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Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue

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This symposium issue is a product of the symposium "Successes, Failures, and Remaining Issues of the Justice System Reform in Japan" held at the University of California, Hastings College of the Law on September 7-8, 2012.[1] As the main planner of the symposium, I would like to briefly explain its background and the structure of this symposium issue.

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1. The author is most grateful to Chancellor and Dean Frank H. Wu, Academic Dean Shauna Marshall, Associate Academic Dean for Global Studies Joel Paul, then Associate Dean for Research Evan Lee, and Associate Professor Keith J. Hand of the University of California, Hastings College of the Law for their decision to host the symposium; and to Michael A. Kelly, Esq., the Egusa Foundation for International Cooperation in the Social Sciences, Tomio Narita, Esq., Simmonds & Narita LLP, and the Arseny & Olga Kovshar Private Charitable Foundation for their generous contributions to the symposium. The author also would like to gratefully mention that the Collaborative Research Network 33 on East Asian Law and Society of the Law and Society Association provided assistance with publicity and that *HICLR* provided personnel to carry out the symposium. Additionally, Mei Cooley of UC Hastings skillfully handled and coordinated all the logistical tasks.

I. Road to the Establishment of the Justice System Reform Council

The Japanese government established the Justice System Reform Council (JSRC) in July 1999, and the JSRC presented its recommendations for a comprehensive reform of the justice system to Prime Minister Jun'ichiro Koizumi on June 12, 2001. Calls for systemic reform of the justice system were not new, but earlier reforms in the 1960s to the 1990s were either failures or very minor, mainly due to resistance or internal conflicts within the legal profession, which used to control the policy-making process of the justice system.[2] The recommendations of the JSRC were so comprehensive that they could be considered as the third major series of reforms of the modern legal system in Japan, following the first wave of major reforms in the late 19th century and the second major wave of reforms introduced after World War II.[3]

The immediate momentum which led to the establishment of the JSRC was the product of *Keidanren* (the Japan Business Federation). *Keidanren* is a national organization which represented over 100 industry associations and over 800 large corporations in the policy-making process in postwar Japan. It provided stable support to the Liberal Democratic Party (LDP) which controlled the government for most of the period between 1955 and 2009,[4] and, consequently, the LDP usually accommodated *Keidanren* interests.

Keidanren's interest in justice system reform was preceded by its movement for administrative reform in the 1960s to the 1990s. Administrative reform sought deregulation of business activities as well as the increased transparency and legal accountability of administrative agencies. To this end, a series of new policies and legislation was introduced by the government in the 1980s and 1990s.[5] Reform of the justice system and legal profession became

2. Setsuo Miyazawa, *Law Reform, Lawyers, and Access to Justice, in* JAPANESE BUSINESS LAW 39, 47-49 (Gerald Paul McAlinn ed. 2007). The legal profession is divided into three groups which are represented by their respective organizations. They are prosecutors represented by the Ministry of Justice (MOJ), judges represented by the General Secretariat of the Supreme Court, and practicing attorneys represented by the Japan Federation of Bar Associations (JFBA).

3. For a historical overview of the first and second waves of major reforms, *see* Miyazawa, *supra* note 2, at 40-47.

4. The LDP regained the control of the government in 2012.

5. On transparency and administrative reform, *see* Katsuya Uga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law* and

the next target for reform because more accessible and competent justice system and legal profession were necessary to promote and protect interests of private parties.[6]

Keidanren issued its "Opinions on the Reform of Justice System" on May 19, 1998.[7] This proposal indicated that as Japan changes from an economy and society dependent upon state administration to a society with a free and fair market, companies and individuals will be required to behave according to the principles of "self-responsibility" and "transparency." Therefore, *Keidanren* argued that the strengthening of the justice system as a fundamental part of the infrastructure of the economy and society is an immediate priority. The proposal also noted that the judicial infrastructure currently does not possess personnel and institutional capabilities that can be effectively used by people and companies.

Keidanren proposed a series of reforms. First, the number of judges should be increased. Second, judges should be appointed from among practicing attorneys.[8] Third, while legal education had been historically provided by undergraduate nonprofessional law faculties,[9] graduate professional law schools should be established. Fourth, considering the concentration of practicing attorneys in large cities, the monopoly of legal services by attorneys should be

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Tom Ginsburg, *The Politics of Transparency in Japanese Administrative Law*, *in* DANIEL H. FOOTE, LAW IN JAPAN: A TURNING POINT, 276, 303 (2007).

6. *See* Miyazawa, *supra* note 2, at 49-51.

7. Keizai dantai rengoukai (経済団体連合会) [Japan Business Federation] [Keidanren], Shihō seido kaikaku ni tsuite no iken (司法制度改革についての意見) [Opinions on the Reform of the Justice System] May 19, 1998, *available at* http://www.keidanren.or.jp/japanese/policy/pol173.html (last visited Feb. 16, 2013).

8. In Japan, those who aspire to be a judge, a prosecutor, or a practicing attorney must first pass the National Bar Examination and, then, receive training as a judicial trainee at the Legal Training and Research Institute managed by the Supreme Court. A vast majority of judges are initially appointed as an assistant judge immediately after completing traineeship and promoted to the full judgeship after completing a ten-year term as an assistant judge. This system is called a career judiciary. On the administrative control of Japanese judges, *see* Setsuo Miyazawa, *Administrative Control of Japanese Judges*, *in* LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 263-81 (Philip S.C. Lewis ed., 1994). There had been proposals to reform this bureaucratic structure of the judiciary by appointing judges from among practicing attorneys. This system is called *hoso-ichigen* or unified legal profession.

9. On the history of legal education in Japan, *see* Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay and Bryant G. Garth eds., 2002).

abolished. Fifth, the pace of civil litigation should be sped up, ADR and international arbitration should be strengthened, and the capabilities of courts and judges in intellectual property should be strengthened.[10]

While *Keidanren* was preparing its proposals, LDP's Special Research Committee on the Justice System conducted a series of hearings beginning in June 1997. Many government agencies, interest groups, and individuals presented their views, including the Supreme Court, the Ministry of Justice (MOJ), and the Ministry of Education, Culture, Sports, Science and Technology (MEXT). The Committee announced its report "Firm Guidelines for the Justice System of the 21st Century" on June 16, 1998.[11] While LDP's report mentioned the concept of "*wa*" (harmony) which would not require much use of law, litigation, and legal profession and took a more "law and order" tone in its section on criminal justice, its dominant tone and specific proposals were very similar to the *Keidanren* proposals.

These proposals by *Keidanren* and the LDP created a political opportunity for other groups which had unsuccessfully proposed reforms in the past. Most notably, the Japan Federation of Bar Associations (JFBA) had long proposed to appoint judges from among practicing attorneys, reintroduce jury trials in a purer form,[12] extend the system of state-appointed attorneys from the post-indictment stage to the investigation stage, and increase state support to the civil legal aid system. The JFBA initially hesitated to participate in the political process of justice system reform because it was likely to increase the number of practicing attorneys and to reduce the monopoly they enjoyed. But eventually, the JFBA decided to participate in the political process and seek realization of its long-held proposals. Thus, the justice system reform became a

10. This is a selective list. There were other reform proposals.

11. Jiyū minshutō shihō seido chōsa kai hōkoku (自由民主党司法制度調査会報告) [Liberal Democratic Party, Justice System Research Committee Report], 21seiki no shihō no tashikana shishin (21世紀の司法の確かな指針), [Firm Guidelines for Justice in the 21st Century], June 16, 1998, *available at* http://www.veritaslaw.jp/ronbun_doc/20090929133643_1.pdf#search='21%E4%B8%96%E7%B4%80%E3%81%AE%E5%8F%B8%E6%B3%95%E3%81%AE%E7%A2%BA%E3%81%8B%E3%81%AA%E6%8C%87%E9%87%9D' (last visited Feb. 16, 2013).

12. A limited form of jury trials was conducted in Japan from 1928 to 1943. *See* Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961, in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 22 (Arthur Taylor Von Mehren ed. 1963).

national agenda.

In this environment of the rising expectation for justice system reform, the government decided to establish the JSRC. The government presented the Act to Establish the Justice System Reform Council to the Diet (Japanese Parliament) on February 5, 1999, and the Diet passed it on June 30, 1999. The Act went into effect less than a month later on July 27, 1999, and the JSRC was established on the same day.

