms have traditionally been of the small, "boutique" variety, but firms now seek to be able to provide clients with legal multiple services.

Law firms, for their part, are now required to handle work, including back-office operations, such as preparation and filing of documents, in large quantities and very quickly as well. Now is the time when business size seems to be crucial for law firms to establish a competitive edge in the domestic legal market.

*Law Firms Seek Mergers to Offer 'One-Stop Service', supra note 155.*

<sup>160</sup> Of course, many of these new hires might represent litigators as well as transactional attorneys:

On the practitioner side, the number of Japanese companies hiring licensed attorneys as in-house counsel has been gradually increasing. Traditionally, Japanese companies hired outside counsel to represent them in litigation (partially because there are not many licensed attorneys in Japan). Recently, however, more and more companies are interested in preventing disputes from arising and are hiring licensed attorneys to specialize in that area.

Shiro Kawashima & Susumu Sakurai, *Shareholder Derivative Litigation in Japan: Law, Practice, and Suggested Reforms*, 33 STAN. J. INT'L L. 9, n.64 (1997)

are fading from view. Perhaps the new law schools will produce graduates who can serve as trustworthy gatekeepers, risk managers, and transaction cost engineers, and who can thereby restore some of the value of reputation in Japanese business transactions.

#### IV. The Players: The Entities Behind the Call to Reform

The recent legal education reform directives should further be viewed in the context of the expressed desires of the entities that have an interest in the types of social, economic and political changes to which reform in Japanese legal education will likely lead.

##### A. The Federation of Economic Organizations (*Keidanren*)

*Keidanren* is an organization that represents the interests of Japanese businesses, industrial associations, and employers.<sup>161</sup> After the Second World War, Japanese business interests, voicing their concerns and recommendations through *Keidanren*, worked closely with the government to bring Japan to a position of economic preeminence.<sup>162</sup> *Keidanren* continues to be a powerful lobbying group today.

*Keidanren* has spoken out on judicial reform, submitting a number of proposals to the Ministry of Justice at the behest of the Liberal Democratic Party in 1998.<sup>163</sup> These proposals were motivated by a desire on the part of corporate Japan not only to make the court system easier and less costly to access, but also to create “a civil justice system better able to state the contours of the legal versus the illegal, to lessen

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<sup>161</sup> In May 2002, *Keidanren* merged with *Nikkeiren* (The Japan Federation of Employers' Associations) to become *Nippon Keidanren*, with a total membership of 1,623 organizations. See *Nippon Keidanren*, available at <http://www.keidanren.or.jp/english/profile/pro001.html> (last visited April 3, 2005). For simplicity, this comment will refer to the organization as *Keidanren*, which was the organization's name when it made the proposals discussed here.

<sup>162</sup> “Most observers of Japan's post-1945 transformation from a devastated, war-torn nation into the world's second-largest economic power have attributed this stunning turnaround in large part to the extraordinary level of cooperation between business and government in pursuing the shared goals of growth and prosperity.” Wanner, *supra* note 30.

<sup>163</sup> *Toward a Revitalization of the Civil Justice System*, available at <http://www.21ppi.org/english/policy/19981222/summary.html>. (last visited April 3, 2005) [hereinafter *Revitalization*]. It was published by The Twenty-First Century Public Policy Institute, a think-tank funded by *Keidanren*, on December 22, 1998. *Id.*

growing risk exposure, and to promote business planning.”<sup>164</sup> Among these was a proposal to establish graduate professional schools for the study of law.

Interestingly, however, *Keidanren* also submitted a number of proposals regarding legal reform aimed at loosening the restrictions on non-*bengoshi* legal professionals, especially those who already work within corporations. First, *Keidanren* proposed that corporate legal staff members be allowed to represent their own companies in litigation.<sup>165</sup> Second, non-*bengoshi* legal professionals, such as tax agents, patent agents, and judicial scriveners should be allowed to handle routine legal affairs.<sup>166</sup> Finally, corporate legal staff members, Diet members, and their policy assistants should be able to practice as attorneys after passing the National Bar Examination, but without having to complete a Legal Research and Training Institute apprenticeship.<sup>167</sup>

Nevertheless, despite the expanded role recommended for non-*bengoshi*, the *Keidanren* proposals contain no recommendation that the number of non-*bengoshi* should be increased. Viewed in this context, *Keidanren*'s proposal that new graduate law schools be established to train more *bengoshi* suggests that the business community of Japan is concerned with increasing the efficient handling of legal matters through the use of professionally-trained lawyers.