Article 2 of the Act set forth the mandate of the JSRC. "The Committee shall clarify the roles the justice system should play in our society in the 21st century and conduct investigation and deliberation on the realization of a justice system more accessible to citizens, citizens' participation in the justice system, the shape of legal profession and the enrichment and strengthening of its functions, and other fundamental measures required for the reform of the justice system and its foundations." Given the political process preceding this Act, the mandate of the JSRC was fairly clear in spite of this abstract language - the JSRC was expected to produce recommendations on a more user-friendly judicial system, public participation in the administration of the judicial system, and an expanded and more competent legal profession.

Independence of the JSRC from the legal profession was a major consideration because the MOJ, as well as the Supreme Court and the JFBA, were part of the subjects for reform. Unlike previous committees on issues of the justice system, the JSRC was not established under the MOJ. Instead, the JSRC was established directly under the Cabinet. For the same consideration, a majority of the JSRC's 13 members were appointed from outside legal academia and the legal profession. They included: three senior members of the legal profession (a former chief judge of a high court, a former head of a high prosecutor's office, and a former JFBA president); three law professors (one each in constitutional law, civil procedure, and criminal procedure); two business people (one each representing *Keidanren* and the Tokyo Chamber of Commerce); the president of the Federation of Private Universities; a professor of accounting; the president of a major foundation (the Nippon Foundation); one representative each from the largest labor organization (*Rengo* or the National Confederation of Private-Sector Trade Unions) and a consumer organization (*Shufuren* or the Federation of Housewives); and a novelist. Koji Sato, a former professor of constitutional law at Kyoto University, was selected as

the Chairperson of the JSRC at its first meeting. Sato had long been involved in administrative reform.

A matter of concern was the Secretariat established under the JSRC. While JSRC members were to work on a part-time basis, members of the Secretariat were to work full-time, collect information, and prepare deliberations of the JSRC. The Secretary General was a prosecutor seconded from the MOJ, and other members were also seconded from various government agencies and the JFBA.[13] Some observers were concerned with the possibility of the Secretariat controlling the deliberation of the JSRC and leading them to take a conservative implementation of its mandate. Partly based on this fear, a watch dog monthly journal was published to closely monitor, comment on, and, if necessary, criticize the JSRC.[14]

II. Recommendations by the Justice System Reform Council

Deliberation of the JSRC was remarkably open to the public for a government committee. Minutes were quickly uploaded to its website,[15] and outside observers could express opinions, present relevant information, and make proposals throughout its deliberation. The pace of deliberation was also fast. At its ninth meeting on December 21, 1999, the JSRC put together a document entitled "The Points at Issue in the Justice System."[16] The JSRC asked the following question to itself, indicating the relationship between the preceding administrative reform and this justice system reform:[17]

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13. Shunsuke Marushima, the keynote speaker of our symposium, was a senior member of the Secretariat.

14. Gekkan shihō kaikaku (月刊司法改革) [Journal of Judicial Reform in Japan] was published by Gendai Jinbunsha (現代人文社) from October 1999 to September 2001. This author was an editor.

15. It still exists. *See* http://www.kantei.go.jp/jp/sihouseido/ (last visited Feb. 16, 2013).

16. Shihō seido kaikaku shingikai (司法制度改革審議会) [JSRC], Shihō seido kaikaku ni mukete (ronten seiri) (司法制度改革に向けて－論点整理－) [Points at Issue in the Justice System] [hereinafter *The Points at Issue*] Dec. 21, 1999, *available at* http://www.kantei.go.jp/jp/sihouseido/pdfs/1221ronten.pdf (last visited Feb. 16, 2013). The official English translation is *available at* http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html (last visited Feb. 16, 2013). Quotations in the text are from the English translation.

17. Unless otherwise noted, the indented quotations hereinafter are taken from the official translation of the JSRC final report. *See infra* note 23.

> Now, it is one hundred years since the compilation of the Civil Code and fifty years since the enactment of the Constitution of Japan. Why is it now that the fundamental justice reform to redefine the administration of justice is instituted as one of the major supports to reconstruct "Our Country and Its Shape" after the administrative reform?

The JSRC answered the question in the following statement:

> It is because we feel keenly that it is difficult for us to have an extensive view of the 21st century society without facing head on at the fundamental issue which we have carried with us for one hundred and thirty years since the beginning of the modern age; that is, what must we do to make the law of a nation flesh and blood of "Our Country and Its Shape"?[18]

These statements imply that the JSRC thought that the law of Japan had not yet become "flesh and blood" of the country in spite of the history of 130 years of the modern legal system in Japan. One may be surprised by this thought if one takes a formalistic concept of the rule of law,[19] because an elaborate system of statutes had existed and a highly centralized, closely coordinated judiciary had applied them. However, the JSRC took a more substantive concept of the rule of law as indicated in the following statement:

> This time of undergoing immense reform, the concept of the rule of law that all the people are equal under the law, and the substantial significance of administration of justice . . . that a fair third party shall make a decision based upon a fair and clear legal rule are never emphasized too much. . . .[20]

"All the people" in this statement includes the government; the JSRC recognized the need to make the government more legally accountable and to make the judicial system a fairer third party to apply clearer legal rules. In other words, the JSRC was going to make proposals to move from the rule *by* law[21] where the justice system functioned essentially as an administrative instrument of the government to the rule of law where private parties can use the justice system to promote and protect their interests against the

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18. Both quotations are from the last paragraph of Chapter II, Section 1 of The Points at Issue, *supra* note 16.

19. On formalistic and substantive concepts of the rule of law, *see* Chapters 7 and 8 of BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

20. Last paragraph, Chapter I, Section 2 of The Points at Issue, *supra* note 16.

21. On the concept of rule by law, *see* TAMANAHA, *supra* note 19, at 92-93.

government.

The JSRC also defined the role of the legal profession in stating that "[l]ike medical doctors who are indispensable for people's health-care service, administration of justice (the legal profession) should play the role of the so-called 'doctors for the people's social life.'"[22] This implied a view that the legal profession should become more readily available and useful in a wider range of areas in social life and in all corners in the country. The JSRC concluded this document by presenting a list of issue items for its deliberation. This list was a declaration of JSRC's intention to make proposals for a truly comprehensive justice system reform.

The JSRC spent the next 54 sessions to solidify those items. The JSRC held four public hearings in four major cities in 2000, conducted six field visits to central and local courts, prosecutor's offices, and bar associations in 1999 and 2000, and visited the United States, Germany, France, and the United Kingdom in 2000. The JSRC finally presented its 118-page report subtitled "For a Justice System to Support Japan in the 21st Century" to Prime Minister Junichiro Koizumi on June 12, 2001.[23]

Excluding the Introduction and Conclusion, the report was divided into the following five chapters:

Chapter I. Fundamental Philosophy and Directions for Reform of the Justice System

Chapter II. Justice System Responding to Public Expectations

Chapter III. How the Legal Profession Supporting the Justice

22. Second paragraph, Chapter I, Section 2 of The Points at Issue, *supra* note 16.

23. Shihō seido kaikoku shingikai (司法制度改革審議会) [JSRC], Shihō seido kaikaku shingikai ikensho - 21seiki no nihon wo sasaeru shihō seido (司法制度改革審議会意見書－21世紀の日本を支える司法制度－) [Report of the JSRC - A Justice System for Japan in the 21st Century], June 12, 2001, *available at* http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/pdf-dex.html (last visited Feb. 16, 2013). The official English translation entitled *Recommendations of the Justice System Reform Council -For a Justice System to Support Japan in the 21st Century* - is *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited Feb. 16, 2013). Statistical and other materials used by the JSRC for its deliberations are available in the CD-ROM appendix of ジュリスト (Jurist), No. 1208 (2001), a semimonthly law journal in Japan. Daniel H. Foote, a presenter at our symposium and a contributor to this symposium issue, prepared the English translation. Without his heroic effort, it would be nearly impossible to attract international attention to this comprehensive reform of the Japanese justice system. Quotations in the text are from this English translation, sometimes in abridged forms. The English translation has no page numbers.

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Chapter IV. Establishment of the Popular Base of the Justice System

Chapter V. Promotion of this Reform of the Justice System

At the beginning of Chapter I, the JSRC summarized its task by asking the question: "How must various mechanisms comprising the justice system and the legal profession, which serves as the bearer of that system, be reformed so as to transform the spirit of the law and the rule of law into the 'flesh and blood' of Japan?", and clearly recognized the relationship of justice system reform with preceding reforms by the following statement:

> Japan, which is facing difficult conditions, has been working on various reforms, including political reform, administrative reform, promotion of decentralization, and reforms of the economic structure such as deregulation. 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. This reform of the justice system aims to tie these various reforms together organically under "the rule of law" that is one of the fundamental concepts on which the Constitution is based. Justice system reform should be positioned as the "final linchpin" of a series of various reforms concerning restructuring of "the shape of our country."