This concern can be further inferred from *Keidanren*'s proposals

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<sup>164</sup> Luke Nottage, *Japan's Impending Reform of the Administration of Justice: Far from Final*, 48 CCH ASIAWATCH NEWSLETTER, Aug. 2001, available at <http://www.law.usyd.edu.au/~luken/asiawatch48.htm> (last visited April 3, 2005).

<sup>165</sup> *Revitalization*, *supra* note 164.

<sup>166</sup> *Keidanren* proposed that

judicial scriveners (specializing in corporate documentation and real estate transactions) be allowed to appear as counsel in Summary Court proceedings; patent attorneys be able to appear in patent infringement proceedings in conjunction with *bengoshi*; tax attorneys be able to give evidence as a matter of course, provided a *bengoshi* is of counsel; similar possibilities be considered for administrative scrivener, social security advisors, and others.

Nottage, *supra* note 165.

<sup>167</sup> “[C]orporate counsel who have passed the bar examination (but not been through the state-sponsored further training to qualify as *bengoshi*, judges or prosecutors) should be allowed to qualify as *bengoshi* after some years working in the private sector.” *Id.*

concerning judges. Specifically, not only should the number of judges be increased, but judges should be appointed from among practicing attorneys.<sup>168</sup> Many Japanese judges join the judiciary fresh from their training at the Legal Research and Training Institute. Thus, while they may have undergraduate degrees in law, the bulk of their legal training will have taken place in bar exam cram schools.<sup>169</sup> Most of these judges then stay on the bench for the rest of their careers.<sup>170</sup> The business community perceives such judges, who lack business education or work experience, as incapable of understanding contemporary business and professional practices.<sup>171</sup> For these reasons, *Keidanren* proposed that judges be appointed from among practicing attorneys who are familiar with the contours of business disputes, and that future judges undertake training in non-legal fields, primarily the sciences, in order better to understand intellectual property cases.<sup>172</sup> In what may be a related trend, the number of judges who have been deemed unfit for reappointment has dramatically increased.<sup>173</sup>

*Keidanren's* proposals for reform also contain provisions for improving the judicial infrastructure to increase access for ordinary citizens, as well as for increasing funding for legal aid. However, these proposals could well have been included not so much to increase access for ordinary citizens, but to make the proposed reforms of more obvious use to the greater public.<sup>174</sup>

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<sup>168</sup> *Revitalization*, *supra* note 164.

<sup>169</sup> Miyazawa, *supra* note 5, at 493.

<sup>170</sup> Approximately three-quarters of the judges appointed from the 1970 LRTI graduating class were still on the bench in 1996. See Haley, *supra* note 73, at 5.

<sup>171</sup> See Goodman, *supra* note 81, at 806.

<sup>172</sup> *Revitalization*, *supra* note 164.

<sup>173</sup> Six judges were denied reappointment in 2003. *Judge Not, Lest ye be Judged*, THE DAILY YOMIURI, Dec. 10, 2003, available at 2003 WL 66820619. Prior to 2003, only two judges had ever been denied reappointment. See Haley, *supra* note 73, at 5.

<sup>174</sup> To promote this type of reform proposal to the public, . . . business groups and conservatives needed other elements in the package that would satisfy the needs of ordinary people. Hence, the strengthening of legal aid, for instance, has been included in the proposal.