In Chapter I, Part 3, the JRSC defined the three pillars of justice system reform. They are (1) "a justice system that meets public expectations," (2) "the legal profession supporting the justice system," and (3) "establishment of the popular base." As described above, the structure of the report reflected these three pillars.

The first group of recommendations addressed the justice system itself. For civil justice, the JSRC stated:[24]

> - With regard to litigation, the aim is to reduce the current duration of proceedings by about half by enhancing the content of proceedings, with the intention that users can obtain proper, prompt and effective remedies. For that purpose, planned

24. The rest of this section is a revised version of Miyazawa, *supra* note 2, at 56-61.

proceedings shall be promoted by making it compulsory to confer to set a proceeding plan, and the process to collect evidence shall be expanded.

- For cases requiring specialized knowledge, the court-appointed expert witness system shall be improved and a new system in which experts participate in the legal proceedings shall be introduced.

- For lawsuits relating to intellectual property rights, the processing system of specialized departments at both the Tokyo and Osaka District Courts shall be further reinforced so that those departments function substantially as patent courts.

- Measures to reinforce response, such as introduction of labor conciliation, shall also be taken for labor-related cases, which have been increasing remarkably in number, mainly for individual labor-management related cases.

- The functions of the family court and the summary court shall be reinforced by readjusting their jurisdiction, etc.

- In order to secure the effective realization of rights, new measures to improve the civil execution system shall be introduced.

- In order to expand public access to justice, efforts should be made to reduce the costs that users bear, to expand civil legal aid, and to reinforce access points that comprehensively offer information on the justice system.

- Efforts should be made to expand and vitalize alternative dispute resolution (ADR), with the intention that the people can choose from among diversified dispute resolution methods according to individual needs.

- Based on the recognition that the role to be played by the justice system takes on even greater importance in the context of a system of separation of powers, or checks and balances, it is necessary to aim at reinforcing the judicial-check function vis-à-vis the administration.

For criminal justice, the JSRC stated:

- In order to further reflect the people's sturdy social common sense on the content of trials, a new system shall be introduced for certain serious cases, under which the general public will participate in deciding cases together with judges.

- In order to reinforce and speed up trials, from the viewpoint of reinforcing the arrangement of the issues and expanding the disclosure of evidence that contributes to that arrangement, a new

preparatory proceeding shall be established and clearer rules relating to disclosure of evidence shall be established, and the holding of trial sessions on consecutive days shall be made the basic principle.

- From the standpoint of securing fairness of criminal justice, in order to effectively secure the suspects' and defendants' rights to receive assistance of defense counsel, the public defense counsel system for these people shall be established.

- Concerning how the institution of public prosecution should be . . . a system of giving legally binding force to specific resolutions by the Inquests of Prosecution shall be introduced so as to reflect popular will more directly.

- In order to ensure that questioning of suspects is conducted in a proper manner, a system shall be introduced establishing a duty to make written records of conditions of the questioning.

The second group of recommendations dealt with the legal profession. The JSRC stated:

- With regard to the number of legal professionals, the aim is to achieve 1,500 successful applicants for the existing national bar examination in 2004, and, while keeping watch over the progress of establishment of the new legal training system, to increase the number of successful applicants for a new national bar examination to 3,000 per year in about 2010.

- With regard to the system for legal training, in order to secure legal professionals with suitable quality to undertake the administration of justice in the 21st century, the system shall not consist of selection based upon the "single point" of the national bar examination. Rather, a system for legal training shall be established that consists of a "process" that organically connects legal education, the national bar examination, and apprenticeship training. As the core of the system, graduate schools specialized in training of legal professionals (hereinafter referred to as "law schools") shall be established.

- With regard to the lawyer system, public access to lawyers shall be expanded by strengthening the work structure of lawyers, including reinforcing legal consultation activities, making lawyers' fees clearer and more rational, and strengthening expertise, taking into account the needs of society. In addition, measures shall be taken to drive home and improve legal ethics, such as making disciplinary procedures clearer, prompter, and more effective.

- With regard to the public prosecutor system, from the

standpoint of securing public trust in the strictness and fairness of public prosecution, measures to reform the consciousness of public prosecutors shall be taken, such as thoroughgoing review of the human resources and education systems. This includes having public prosecutors spend time working at places where they can learn the sense of the general public. Also, a system shall be established that can reflect the voices of the people with regard to the administration of the public prosecutors offices.

- With regard to the judge system, measures shall be taken to diversify sources of supply for judges, such as promotion of appointment of lawyers as judges and reform of the assistant judge system, which includes establishment of a system to institutionally secure that assistant judges accumulate diverse experience as legal professionals in various positions other than as judges. In addition, a system shall be established in which organizations reflecting public views participate in the process of appointing judges and a system shall be established to secure transparency and objectivity of personnel evaluation.

The third group of recommendations concerned the popular base for the justice system. The JSRC stated:

- As a new system for popular participation in litigation proceedings which constitute the core of the justice system, a new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding the cases autonomously and meaningfully.

- In the civil procedure, for cases that require specialized knowledge, a system shall be introduced in which experts become involved in all or part of trials and support judges.

- The existing participation systems shall be expanded, such as by giving legally binding force to certain resolutions by Inquests of Prosecution and by expanding the court councilor system as a part of reinforcement of the function of the family court accompanying transfer of jurisdiction for actions related to personal status.

- A system to reflect public views on procedures for appointment of judges and a scheme to further reflect public views on administration of the courts, the public prosecutors' offices and the bar associations shall be introduced.

- Coordination of conditions to make such participation in the administration of justice effective shall be promoted, such as realization of an easily understandable system of justice including

adjustment of the basic laws, reinforcement of legal education and promotion of information disclosure relating to the administration of justice.

The main body of the report consisted of an elaboration on these recommendations. Some sections are more elaborate than others, and signs of compromise with those who wanted to keep the status quo were everywhere. Moreover, the JSRC did not touch on some important issues. The most conspicuous example is criminal investigation. Criminal investigations consisted of lengthy detentions, heavy reliance on confessions, interrogations without the presence of a defense lawyer, and a lack of audio-video recordings of interrogations.[25] These practices had been criticized as the causes of false accusations. While a series of recent cases have created strong criticism and a special panel of MOJ's Legislative Council is now discussing the introduction of mandatory electronic recording of interrogations,[26] the problem had long been recognized and reform proposals had been made before the establishment of the JSRC. Nonetheless, the JSRC merely recommended requiring interrogators to keep written records of conditions of interrogation.

The JSRC also failed to notice some developments which would have impacted the implementation of recommendations. The most serious development was the rise of the victim rights movement. It demanded the right of victims and their representatives to actively participate in criminal trials, question the defendants, and recommend a sentence.[27] While the National Association of Crime

25. For a general description of the legal system on criminal investigation in Japan, see SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME 16-25 (Frank G. Bennett, Jr. & John O. Haley trans. 1992).

26. *Judicial System Reform*, THE JAPAN TIMES, July 10, 2011 (a special panel of MOJ's Legislative Council on June 29, 2011, started discussions on the reform of criminal procedure, with electronic recording of interrogations as a major issue); *Opinion: Improving Japanese Justice*, THE JAPAN TIMES, Jan. 8, 2013 (demanding electronic recording of the whole process of interrogation). Electronic versions of both articles are available on LEXIS/NEXIS (last visited Feb. 17, 2013).

27. *See* Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 (1) PUNISHMENT & SOCIETY 47 (2008); David Johnson, *Early Returns from Japan's New Criminal Trials*, THE ASIA-PACIFIC JOURNAL (Sept. 7, 2009), http://japanfocus.org/-david_t_-johnson/3212 (last visited Feb. 17, 2013); Shigenori Matsui, *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, 13 ASIAN-PAC. L. & POL'Y J. 54 (2011). *See also* Hiroshi Fukurai, *A Step in the Right Directionfor Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L &

Victims and Surviving Families (NAVS) was established in January 2000 with a phenomenally successful first symposium which immediately attracted attention from conservative politicians and the media, and NAVS' agenda had included such a right for active participation in criminal trials, the JSRC failed to pay any attention to what might result in criminal trials which would have both lay judges and victim participants.

Nevertheless, this was the first time that major reforms were successfully proposed by a government committee as national policies. This included a large increase in the number of legal professionals, a fundamental change in legal training system, and the introduction of lay judges. This was clearly a major achievement. The consensus was that it was largely due to the composition of the JSRC, where representatives of the judiciary, the public prosecutor, and the bar were in the minority; and the one for the bar was actually most progressive among the 13 members.