Whether this hypothetical explanation is correct or not, it is clear that business groups and, to a lesser extent, LDP



## B. The Liberal Democratic Party (LDP)

Japan's dominant political party established a commission to examine the likely needs of the judicial system in the twenty-first century, issuing a report in June of 1998.<sup>175</sup> The research group's report acknowledged that economic liberalization and deregulation would increase the needs of Japanese citizens and businesses for a responsive judiciary.<sup>176</sup> An increase in the number of legal professionals was also seen as necessary to accommodate proposed increases of civil and criminal legal aid services, multi-disciplinary law partnerships, and judicial review of administrative agencies.<sup>177</sup> To meet these needs, the number of judges, prosecutors, and *bengoshi* should be increased, primarily by expanding the legal education system and by reforming it to incorporate the kind of practical legal training emphasized in U.S. law schools.<sup>178</sup>

## C. The Judicial System Reform Council (JSRC)

### 1. Formation of the JSRC

In response to the above proposals put forward by *Keidanren* and the LDP, the Diet enacted a law in 1999 calling for the formation of a thirteen-member committee to formulate policies that would strengthen the judicial system and make it more responsive to the public.<sup>179</sup> The members represented the legal profession, legal scholars, business interests, educators, labor unions, and consumers.<sup>180</sup> Significantly, only

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politicians are indicating that people need more access to the law.

Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 19, 102 (2001).

<sup>175</sup>司法制度特別調査会報告— 21世紀の司法の確かな指針 [The Report of the Special Research Group of the Judicial System: Concrete Policy for the Judiciary in the 21st Century], June 16, 1998, available at <http://www.jimin.jp/jimin/saishin9998/seisaku-13.html> (last visited April 5, 2005).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Miyazawa, *supra* note 175, at 105, 106.

<sup>180</sup> *Id.* at 106.

three council members were members of the Japanese Bar, the organization that heretofore had had the dominant voice as to the direction of Japanese legal education.<sup>181</sup>

Three law professors were appointed to the council, including its chair, Koji Sato of Kyoto University. Professor Sato was known for his previous proposals to establish graduate schools for legal education, as well as for his outspoken views concerning administrative reform as a means of increasing the participation of Japanese citizens in the legal system, thereby realizing the true “rule of law” in Japan.<sup>182</sup> The council also included Kohei Nakabo, a lawyer who was well known in Japan for his strong character, exemplified by his willingness to take on organized crime in order to collect bad debts for the government after the bursting of the housing bubble in the 1990s.<sup>183</sup>

## 2. JSRC Recommendations

On June 12, 2001, the JSRC presented its final report to the Cabinet.<sup>184</sup> The underlying reasons for the proposed reforms, namely, the recent social and economic changes that have led to the need for judicial reform, are described in quite broad and idealized terms. Facing “difficult conditions,” the report explains, “Japan . . . has been working on various reforms, including political reform, administrative reform, promotion of decentralization, and reforms of the economic structure such as deregulation,” with reform of the judicial system aimed at “t[ying] these various reforms together organically under ‘the rule of law’ that is one of the fundamental concepts on which the Constitution is based.”<sup>185</sup> There are somewhat oblique references to the actual human

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; see also *infra* note 186.

<sup>183</sup> Brian Bremner, *The Toughest Job in Japan*, BUSINESS WEEK, Feb. 25, 2002, available at [http://www.businessweek.com/magazine/content/02\\_08/b3771147.htm](http://www.businessweek.com/magazine/content/02_08/b3771147.htm) (last visited April 5, 2005). Nakabo, although a widely admired figure, recently stepped down as president of the Resolution and Collection Corporation, established by the government to collect bad debts, because some employees had been found to have taken bribes. See *Nakabo to Quit Bar Over Loan Fraud Case*, ASAHI SHIMBUN, Oct. 10, 2003, available at 2003 WL 60237077.

<sup>184</sup> JSRC Report, *supra* note 12.

<sup>185</sup> *Id.* at ch. I. The aspirational language and ideology of the chair, Professor Sato, comes through clearly in this prefatory passage:

needs and socioeconomic realities, such as bureaucratic corruption and globalization, that inspired the call for reform in the first place: “[S]ocial conditions are changing domestically and internationally every moment, becoming more complicated, sophisticated, diversified and internationalized.”<sup>186</sup> The report emphasizes that Japanese society’s ability to respond to globalization should be fostered by clarifying legal rules in such a way as to ease the resolution of “various disputes” and “prevent those in a weak position from suffering unfair disadvantage in connection with the abolition or deregulation of advance control.”<sup>187</sup>