JSRC's recommendations on June 12, 2001, were enthusiastically supported by the media. All of the four major national dailies published summaries of the recommendations and commentaries on the following morning.[28] Most of them followed up those articles with editorials urging the faithful implementation of the recommendations. The headlines of those editorials were "Will They Meet the Deadline: Law Schools" (これで間に合いますか 法科大学院),[29] "Justice System Reform: Changing Attitudes of Legal Profession Is the Priority."

COMP. L. REV. 517 (2013).

28. *See, e.g., Saiban e no shimin sanka unagasu shihō seido kaikaku shingikai ga ikensho* (裁判への市民参加促す司法制度改革審議会が意見書) [Citizens' Participation in Litigations Urged: The JSRC Presented Its Opinions], ASAHI SHIMBUN, June 13, 2001 (available on the online database *Kikuzo II Visual* (last visited Jan. 12, 2013)); *Shihō seido kaikaku shingikai-saishū iken - 21seiki no shihō no sugata ha* (司法制度改革審議会・最終意見 21世紀の司法の姿は) [Final Opinions of the JSRC: What Is the Shape of the Justice System in the 21st Century?], MAINICHI SHIMBUN, June 13, 2001 (available on the online database *Mainichi News Pack* (last visited January 30, 2013)); *Saiban jinsokuka he gutaizō-shihōshin ga saishū iken* (裁判迅速化へ具体像 司法審が最終意見) [Concrete Images for Speedier Litigations: The JSRC Presented Final Opinions], NIHON KEIZAI SHIMBUN, June 13, 2001 (available on the online database *Nikkei Telecon 21* (last visited Feb. 8, 2013)); *Shihō seido kaikaku shingikai ikensho no yōten (kaisetsu)* (司法制度改革審議会意見書の要点（解説）) [Main Points of the Final Opinions of the JSRC (Commentary)], YOMIURI SHIMBUN, June 13, 2001 (available on the online database *Yomidasu Rekishikan* (last visited Feb. 8, 2013)). The newspaper articles in the rest of this paper can be found in the online databases mentioned here.

29. ASAHI SHIMBUN, June 27, 2001.

(司法制度改革　法曹人の意識変革が先決だ),[30] "Tackle the Justice System Reform with the Entire Cabinet" (司法改革へ内閣挙げた取り組みを),[31] and "Justice System Reform: Crucial Moment for Realizing 'User-Friendliness.'" (司法制度改革「身近　さ」の具体化へ正念場だ).[32] The justice system reform, thus, set sail with great fanfare.[33]

III. Return of the Old Policy-Making Process[34]

A. Bureaucracy for Implementation

I concluded a paper I published in 2001 with a statement that "Details still remain undecided. Much will depend on the legislative process that is expected to commence very soon."[35] The process for implementing the recommendations of the JSRC was initiated by the establishment of the Office for the Preparation of the Promotion of Justice System Reform (the Preparation Office) under the Cabinet. The main function of the Preparation Office was to draft the Law on the Promotion of Justice System Reform (the Promotion Law) and to prepare for the establishment of the Headquarters for the Promotion of Justice System Reform (the Promotion Headquarters) that would be headed by the Prime Minister.

The establishment of the Preparation Office marked the return of a legislative process that is dominated by the MOJ. A prosecutor was appointed to head the Preparation Office. The Office had approximately 30 members that included several members who were temporarily assigned from various government agencies and the JFBA, but the majority of members were prosecutors and judges. In other words, the implementation of the reforms was largely placed in the hands of judicial bureaucrats who themselves were the

30. MAINICHI SHIMBUN, June 17, 2001.

31. NIHON KEIZAI SHIMBUN, June 13, 2001.

32. YOMIURI SHIMBUN, June 13, 2001.

33. For a comprehensive analysis of the process of the justice system reform up to this point, see Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 1 ASIAN-PAC. L. & POL'Y J. 89 (2001).

34. This section is a revised and partly abridged version of Miyazawa, *supra* note 2, at 61-74. For a general analysis of the situation soon after the start of implementation, *see* Daniel H. Foote, *Introduction and Overview: Japanese Law at a Turning Point*, *in* FOOTE, *supra* note 5, at xix-xxxix.

35. Miyazawa, *supra* note 33, at 121.

main targets of the proposed reforms.

The Preparation Office did not limit its activities to the drafting of the Promotion Law and the preparation of the Promotion Headquarters. Although the Promotion Headquarters was to become the main agency for designing the details of the reforms, the Preparation Office proceeded to start discussions about substantive policy matters with various government agencies and outside organizations that were related to each reform item. Furthermore, the Preparation Office took the position that it was not required to open its policy-making process to the media and the public, because its policy-making process should be the same as that of every other policy-making processes in government agencies in Japan.

The Preparation Office succeeded in obtaining a higher status and more power than existing government agencies that were more directly related to particular issues. This was evident in the designing of a new system for the production of legal professionals, including the core reform issue of establishing graduate professional law schools.[36] Since the policy-making process on this issue was a typical example of implementation processes of JSRC recommendations, this and the following subsections will provide some details about it.

Since the JSRC recommended that new graduate professional law schools be established as part of the university system covered by the Law on School Education, the MEXT assigned the matter to its Central Education Council soon after the presentation of the JSRC recommendations to the Prime Minister. The Ministry's Sub-council on Universities established the Committee on Graduate Professional Law Schools (the Law School Committee) on June 15, 2001, only three days after the presentation of the JSRC recommendations.

The Law School Committee included 16 prominent members. Seven law professors were appointed to the Committee. Two other academics on the Committee were the president of Hitotsubashi University, who was an economist; and a professor from the National Institution of Academic Degrees, who was a specialist in higher education. A member was included from each of the MOJ,

36. *See generally* Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 S. TEX. L. REV. 419 (2002); Setsuo Miyazawa, *Education and Training of Lawyers in Japan: A Critical Analysis*, 43 S. TEX. L. REV., 491 (2002); James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303 (2004).

the judiciary, and the JFBA. Three members were appointed to represent end-users of legal services, including a vice president of *Rengo*, the largest labor organization, who was also a former JSRC member; a legal commentator from *Nihon Keizai Shimbun*, the top economic newspaper; and the head of the legal department of Toyota.

Establishing of the new system for the production of legal professionals included the following four main issues: (1) standards for the chartering of new graduate law schools; (2) a system of and standards for the accreditation of graduate law schools that have been chartered; (3) a proposal for a new National Bar Examination; and, (4) a new apprenticeship training system.

At its first meeting on August 31, 2001, however, the Law School Committee decided to limit its scope to the chartering standards, much simpler and more abstract than the accreditation standards. It even announced that the Preparation Office should decide the details of the legal education standards for chartering. In doing so, the Committee referred the more substantial question of the content of the new legal education system to the closed process dominated by judicial bureaucrats.

In the meantime, the Promotion Law was enacted on October 30, 2001. The Promotion Law stipulated that the government had the responsibility to draw up the Plan for the Promotion of Justice System Reform (the Promotion Plan) by a Cabinet decision and to take whatever legal, financial, and other measures that are necessary to implement concrete policies within the three-year period during which the Promotion Law remained effective.

The Promotion Headquarters was formed on December 1, 2001, and the Prime Minister became its nominal head. All the cabinet members also became members, including the Justice Minister and the Chief Cabinet Secretary as the vice heads. The real work was to be carried out by its Secretariat (the Promotion Secretariat), established as the successor of the Preparation Office. The new Promotion Secretariat had some 50 members. The Secretary General was a former judge who transferred to the MOJ as a prosecutor in the middle of his judicial career. The majority of staff was prosecutors and judges who were temporarily assigned to the Secretariat. Under the Secretariat, ten Deliberative Committees

(*kentokai*) were formed, each in charge of details of one area.[37] Some observers expressed a concern that a Secretariat staffed mainly by mainstream prosecutors and judges would largely try to implement the JSRC recommendations at the lowest possible level.

The Advisory Council (the Promotion Advisory Council) was established to advise the Promotion Headquarters. It had eight members. Since the Prime Minister was expected to attend some of its meetings, it was widely expected that the Promotion Advisory Committee would try to oversee the Secretariat.