To meet these laudable but rather hazily-defined goals, the JSRC Report recommends a number of changes to the legal system: increasing the number of professionals in the legal system, reforming legal education, establishing postgraduate law schools,<sup>188</sup> and increasing the number of successful applicants for the new national bar examination to 3,000 per year (up from the current 1,000) by 2010.<sup>189</sup> The JSRC recommendations also include reducing the duration of civil proceedings by about half by shortening the intervals between trial dates, which in turn is to be accomplished by “expanding the human base of the legal profession” through increases in the number of lawyers, judges, and legal staff, and through “promoting the incorporation of law firms and the use of joint law firms.”<sup>190</sup>

Also, courts should become quicker to secure expert witnesses in cases requiring technical expertise, such as medical malpractice and intellectual property cases, and lawyers themselves should become more proficient in technical matters through their legal training and through the expansion of specialized departments in incorporated law firms.<sup>191</sup>

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What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country.

*Id.*

<sup>186</sup> *Id.* at ch. I, pt. 1.

<sup>187</sup> *Id.* at ch. I, pt. 2-1.

<sup>188</sup> *Id.* at ch. III, pt. 2-2.

<sup>189</sup> *Id.* at ch. I, pt. 3-2(2).

<sup>190</sup> *Id.* at ch. II, pt. 1-1(3).

<sup>191</sup> *Id.* at ch. II, pts. 1-2, 1-3.

District courts and family courts should be granted expanded jurisdiction to hear diverse matters pertaining to divorcing parties.<sup>192</sup> To make lawsuits less burdensome to file, fees should be reduced, and losing parties should be made to pay attorney's fees.<sup>193</sup> Civil legal aid will have to be expanded to meet the mandate of the new Civil Legal Aid Law No. 55, passed on October 1, 2000.<sup>194</sup> The implementation of class action lawsuits should also be considered.<sup>195</sup> In the criminal law system, public defense of suspects, including the right to counsel, should be instituted.<sup>196</sup> As to Japan's response to globalization, there is a suggestion that the rules governing collaboration between Japanese and foreign lawyers (*gaiben*) should be relaxed, and "continued consideration" should be given to abolishing the prohibition on employment of Japanese lawyers by foreign law firms.<sup>197</sup>

Thus, reform of Japanese legal education through the establishment of graduate law schools and increasing the bar passage rate are just two of the many JSRC recommendations. These two particular reforms are noteworthy in that they are, after years of talk and debate, finally being implemented. These nearly-radical reforms in a conservative country like Japan make sense only in the much broader context of the many other administrative reforms that have been implemented in response to economic stagnation, scandal, shifts in the loci of power, and the demands of the Japanese corporate community.

#### V. Difficulties and Likely Effects of Legal Education Reform

While the need for reform of the Japanese legal education system has been widely recognized, questions and disagreements as to the details have inevitably arisen among legal scholars and practicing legal professionals.

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<sup>192</sup> *Id.* at ch. II, pt. 1-5.

<sup>193</sup> *Id.* at ch. II, pts. 1-7(1)(a) and (b).

<sup>194</sup> *Id.* at ch. II, pt. 1-7.

<sup>195</sup> *Id.* at ch. II, pt. 1-7(4)(b).

<sup>196</sup> *Id.* at ch. II, pt. 2-2(1)(a).

<sup>197</sup> *Id.* at ch. II, pt. 3-4. That consideration was in fact given to the loosening of restrictions on *gaiben* can be seen in the recent announcement that foreign law firms with offices in Japan will be allowed to hire Japanese lawyers beginning in the summer of 2005. See Fuyuno, *supra* note 10, at A18.

### A. Keeping the Bar Admissions Quota

Observers of Japanese legal education reform have noted that retention of a quota on the number of successful applicants to the Japanese bar indicates that the current reforms are not as profound as they may first appear.<sup>198</sup> The goal of graduating 3,000 new lawyers from the Legal Research and Training Institute (LRTI)<sup>199</sup> each year by 2010 may well be difficult to meet,<sup>200</sup> making this administrative reform insufficiently responsive to the immediate problems posed by global competition and the demands of Japanese businesses for more access to legal counsel.