B. Politics over Implementation of the JSRC Recommendations

Another complication that had not existed during the term of the JSRC was the aggressive involvement of LDP politicians. The continuous control of the government by the LDP since 1955, except the period between 1993 and 1996, had led to the development of a policy-making system that allowed intervention by LDP politicians at the stage between the preparation of a policy by respective government agencies and the final adoption of the policy by the Cabinet. The central forum for political intervention is the LDP Policy Affairs Research Council (the LDP Council), which is divided into several divisions each of which roughly corresponds with a ministry in the government. LDP politicians who represent the interests of respective ministries or concerned pressure groups, commonly called "*zoku*" (tribes), try to exert their influence to promote, block, or modify proposed policies affecting their respective constituencies. Among these divisions, the Research Council on the Judicial System had jurisdiction over judicial reform, and its Subcommittee on the System of Training of Legal Professionals, Legal Education, and Qualifying Examination started to meet in March 2002. LDP politicians in the Subcommittee were called *homu-zoku* (judicial tribe).

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37. Those areas were: labor disputes; access to justice; ADR; arbitration; administrative litigation; public participation in the administration of justice and criminal justice; publicly funded criminal defense system; internationalization; education and training of legal professionals; and, legal professionals. Each Deliberative Committee had eleven members. Their minutes are still *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/index.html (last visited Feb. 18, 2013). Daniel H. Foote was a member of the Deliberative Committee on the education and training of legal professionals. Satoru Shinomiya, Esq., a member of the one on the public participation in the administration of justice and criminal justice which designed the *saiban-in* system, attended our symposium.

These developments alerted progressive observers. Therefore, the same group of scholars who had earlier published a monthly magazine[38] started a new bimonthly magazine in May of 2002.[39] Around this time, the four major national dailies also published editorials which criticized the downgrading of many aspect of the new system, particularly the reform of legal education; examples of their titles were "Don't Forget the Starting Point of the Reform: Law Schools" (改革の原点を忘れるな　法科大学院),[40] "Law Schools: The Justice System Reform Is Endangered?" (法科大学院これでは司法改革が危ない),[41] "Don't Allow Emasculation of Law Schools" (法科大学院の骨抜きを許すな),[42] and "Law Schools: The Entire Legal Profession Should Seek to Realize Meaningful Contents" (法科大学院　法曹界あげて実ある内容めざせ).[43]

C. Politics of the Reform of Education and Training of Legal Professionals

Reform of the system for the education and training of legal professionals was the first priority of the Promotion Secretariat because the JSRC deemed it the basis of the entire judicial reform agenda. New laws and regulations were enacted in the fall of 2002 in order for new graduate law schools to be established in April of 2004.[44] The political process relating to this issue had reached a conclusion in August of 2002, ahead of all the other reform issues. As explained above, the establishment of a new system for the production of legal professionals included the following four main items: (1) standards for chartering new law schools; (2) the system and standards for accreditation of law schools that have already been chartered; (3) a new National Bar Examination; and, (4) a new system of apprenticeship training.

The design of the new National Bar Examination became the

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38. Gekkan shihō kaikaku (月刊司法改革) [Journal of Judicial Reform in Japan], *supra* note 14.

39. Its title was カウサ(Causa). This author was a member of the editorial board and wrote several articles for *KAUSA*. This bimonthly was closed in April 2004.

40. ASAHI SHIMBUN, Aug. 26, 2002.

41. MAINICHI SHIMBUN, June 17, 2003.

42. NIHON KEIZAI SHIMBUN, Feb. 2, 2002.

43. YOMIURI SHIMBUN, Oct. 13, 2002.

44. A Japanese academic year starts in April and ends in March, with summer, winter, and spring recesses interspersed.

most politically contentious issue in the debate over the reform of the system of education and training of legal professionals. The central subject of the debate was not the new examination itself, but the Preliminary Examination for those who want to take the new examination without going to a law school.

The MOJ initiated the debate. On the one hand, the JSRC proposed an exception to the requirement of a degree from a law school to sit for the examination for those who cannot afford to go to a law school, or for those who do not need to go to a law school because of their practical experience in law-related jobs. However, the MOJ argued that such limitations were impossible to design. Several members of the Law School Committee of the Central Education Council of the MEXT criticized the MOJ's position, as did members of the Advisory Committee of the Promotion Headquarters.

Yet, the MOJ and the Promotion Secretariat argued that their proposal would not violate the JSRC proposal because applicants' financial conditions and practical backgrounds could still be examined in the Preliminary Examination itself. They also argued that since the Preliminary Examination could be designed to test whether applicants have the same level of legal knowledge as that of law school graduates, their proposal would not violate the ideal presented by the JSRC.

Many observers believed that the MOJ and the Promotion Secretariat took such a position because they wanted to maintain the importance of the bar exam itself and with it, the power of the Ministry. The Deliberative Committee on Education and Training of Legal Professionals never published a formal report on this issue. It simply stopped discussion on the Preliminary Examination after June 2002, leading many observers to believe that the MOJ prevailed in this debate. Some observers believed that *homu-zoku* politicians contributed to this result through lobbying for the interest of the cram school industry.

The old Bar Examination would be gradually narrowed in the five-year transition after 2006. Much, therefore, depended on the implementation of the old and new Bar Examinations by the new National Bar Examination Committee (the Examination Committee). While the old Examination Committee consisted of only three members, with one each from the MOJ, the judiciary, and the JFBA, the JSRC proposed to expand it to include law professors and public

members. The idea was that such an expanded Examination Committee might not be as easily dominated by the MOJ and the judiciary, as was the case under the old system. Still, uncertainty remained.

After the political process strongly influenced by LDP politicians described above, the Cabinet approved on October 18, 2003 the establishment of graduate professional law schools in 2004 and immediately presented legislation designed to accomplish this to the Diet. In April of 2004, graduate professional law schools were ready to open their doors. One of the laws amended to make this possible is the Law on School Education. The amendment had two main purposes. One was to introduce the concept of professional schools as a new category of graduate programs at Japanese universities. Law schools would exemplify this plan. The other purpose was to introduce the concept of accreditation. The Education Minister would certify accreditation organizations, and more than one accreditation organization might exist in each field. Universities and colleges would be required to receive periodic accreditation. The accreditation system for law schools would exemplify this requirement. The introduction of graduate professional law schools, therefore, represents a major change in Japanese higher education as well.

The introduction of the new graduate law school system also entailed the passage of a law concerning coordination between law schools and the National Bar Examination. The provisions regarding the role of the Justice Minister *vis-à-vis* the Education Minister in chartering and accreditation were even more important. The Justice Minister may present opinions to the Education Minister regarding chartering standards and accreditation organizations; the Justice Minister may request the Education Minister to take measures against a law school; and, the Education Minister may seek consultation with the Justice Minister regarding the National Bar Examination.

Another law that was amended was the Court Act. The amendment reduced the length of judicial traineeship to one year, for those who pass the new National Bar Examination and to one year and four months for those who pass the old National Bar Examination.

The most crucial issue for the successful development of law schools and the new system for training legal professionals based on

law schools was the administration of the new National Bar Examination and the Preliminary Examination. If the new National Bar Examination was administered as a competitive examination with a limited quota or if the Preliminary Examination passed a large number of applicants who simply do not want to go to a law school, law schools would have no future. The amended and new laws regarding law schools did not have any provisions on how these two examinations should be administered.

After the highly politicized policy-making process described above, the MEXT issued the standards for chartering new law schools in March of 2003, and the Diet passed the law to allow incumbent judges and prosecutors to become faculty members at law schools while maintaining their status. Main features of new law schools were the following:

(1) The standard term of study at a law school is three years, but a law school may also have a two-year program.[45]

(2) LSAT-type aptitude test was introduced for law school applicants. The MEXT authorized two organizations, and law schools may choose any of them.

(3) A minimum of twelve full-time faculty members is required; fifteen to one student/faculty ratio must be maintained. However, one-third may be counted also as full-time faculty members at undergraduate law faculties and academic graduate schools of law until 2013. The teaching load of such double-counted faculty members might be simply doubled.

(4) 20% of full-time faculty members must have a practical experience of more than five years, and a system was established to allow incumbent judges and prosecutors to become full-time faculty members while maintaining their status. Faculty members from practice may be counted as full-time faculty members even when their teaching load is much smaller than regular faculty members.

45. Three-year program was considered a standard program, but law schools were also allowed to have a two-year program for those who have already acquired a high level of legal knowledge which does not require taking courses in the first year. This two-year program was widely considered a compromise for those who wanted to maintain undergraduate law faculties. In contrast, the new legal education system in Korea required the universities which were authorized to open a post-graduate profession law school to close its undergraduate law faculty. *See,* Setsuo Miyazawa, Kay-Wah Chan, & Ilhyung Lee, The *Reform of Legal Education in East Asia*, 4 ANN. REV. L. & SOC. SCI. 333, 354 (2008).

(5) The law school should be independent from the undergraduate law faculty in the same university. However, it may be established within the existing academic graduate school of law.[46]

(6) 30% of students must be graduates of non-law undergraduate programs or those who have social experiences. But the definition of social experience is determined by each school.

(7) The curriculum should not be limited to the subjects included in the bar exam, but rather it should consist of not only basic doctrinal courses, but also courses providing bases for legal practice (e.g., professional ethics), courses on theories of law (e.g., the sociology of law) and related disciplines (e.g., political science), and courses on advanced or applied fields of law (e.g., intellectual property law).

(8) 93 credits or more should be required for the completion of three year programs; 63 credits or more are required for two year programs.

(9) The degree of *Homu Hakushi* or J.D. will be awarded for those who complete the program.

(10) Every law school must receive accreditation every five years. The MEXT authorized three accreditation organizations, and law schools may choose any of them.

Applications were made in June of 2003 to the MEXT for 72 law schools. In spite of the stringent requirement of student-faculty ratio of 15 to one, 68 out of 72 applicants succeeded to obtain chartering by the MEXT. Since the 70 to 80% bar passage rate expected by the JSRC implied approximately 4,000 entering students, this unexpectedly large number of students worried many observers about the passage rate that would be much lower than the expected one.

The MEXT certified the Ministry-related National Center for University Entrance Examinations (NCUSS) and the JFBA-related Japan Law Foundation (JLF) as organizations to administer LSAT-type aptitude tests.[47] They administered the first exams in August 2003. In 2004, six more schools were approved, and the authorized

46. An academic graduate school of law designed to train legal academics is usually attached on top of an undergraduate faculty of law. Naturally a law school which established as part of an academic graduate school of law would have a closer relationship with the undergraduate law faculty on the basis of which the academic graduate school of law is established.

47. They are now merged.

number of entering students reached 5,825.[48]

Finally, the significance of the sheer number of nearly 6,000 students each year should be considered. As described above, the JSRC noted that "it is necessary to note that securing 3,000 successful candidates for the national bar examination annually is a goal to be achieved 'deliberately and as soon as possible,' and this number does not signify the upper limit." Law schools can produce 3,000 successful candidates when they graduate nearly 6,000 students in 2007. Still the passage rate would be only roughly 50%. That is substantially lower than 70 to 80% expected by the JSRC.

D. Immediate Crisis of the Law School System

Law schools faced an enormous roadblock early in their existence. That was the policy of the MOJ regarding the new National Bar Examination. The National Bar Examination Committee decided (1) to pass 900 to 1,100 in the new Examination in 2006 and (2) to pass approximately twice as many in the new Examination in 2007. Since approximately 2,200 students were expected to graduate in 2006 from two-year programs, the pass rate in that year was expected to reach 50%. Adding those who would fail in 2006 to graduates from both three-year and two-year programs in 2007, the pass rate would go down to nearly 30%.

These developments quickly had a strong chilling effect on potential applicants to law schools, particularly graduates of non-law undergraduate faculties and working people. The number of people who took the NCUEE LSAT, for instance, declined from 35,499 in 2003, to 21,298 in 2004, 17,791 in 2005, and 16,630 in 2006. The proportion of LSAT-takers with an undergraduate law degree increased from 58.4% in 2003, to 62.1% in 2004, 67.4% in 2005, and 68.5% in 2006. The proportion of law school entrants with an undergraduate law degree increased from 65.5% in 2005 to 70.1% in 2005, and 70.7% in 2006, while the proportion of entrants with work experience declined from 48.4% in 2004 to 37.3% in 2005, and 33.3% in 2006.[49] All in all, the pool of potential applicants radically

48. For general analyses of the situation around that time, *see* Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 107 (William P. Alford et al., eds. 2007); Foote, *Introduction and Overview: Japanese Law at a Turning Point*, *supra* note 34.

49. For these statistics, see Eri Osaka, *Debate over the Competent Lawyer in Japan: What Skills and Attitudes Does Japanese Society Expect from Lawyers?*, 35 INT'L J. SOC. L.

shrunk, and the diversity of student body also shrunk. This shift particularly strongly impacted a small number of law schools that had admission policies to attract non-law graduates and working students.

Under these extremely unfavorable developments, the first new National Bar Examination was administered on May 19-23, 2006. 2,087 candidates completed the examination, and 403 takers, or 19.3%, were eliminated without grading their essay questions because of their low scores in multiple choice part. The final result of the first examination was published on September 21, 2006. Of the total 2,087 graduates of two-year programs who took the exam, 1,009 passed, with the passing rate of 48.3%.

What has happened since then? Daniel H. Foote will explain it in detail in his contribution to this symposium issue, along with his analysis of the closely-related issue of the size of the legal profession, particularly the number of practicing attorneys.

IV. Unrecognized Tenth Anniversary

Except the new law school system which has continued to face an increasingly worsening crisis under the low and declining bar passage rate and with the introduction of the Preliminary Examination in 2011 which allows passers to take the Bar Examination without graduating from a law school, the justice system reform has ceased to attract media attention. Part of this may be because other reform items were far less controversial or many of them have been satisfactorily implemented. Whatever the reasons, the tenth anniversary of the JSRC recommendations on June 12, 2011, met with little fanfare and was nearly totally unrecognized by the media.

The only exception among the four major national dailies was *Asahi Shimbun*. First, it published a full-page article which reviewed ten major points of reform, with an interview of Koji Sato, former JSRC Chairperson.[50] This article reviewed (1) the *Saiban-in* system,

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1 (2007).

50. *Mijikana shihō e mosaku tsuzuku – kaikakushin ikensho kara 10nen* (身近な司法へ模索続く 改革審意見書から10年) [Continuing Groping for a User-Friendly Justice System: Ten Years Since the JSRC Opinions], ASAHI SHIMBUN, June 7, 2011. For an overview of most of the reviewed points, *see*, Miyazawa, *supra* note 2, at 74-89.

(2) the Japan Legal Support Center (nicknamed Hō-*Terasu*),[51] (3) education of legal profession and law schools, (4) labor conciliation, (5) judicial appointment, (6) provision of state-appointed attorneys at the investigation stage, (7) expansion of ADR, (8) administrative litigation, (9) the Intellectual Property High Court, and (10) binding force of the Inquest of Prosecution.

Second, *Asahi* published a series of five articles, each of which focused on one item.[52] The featured topics were (1) positive impacts of the increased number of practicing attorneys, particularly in areas which used to have no or only a very small number of lawyers, including a story about a small city in north-east Japan which was heavily damaged by the tsunami on March 11, 2011, (2) contrasting trends of labor conciliations and formal civil litigation, (3) administrative litigation, (4) provision of state-appointed attorneys at the investigation stage, and (5) in-house lawyers of companies and local governments and the crisis of the law school which produced such lawyers.

Third and finally, *Asahi* capped these articles with an editorial.[53] The editorial stated that in contrast to the highly successful Saiban-in system, the new system of training of legal professionals is bumping into a thick wall, criticized lawyers who oppose further increase of lawyers for their selfishness, and expressed a hope that a new committee appointed by the government will engage in a rich discussion which goes beyond selfish interests and motives.[54]

Asahi's evaluation may be summarized in the following way:

(1) Practicing attorneys: The policy to increase the number of new lawyers has had a positive impact to increase lawyers working in small towns, particularly those jurisdictions of branch district

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51. *See* JAPAN LEGAL SUPPORT CENTER, http://www.houterasu.or.jp/en/index.html (last visited Feb. 18, 2013); Miyazawa, *supra* note 2, at 84-86.

52. *Shihō wa ima - kaikaku no 10nen (1)-(5)* (司法はいま 改革の10年(1)~(5)) [The Justice System Now: Ten Years of Reform (1)-(5)], ASAHI SHIMBUN, June 6-10, 2011.

53. *Shihō kaikaku 10nen - jidai ninau sou dou sodateru* (司法改革10年 次代担う層どう育てる) [Ten Years of Justice System Reform: How Should We Rear the Next Generation of Lawyers?], ASAHI SHIMBUN, June 14, 2011.

54. *Asahi* also published interviews of three people, a lawyer who worked in a jurisdiction of a branch district court which had only one lawyer before his arrival, the JFBA president who defended JFBA's current proposal to reduce the number of new lawyers in terms of the interest of citizens, and Daniel H. Foote who argued that Japan still needs a wider variety of lawyers. *See Shihō kaikaku-sono saki wa* (司法改革 その先は) [Justice System Reform: What Lies Ahead?], ASAHI SHIMBUN, June 14, 2011, morning.

courts which used to have no or only one lawyer (called "zero-one" areas). JFBA's program to provide financial assistance to lawyers going to law offices in such areas (called *Himawari Kōsetsu Jimusho*) and law offices of the Japan Legal Support Center (nicknamed *Hō-Terasu*) operated by government budget have contributed to such a result. However, just having one lawyer in such an area is not enough, while there are also needs for better access to lawyers in urban areas from indigent people, including temporary workers and foreigners.