Further, maintaining the LRTI as an institution presents several concerns, although these are perhaps more ideological than educational. First, continuing to impose the requirement that all new lawyers pass through the LRTI apprenticeship shows a certain non-responsiveness to the immediate economic and societal changes that have ostensibly prompted the reforms outlined above: instead of allowing the number of new lawyers each year to be determined by societal need or individual vocation, the number will be determined by the spaces available at the LRTI.<sup>201</sup> Second, limiting the number of new lawyers to the number of available LRTI seats may perpetuate the notion that the law is an exclusive, elitist endeavor open only to a select few, most of whom will end up choosing to remain in Tokyo rather than practicing in those prefectures where the shortage of lawyers is more acute.<sup>202</sup> Finally, sending all of Japan's lawyers, judges, and prosecutors through what is

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<sup>198</sup> 'The motivation for the change was certainly pure,' says Curtis J. Milhaupt, director of the Center for Japanese Legal Studies at Columbia University School of Law. 'But I think a fundamental reform of Japanese legal education and legal profession will only come when the quota of the bar exam is lifted.'

*Id.* at A18.

<sup>199</sup> The details of the LRTI apprenticeship program are discussed *supra* notes 6, 7, and 36.

<sup>200</sup> Because of the difficulty of tweaking the bar exam to insure that the "correct" number of applicants pass, a more realistic timeframe might be twenty to twenty-five years. See Robert F. Grondine, *An International Perspective on Japan's New Legal Education System*, 2 ASIAN-PAC. L. & POL'Y J. 13, 14 (2001).

<sup>201</sup> McAlinn, *supra* note 7, at 18.

<sup>202</sup> *Id.*

in effect a single, centralized school creates a system that, while perhaps producing predictable outcomes in the country's courts, also creates inflexibility that hinders effective response to the diverse nature of the contemporary problems that beset Japan.<sup>203</sup>

## **B. Will Japanese Law and Culture Become Further “Americanized”?**

Will Japan develop a more combative, adversarial culture with this increase in the size and responsiveness of the legal system, especially with the increase in the number of *bengoshi*? Throughout the postwar era, Japanese political and business leaders have seen the American legal style as a threat to the “traditional” Japanese way of regulating business, such as through bureaucratic administrative guidance.<sup>204</sup> Thus, with an increase in the number of lawyers and use of the courts to resolve disputes, Japan may indeed begin to evince more “adversarial legalism.”<sup>205</sup> Also, the reforms outlined above, such as the Administrative Procedures Law and the revision of the Civil Procedure Code, will likely make Japanese law, and perhaps Japanese society, somewhat more adversarial in nature.<sup>206</sup>

However, it is important to remember that these reforms were instituted by representative politicians precisely in order to provide Japanese citizens, and especially Japanese businesses, with the many perceived benefits of American legal culture that have been unavailable

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<sup>203</sup> Dan Rosen, *Schooling Lawyers*, 2 ASIAN-PAC. L. & POL'Y J. 17, 67 (2001).

<sup>204</sup> See discussion *supra* Part III.B.2; see also Kelemen & Sibbitt, *supra* note 23, at 295 (“Political leaders saw American legal style, and American lawyers, as an explicit threat to the Japanese approach to regulation. Japanese industry feared the emergence of American style litigation, legal expenses and damage awards.”).

<sup>205</sup> This term is attributed to Professor Robert Kagan, who uses it in describing American legal style as being characterized by “more frequent recourse to formal legal methods of implementing policy and resolving disputes; more adversarial and expensive forms of legal contestation; more punitive legal sanctions (including larger civil damage awards); [and] more frequent judicial review.” Robert A. Kagan & Lee Axelrad, *Adversarial Legalism: An International Perspective*, in COMPARATIVE DISADVANTAGES?: SOCIAL REGULATIONS AND THE GLOBAL ECONOMY 146, 150 (Pietro S. Nivola ed., 1997). David Johnson defines the term as “litigant activism and the threat or reality of formal legal contestation.” Johnson, *supra* note 88, at 783.