(2) *Hō-Terasu*: It was established as a nation-wide organization which provides the public with information about sources of legal assistance, administers civil legal aid and state-appointed criminal defense lawyers, provides legal assistance to crime victims, and provides legal services in depopulated areas. It has increased its law offices with full-time staff attorneys, and the number of callers for information and the application to civil legal aid have been increasing. However, it still needs to improve its public recognition.

(3) Law schools: Law schools have had a positive impact to increase the number of lawyers who go into new practice settings, including corporate legal departments and local governments. However, too many law schools were established, and, as a result, the bar passage rate has declined to 20 to 30%. Restructuring of the system is inevitable.

(4) Judicial training and appointment:[55] The system to give opportunities to incumbent judges to work outside the judiciary has spread, but the appointment of practicing attorneys as judges has been very limited, with only one in 2010.[56]

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55. Lower court judges are appointed by the Cabinet on the basis of the list of candidates prepared by the Supreme Court for a term of ten years (Article 80 (1), Constitutional Law of Japan). It is widely believed that the Cabinet makes appointments totally according to the list. Supreme Court's General Secretariat used to have a total monopoly of the authority to nominate judicial candidates. Following recommendations by the JSRC, the Advisory Committee on the Nomination of Lower Court Judges was established in 2003; the General Secretariat now has to obtain advisory opinions from the Committee before making final nomination to the Cabinet. Also following JSRC recommendations, a system was introduced in 2005 to give opportunities to assistant judges to work outside the judiciary in the middle of their ten-year term. Still another reform about judges following JSRC recommendations is to increase transparency of the system of evaluating incumbent judges, by allowing judges, among other things, to request a written evaluation to the superior. *See* Miyazawa, *supra* note 2, at 86-89.

56. For an overview of the court system and different types of judges, see, Gerald Paul McAlinn, *Introduction: Japan, in* McAlinn, *supra* note 2, at 30-38.

(5) Intellectual Property High Court: The Intellectual Property High Court was established in 2005 as a special branch of the Tokyo High Court with sole jurisdiction to review decisions of the Japan Patent Office (JPO) and to decide appeals to district court decisions in patent or other technical IP cases.[57] The rate of overturning JPO decisions is increasing, and the business community has welcomed it.

(6) Administrative litigation: The provision about standing in the Administrative Case Litigation Act was slightly liberalized in 2005. While there have been some cases which seem to indicate its positive impact, the overall number of administrative litigation has not increased.

(7) Labor conciliation: The Labor Conciliation Procedure was introduced in 2006 as an ADR annexed to a district to handle disputes between workers and employers. The case is handled by a panel of a judge and two conciliators. Settlement is tried first, and, if the parties cannot settle, the panel will propose a resolution, and it will be finalized if both parties accept. Users are mostly satisfied, and the number of cases has been increasing.

(8) Enhancement of ADR: An act to promote the use of ADR was enacted in 2006, and the system by which the government accredits appropriate organizations as ADR providers was introduced. While the number of such provided reached nearly 100 in 2011, they have not yet been well used.

(9) Expansion of the provision of state-appointed criminal defense lawyers:[58] Free defense lawyers were available only after indictment before the reform. In 2006, provision of state-appointed defense lawyers was expanded to cover suspects of relatively serious crimes after the judicially authorized detention which usually occurs 72 hours after arrest, and it was expanded to cover detained suspects less serious crimes in 2009. The number of suspects who had a lawyer increased ten times from 2007 to 2010. However, this has created a problem that interview rooms at police stations where suspects are detained are crowded by lawyers, and lawyers often have to wait their turn.

(10) Binding force of decisions by the Prosecution Inquest

57. *See* Edward S. "Ted" Johnson, Jr., *Intellectual Property and Licensing, in* McAlinn, *supra* note 2, at 372-73.

58. *See* Miyazawa, *supra* note 2, at 75.

Board: Prosecution Inquest is the system where eleven randomly-selected local voters review a prosecutor's decision not to indict in a case. While its decision was totally advisory before the reform, it became binding in 2009 once the Board twice decided that the suspect should have been indicted by eight or more votes. Practicing attorneys are appointed as special prosecutors in such cases. There had been four such decisions by June 2011, including the one against Ichiro Ozawa, a powerful politician, but no one had been convicted. There is a criticism of the system for allowing public sentiments to overturn prosecutor's decision. The propriety of the system will be questioned if acquittals continue.

(11) *Saiban-in* system: 11,889 people served as *saiban-in* from August 2009 to March 2011. More than 95% responded after their service that it was a worthwhile experience. Review of the system is to be conducted after three years of operation. Exclusion of sex offenses and drug offenses and the liberalization of *saiban-in's* duty of confidentiality are likely to be among the issues to be discussed.

These *Asahi* articles certainly provide useful information and perspectives to review the first ten years of justice system reform initiated by the JSRC. However, they are not enough. No other media outlet paid serious attention and no law school, nor academic association held a symposium. *Keidanren* seemed to have totally forgotten the role it played ten years ago, and, most of all, the Japanese government has shown no interest to conduct a comprehensive review of the reform.

This situation was extremely unfortunate because, as I have explained above, JSRC's recommendations included a wide range of reform proposals which might affect many aspects the people, society, and country of Japan. The tenth anniversary was an ideal occasion to examine successes, failures, and remaining issues of the justice system reform in Japan. There was a dire need to fill this vacuum.

V. The Symposium

Under the new Chancellor and Dean, Frank H. Wu, the University of California, Hastings College of the Law started to strengthen its ties with East Asia and to enhance its offerings in East Asia. The establishment of the East Asian Law Program was a vital

step in that direction.[59] I thought that a symposium on justice system reform would provide an ideal occasion to inaugurate the program, and leaders of the College accepted my proposal.

The symposium was planned with a full-day formal program on Friday, September 7, 2011, and a half-day informal program on Saturday, September 8, 2011. In addition to a keynote speech, the formal program on September 7 was divided into four major areas of reform: (1) legal education and legal profession; (2) courts and judges; (3) civil justice and ADR; and (4) criminal justice. General comments were added at the end. On the morning of September 8, a presentation on judicial appointment and evaluation was placed at the beginning, and a free discussion with spontaneous comments filled the rest of the morning. I was to take the role of moderator on both September 7 and 8.

We were extremely fortunate to have Shunsuke Marushima, Esq., as the keynote speaker. A practicing attorney with an experience of 35 years by the time of the symposium, interspersed with roles of public service, he was intimately involved in the justice system reform in Japan, particularly as a senior staff member of the Secretariat of the JSRC in 1999-2001 and as the Secretary General of the JFBA in 2008-2010. He is currently a board member of the Nuclear Damage Liability Facilitation Fund (原子力損害賠償支援機構) which was established by the Japanese government in August 2011 in the wake of the disaster at the Fukushima Daiichi Nuclear Power Plant on March 11, 2011, and a member of the Judicial Training System Review Committee (法曹養成制度検討会議) established under the MOJ in August 2012, just a few days before the symposium. We were grateful to him for his speech as well as candid comments throughout the symposium, all based on his personal experience. Professor Hiroshi Fukurai kindly provided interpretation. Kozo Yabe, Esq., and Akiko Kawakatsu, Esq., kindly helped Mr. Marushima as his interpreters for discussion throughout the symposium.

Each session on the four selected areas consisted of an invited speaker and a discussant selected from among faculty members of the University of California, Hastings College of the Law. The

59. *See University of California Hastings College of the Law East Asian Law Program*, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, http://www.uchastings.edu/academics/study-abroad-exchange/docs/UC%20Hastings%20East%20Asian%20Law%20Current.pdf.

invited speakers and the general discussant were all top scholars in Japanese or East Asian legal studies. We were very honored and proud to have them. Following was the structure of the symposium.

September 7, 2012.

Morning:

Introduction: Setsuo Miyazawa, Professor of Law, Aoyama Gakuin University; Visiting Professor of Law, University of California, Hastings College of the Law.

Keynote Speech: Shunsuke Marushima, practicing attorney; former senior staff member of the JSRC; former Secretary General, JFBA. (In Japanese; consecutive interpretation was provided by Professor Hiroshi Fukurai, Professor of Sociology, University of California at Santa Cruz)

Session 1: Legal Education and Legal Profession.