<sup>206</sup> Johnson, *supra* note 88, at 782.

under previous Japanese systems, both in resolving disputes and in conducting business.<sup>207</sup> Moreover, the question may not be one of imitating “American” legal style at all, but rather one of finding an appropriate response to the modern global complexities of economic liberalization and competition,<sup>208</sup> as well as the specific Japanese problems of political fragmentation<sup>209</sup> and bureaucratic scandal.<sup>210</sup>

### C. A Cultural Shift in How the Japanese See and Use the Law?

The current reform of legal education in Japan may reflect an underlying cultural shift toward increased litigiousness, or at least a fascination with a life in the law. There are some signs of this in the popular culture: reality television shows featuring lawsuits have become popular,<sup>211</sup> advertisements for law firms are popping up in commuter trains,<sup>212</sup> and a television drama about new law school graduates proved a popular success last year.<sup>213</sup>

But Japanese interest in legal matters and the law may actually run deeper than it does in the American population. When surveyed, over 30% of Japanese responded that they owned a basic legal text, such as the *Roppo Zensho*.<sup>214</sup> America graduates about 38,000 students from

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<sup>207</sup> “[T]he benefits of the American way of law look especially attractive to persons who do not enjoy them.” *Id.*

<sup>208</sup> Kelemen & Sibbitt, *supra* note 23, at 271.

<sup>209</sup> See discussion *supra* Part II.B.3.

<sup>210</sup> See discussion *supra* Part II.C.

<sup>211</sup> Mayumi Saito, *Law Firms Going Global in Japan*, JAPAN INC., Jan. 2003, available at <http://www.japaninc.net/article.php?articleID=996> (last visited April 5, 2005).

<sup>212</sup> *Id.*

<sup>213</sup> *Law Trainees Battle Injustice, Professors*, YOMIURI SHINBUN, Oct. 9, 2003 (on file with the University of Miami International & Comparative Law Review). On this television program (“Beginner”), the sometimes-complicated legal arguments between law students and professors featured explanatory text on the bottom of the screen. In the supposedly much more law-centric United States, programs such as “Law and Order,” while popular, do not go so far as to provide on-screen legal analysis for viewers.

<sup>214</sup> Michael K. Young et al., *Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate*, 34 GEO. WASH. INT'L. L. REV. 789, 805 (2003). The *Roppo Zensho* is a collection of the six main codes of Japanese law (constitutional; commercial; civil and criminal codes; civil and criminal

its law schools every year,<sup>215</sup> while Japan, with half the population, graduates over 40,000 college students with degrees in law.<sup>216</sup> Although Japanese undergraduate law students may spend comparatively little time learning the practical skills of the legal profession, such as how to question a witness or draft a brief, they unquestionably learn the substantive rules of law in a broad range of areas, just as well as or even better than American law students.<sup>217</sup> Furthermore, many of these 40,000 graduates go on to work in corporate Japan,<sup>218</sup> which has long recognized the importance of having employees who are knowledgeable about the law, even as actual *bengoshi*, because of the strict quotas on bar admissions, are too scarce to hire in great numbers. Japanese interest

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procedure.) One would be hard pressed to imagine a similar percentage of American homes containing comparable legal text.

<sup>215</sup> American Bar Association, *Legal Education and Bar Admission Statistics*, available at [http://www.abanet.org/legaled/statistics/le\\_bastats.html](http://www.abanet.org/legaled/statistics/le_bastats.html) (last visited August 5, 2004).

<sup>216</sup> Kawabata, *supra* note 3, at 431.

<sup>217</sup> Make no mistake about it, . . . these graduates undertake an intense, detailed study of the law and, at least at the time of graduation, are as conversant as American law school graduates with the dictates of the law in a broad variety of settings. Indeed, given that American law schools tend to train students more in methods of analysis and research and Japanese law schools more in the substantive content of legal rules, we would venture that Japanese students can, upon graduation, recite the applicable law with much more confidence and accuracy than their American counterparts.

Young et al., *supra* note 215, at 806.

<sup>218</sup> See ODA, *supra* note 4, at 101; see also Joseph Grimes, *Seriously, Japan Needs More American Lawyers*, ASIAN WALL ST. J., Oct. 31, 1991 (on file with the University of Miami International & Comparative Law Review):

What happened to the huge number of Japanese law school graduates who didn't become *bengoshi*? They are sitting on the other side of the negotiating table, working for the powerful Japanese bureaucracy and for Japanese companies. And while a few of these law graduates have gone to work for Japanese subsidiaries of American companies, the majority still prefer to cast their lot with Japanese companies.

*Id.*



in law has deep historical roots,<sup>219</sup> thus the relative lack of litigiousness over the past eighty years may be no more than a historical anomaly, brought on by the political and institutional restrictions outlined above.<sup>220</sup>

#### D. Opposition from the *Nichibenren* (Japan Federation of Bar Associations)

The lawyer-members of the *Nichibenren* are understandably protective of their profession, having maintained for years that changes in the legal education system will compromise the quality of the Japanese legal system as a whole.<sup>221</sup> It is the Japanese Bar that has maintained the strict limits on the number of applicants who are allowed to pass the national bar exam each year.<sup>222</sup>

But the strength of the Japanese Bar appears to be waning. In the 1990s, in the face of opposition from *Keidanren*, the LDP, and the Ministry of Justice, the *Nichibenren* proved unable to prevent increases in the bar passage rate<sup>223</sup> as well as a decrease in the length of the LRTI

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<sup>219</sup> Japan has had lawyers of one sort or another for over 1,300 years. See ODA, *supra* note 4, at 13. The first true legal system in Japan was a modification of a Chinese import: the *ritsuryou*. *Id.* These penal and administrative codes were brought to Japan by Soga clan envoys returning from studying the Buddhist and political institutions of T'ang China in the seventh century. *Id.* These foreign laws naturally required interpretation and modification, which was the province of members of the emperor's *daijoukan*, or administrative council. See JOHN WHITNEY HALL, JAPAN: FROM PREHISTORY TO MODERN TIMES 51 (1970).

<sup>220</sup> See generally UPHAM, *supra* note 35 and note 63.

<sup>221</sup> This concern has been directed toward foreign lawyers as well:

Japanese lawyers, often acting under the aegis of the Japanese Federation of Bar Associations (*Nichibenren*), wished to restrict competition by limiting the number of lawyers party to their domestic monopoly and keeping foreign lawyers out of their captive market. Except during the Occupation, and with the minor exception of a tiny class of foreign lawyers grandfathered at that time, foreign lawyers were entirely excluded from the Japanese legal services market until 1986.

Kelemen & Sibbitt, *supra* note 23, at 295-96.

<sup>222</sup> Miyazawa, *supra* note 175, at 90.

<sup>223</sup> [T]he Justice Ministry convened the Three-Party Committee on the Legal Profession (*Hôsô Sansha Kyôgikai*) in 1988, which consisted of representatives from the Justice Ministry, the Supreme Court, and the JFBA. The Justice Ministry managed to obtain an agreement in the twenty-second session

apprenticeship training period.<sup>224</sup> Similarly, Japanese law firms, recognizing that both domestic and foreign corporations prefer to hire larger firms with multiple specialty departments, have continued to grow and merge, despite some *Nichibenren* opposition.<sup>225</sup> The *Nichibenren* also continues its vocal opposition to loosening the strictures on foreign lawyers who wish to work in Japan, despite the clear intent of foreign lawyers merely to facilitate the work of Japanese lawyers and businesses, rather than taking work away from Japanese lawyers by practicing “Japanese law.”<sup>226</sup> The biggest blow of all might have come with the formation of the Justice System Reform Council in 1999, which allowed a great many other voices, aside from those of *Nichibenren* members, to speak out on the direction of Japanese legal education in the twenty-first

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of the Committee in 1990, and the National Bar Examination Act was amended in 1991. The number of those passing the examination increased from approximately 500 to roughly 600 in 1991, and to 700 in 1993.

*Id.* at 91.

<sup>224</sup> In 1999, the length of the practical training period at the LRTI was reduced from two years to one and a half years. *Id.* at 94.