Speaker: Daniel H. Foote, Professor of Law, University of Tokyo.

Discussant: Richard Zitrin, Lecturer in Law; University of California, Hastings College of the Law.

Afternoon:

Session 2: Courts and Judges.

Speaker: Tom Ginsburg, Leo Spitz Professor of International Law and Professor of Political Science, University of Chicago.

Discussant: Dorit Rubinstein Reiss, Professor of Law, University of California, Hastings College of the Law.

Session 3: Civil Justice and ADR.

Speaker: Mark Levin, Professor of Law, University of Hawai'i William S. Richardson School of Law.

Discussant: Eric Sibbitt, Adjunct Professor of Law, University of California, Hastings College of the Law.

Session 4: Criminal Justice.

Speaker: Hiroshi Fukurai, Professor of Sociology, University of California at Santa Cruz.

Discussant: Keith J. Hand, Associate Professor of Law, University of California, Hastings College of the Law.

General Comments: Frank K. Upham, Wilf Family Professor of Property Law, New York University.

September 8, 2012.

Morning: Informal Session.

Presentation: Judicial Appointment and Evaluation.

Speaker: Takayuki Ii, Associate Professor of Law, Hirosaki University.

Free Discussion.

VI. This Symposium Issue

Although a videotaping of the formal program on September 7 can be seen online,[60] the symposium would not produce much impact on the analysis of justice system reform in Japan by a broad range of scholars in the future unless papers are published on the basis of it. This symposium was also too precious to finish without publications because this was the first comprehensive symposium on justice system reform in Japan and the group of scholars who got together there was truly distinguished.

Fortunately, *HICLR* had agreed at the planning stage of the symposium that it would publish a symposium issue. I was most grateful to its editors. In addition to an English translation of Mr. Marushima's keynote speech by Professor Fukurai, I asked Professors Foote, Ginsburg, Levin, Fukurai, Upham, and Ii to write an article or a note based on their respective presentation or comments. Furthermore, while he was a discussant, I asked Professor Sibbitt to write a paper because he is himself a Japanologist. All of them graciously accepted my request. Six scholars eventually submitted their contributions.

After Mr. Marushima's keynote speech, the articles and comments are arranged thematically. The two articles on legal education reform by Professors Foote and Sibbitt come first, and they are followed by Professor Ii's article on the reform of judicial appointment and evaluation of incumbent judges. Professor Levin's paper on civil justice comes next, and Professor Fukurai's paper on citizen participation in the administration of justice is placed at the end of the substantive part of this symposium issue. Professor Upham's general comments conclude the symposium issue.

Mr. Marushima's keynote speech, "Historical Genealogy of Japan's Judicial Reform: Its Achievements and Challenges,"

60. The formal program on September 7 was completely videotaped, and it can be seen at http://hastingsmedia.org/Downloads/japan/.

provides us with a concise overview of justice system reform in Japan, from its historical background, to its present difficulties under the fading interest of the public and the government. His speech points out all the major items to be discussed.

Professor Foote's article, "The Trials and Tribulations of Japan's Legal Education Reforms," is truly a *tour de force* and, with no doubt, the most detailed account of the legal education reform in Japan, either in English or otherwise. Throughout the article, his deep and broad involvement in the reform process both as a member of various government committees and as the only American full-time professor at a top Japanese law school provides information and insights unavailable elsewhere. He also discusses the debate over the number and roles of lawyers as one of the crucial issues which has and will affect the direction of legal education in Japan. He discusses many positive contributions of the new law school system most of which are unknown to the public and policy-makers. His view about the future of the law school system was fairly pessimistic before learning the results of the 2012 preliminary examination. It has become more pessimistic after learning the results. This article will instantly become essential reading for anyone who wants to discuss the legal education reform in Japan.

Professor Sibbitt's article, "Adjusting Course: Proposals to Recalibrate Japan's Law Schools and Bar Exam System," is a crisp presentation of proposals to save the law school system and realize its original aspirations. Probably not too surprisingly, his proposals resemble many of the proposals from progressive reformers in Japan[61] and the basic features of the new law school system Korea introduced after learning the tribulations of the Japanese reform.[62] With those proposals, Professor Sibbitt's article nicely complements Professor Foote's article.

Though fairly short, Professor Ii's article, "Japan's Judicial System May Change, But Its Fundamental Nature Stays Virtually the Same?: Recent Japanese Reforms on the Judicial Appointment and Evaluation," is probably the first English-language paper about the reform of judicial appointment and evaluation of lower court judges in Japan that is easily accessible outside Japan.[63] He states

61. *See* Kawabata & Miyazawa, *supra* note 36; Miyazawa, Chan & Lee, *supra* note 45, at 344-46.

62. *See* Miyazawa, Chan & Lee, *supra* note 45, at 353-55.

63. Professor Foote earlier published a much longer article on this and related

that many JSRC proposals were systematically altered or removed in the process of rule-making and implementation, and, as a result, there remains virtually an unchanged system of institutional authority wielded by the Supreme Court and the judiciary as a whole. He concludes this article by presenting two possible scenarios for the future, both positive and negative.

Professor Levin's paper, "Circumstances That Would Prejudice Impartiality: The Meaning of Fairness in Japanese Jurisprudence," looks at a concept which is discussed less often in the context of civil justice, than in the context of criminal justice, namely the concept of procedural fairness or due process. He points out that the 1996 revision of the Code of Civil Procedure incorporated that concept in its Article 2 and analyzes judicial disqualifications to find out how it has been treated. Unfortunately, relevant published decisions are scarce. He contemplates, however, a decision handed down by the Supreme Court in 2011, which was the 10th anniversary of the JSRC report, and a few other cases suggest a possibility of the concept playing increasingly more visible role in Japanese jurisprudence.[64]

Professor Fukurai's article, "A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation," is another *tour de force* in this symposium issue. He not only discusses the *saiban-in* system and the reform of the Prosecution Review Commissions (Prosecution Inquest) *per se*, but also analyzes a broader range of criminal justice issues in light of potential impact of the *saiban-in* system. Furthermore, he goes beyond criminal justice and discusses possibility to introduce lay adjudication into civil and administrative cases. This will serve as an ideal starting point for any scholar who wants to conduct a comprehensive study of the implications of citizen participation in justice system as a whole.

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topics in a Japanese journal. *See* Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HŌSHAKAIGAKU [THE SOCIOLOGY OF LAW] 128 (2007).

64. Professor Levin and his colleague have compiled a comprehensive bibliography about the implementation of JSRC recommendations. I am most grateful to their great work. See, Mark A. Levin and Adam Mackie, *Truth or Consequences after the Justice System Reform Council: An English Language Bibliography from Japan's Millennial Legal Reforms*, 14 ASIAN-PAC. L. & POL'Y J. (forthcoming April 2013).

Finally, Professor Upham's comment, "Japanese Legal Reform in Institutional, Ideological, and Comparative Perspective," provides us with an opportunity to analyze the Japanese situation from a broader or higher vantage point. Many authors writing about the justice system reform in Japan are actually participants of its political process, one way or another; at this symposium, Mr. Marushima, Professor Foote, Professor Ii, and myself, for instance, have been certainly so. People like us may tend to look at the scene from one's vantage point on the ground level and may fail to perceive a larger picture. Professor Upham's masterful comment is refreshing and stimulating. He presents three points. The first point is institutional: in a democratic country, there should be no surprise that social progress proposed by some elite can be aborted by other people who wanted to maintain their comfortable *status quo*. This point invites us to conduct political analyses of the forces and mechanism which worked in the process of success or failure of specific reform proposals. It also raises a conceptual question of whether the policy-making process can be considered democratic if those people protecting their vested interests have privileged positions and more or less control the policy-making process. The second point is ideological: increasing lay participation in the administration of justice may be contrary to the goal of the justice system reform to promote the rule of law in Japan. This point invites us to examine in what sense the JSRC used the concept of the rule of law and whether we accept it or not.[65] The third point is comparative: while legal reformers outside the United States often take procedural justice embraced in the United States as their own ideal, the United States has failed miserably in substantive justice, so that reformers in other countries like Japan should be careful not to lose substantive justice. This point is probably most profound. Is trade-off between procedural justice and substantive justice inevitable? To use the term repeated by the JSRC, what "shape of our country" do we want?

Of course, no single symposium can possibly cover all the relevant issues of a broad social phenomenon like the justice system reform in Japan. Still, I hope that this symposium issue will become an indispensable source of reference for any scholars and students who want to investigate it by themselves and inspire more and better investigations.

65. For my view, see *supra* note 19 and accompanying text.

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