<sup>225</sup> Nagashima Ohno & Tsunematsu is credited with beginning the recent wave of megafirm mergers on January 1, 2000, by merging the large firm of Nagashima & Ohno with Tsunematsu, Yanase & Sekine, thereby creating a joint firm with around 150 lawyers dealing with a wide variety of domestic and international legal issues. More recently, the December 1, 2002, merger of one of Japan’s ‘big four’ firms, Mori Sogo, with Hamada & Matsumoto has created Mori Hamada & Matsumoto, a firm of 160 attorneys that is already being regarded as one of the top capital markets firms in Tokyo as well as a pioneer in rapidly developing technology fields such as telecommunications and information services. Other Japanese firms are rapidly gaining on the former ‘big four’ Japanese firms as ‘aggressive expansion’ becomes crucial in Japan’s tight market.

Suzuki, *supra* note 27, at 395-96.

<sup>226</sup> See *Japanese Lawyers Scramble to Protect Walled Garden*, *supra* note 26. And as previously noted, *Nichibenren* opposition to expanding the scope of a foreign lawyer’s potential practice in Japan is perhaps being diluted with the recent decision to allow foreign law firms with offices in Japan to hire Japanese lawyers. See *supra* note 198.

century.<sup>227</sup>

### E. Are These Reforms Too Timid?

The intense focus on the creation of new law schools may be too conservative an approach, one that misses an opportunity to meet the lofty and admirable goals expressed by the Justice System Reform Council.<sup>228</sup> Perhaps the new law schools are just an expensive, showy distraction, and more effective lawyers could be trained by simply revamping the undergraduate legal education programs that are already in place.<sup>229</sup> Double undergraduate degrees, like those offered in Australia and New Zealand, could ensure the needed diversity of intellectual backgrounds that appear to be lacking in the successful cram-school applicants of today.<sup>230</sup> Adding years to the legal education process will dramatically increase the cost for students who want to become lawyers, but adding years to the process is no guarantee that graduates will be more mature or perspicacious.<sup>231</sup> And not only the

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<sup>227</sup> See discussion *supra* Part V.C.1.

<sup>228</sup> See, e.g., Professor Sato's comments, *supra* note 186.

<sup>229</sup> Nottage, *supra* note 1, at 35.

<sup>230</sup> Those graduating with double degrees gain an edge over those majoring only in law, amidst increasing competition to be hired by a good law firm. They are also better equipped to move into neighboring areas of work, such as accountancy or business consultancy, more like legal information engineering. Ultimately, should they want to become the judges of the future, they may retain a distinct advantage over those who have studied only law. At the least, the New Zealand and Australian experience shows that it is not necessary for law faculties to train students for five or six years, just to become an effective practicing lawyer.

*Id.* at 43.

<sup>231</sup> Even if it can be shown systematically that Japanese law students, even the highly motivated and intelligent ones that currently pass the bar examination, lack basic maturity, it need not follow that they should spend more time at law school. If the real problem is unawareness of contemporary society or business practices among that [*sic*] those who go on to a career as a judge, for instance, then a better solution may be to improve the systems for selecting judges (e.g., *hoso ichigen*) or for training them (including continuing education).

*Id.* at 51.

Japanese Bar, but some business leaders also are doubtful that creating so many new law schools in such a short time will produce Japanese legal professionals of high caliber.<sup>232</sup>

### Conclusion

The sudden appearance of sixty-eight new law schools in one month in 2004 looks radical from the outside, but it can be understood in the context of decades of debate, years of economic stagnation, increasing bureaucratic scandal, the spurs of global competition, administrative reforms that ease litigation, and the demands of the Japanese corporate community. Rather than simply reflecting a new-found litigiousness induced by exposure to American legal ways, the new law schools represent one among many institutional reforms that are poised to allow Japan to respond to contemporary economic and social problems in a new way, one that may finally pull Japan out of the economic doldrums of the past decade.<sup>233</sup>

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<sup>232</sup> *Id.* at 49-50.

<sup>233</sup> “The new law schools may be more likely to succeed if they adopt this broader view of practical education [that includes a greater emphasis on business law subjects] and broaden it still further to include an emphasis on training in the legal method.” Maxeiner & Yamanaka, *supra* note 2, at 317.