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Legal Reform in Contemporary Japan

Eric A. Feldman¹

I. Introduction

In this chapter I offer a preliminary assessment of a quickly moving target—legal reform and its impact on rights in Japan. Although a broad consensus has emerged among interested parties that at least some degree of reform is desirable, there is significant disagreement about the goals of reform, and also about the likelihood that it will achieve certain objectives. Some commentators believe that the Japanese legal system is on the cusp of a “revolution” that will shore up long-neglected rights and create new entitlements. Others predict that the consequences of reform will be modest; and they despair that aggrieved individuals will remain unable to obtain legal representation, while Japanese companies will be at a competitive disadvantage in the global marketplace. This essay charts a middle course. It notes that the source of many of Japan’s new legal institutions is the United States and Europe, but demurs from the view that the world’s legal systems are converging. Change is afoot in Japan, it argues, but its consequences are likely to be more muted, and have a different complexion, than many have suggested. Rather than producing a revolution in the law, current reforms will lead to an incremental shift, with the Japanese legal system remaining a distinctive blend of indigenous process and practices influenced by Western doctrines and dispositions.²

1. Professor, University of Pennsylvania Law School. Funding for the research and writing of this chapter was provided by the University of Pennsylvania Law School’s Summer Research Fund and a grant from the University of Pennsylvania’s Center for East Asian Studies. I am grateful to David Johnson, Setsuo Miyazawa, and Frank Upham for their insightful comments on the first draft of this paper, to Eri Osaka for her willingness to share and explain some crucial data, and to Harry Scheiber for inviting me to contribute to this volume, and then being extraordinarily patient while waiting for the final product.

2. In his analysis of electoral reform, legal education, and corporate governance, John Haley makes a similar point, arguing that “the reforms in these three areas have left untouched basic structural arrangements that appear to be the critical determinants of distinctively Japanese patterns of

Legal reform in Japan is a work in progress; many of its elements have only recently been implemented, and some have yet to unfold. For that reason, Japan provides near-laboratory conditions for the study of legal change. Rather than retrospectively evaluating the causal relationships between changes in legal rules and procedures and their consequences, the current effort to reform Japan's legal system gives observers a real-time vantage point from which to examine the link between shifts in the institutional structure of the legal system and its actual operation. In essence, the reforms offer an opportunity to test long-standing claims about the relative influence on law in Japan of factors like socio-cultural norms, political power, and economic interests. For those who are convinced that the operation of the Japanese legal system is particularly dependant upon either institutional structure or cultural norms, contemporary legal reform in Japan offers a sobering test of their preconceptions.

Clearly, the impetus to reform can be attributed to a wide range of factors, and the effort to disaggregate and analyze them has already triggered a lively academic debate.³ This essay focuses not on the background factors that contributed to the initiation of reform, however, but on the consequences of structural and institutional change for the operation of law in Japan. At present, the key agents of change are unambiguously the elites—law professors, big business, the bar association, the judiciary, and government officials from a number of ministries, among others—and the locus of change is the bureaucracy, not the legislature. A process of reform dominated by unelected elites with vested interests may lead one to assume that it will be superficial, incremental, and self-serving; and to at least some extent that is the case. But once set in motion, changes that affect the operation of the legal system can take unexpected turns. It is too early to anticipate the many bends in the road; instead, this essay maps the general contours of reform and speculates on the future topography of the Japanese legal system, while remaining acutely aware of the humility demanded by the enterprise of prediction.

During the past 150 years, Japan has experienced two periods of fundamental legal change. The first, which started in the late 1860s and continued until the end of the nineteenth century, resulted in the creation of the Imperial Diet; the enactment of European-influenced laws like the Commercial Code, Civil Code, and

political, legal and organizational behavior. John O. Haley, "Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?" Washington University in St. Louis School of Law Faculty Working Paper Series #05-10-02, <http://ssrn.com/abstract=825689>.

3. See, for example, Setsuo Miyazawa, "The Politics of Judicial Reform in Japan: The Rule of Law at Last?" *Asian Pacific Law and Policy Journal* 2 (2001): 89–121, http://www.hawaii.edu/aplpj/table_of_contents/June2001artindex.html.

Code of Civil Procedure; the adoption of the Meiji Constitution; the development of a coordinated, hierarchical system of courts; the restructuring of the tax system, and more. To enable those reforms a new legal language was created, since at least some of the European concepts that inspired Japan's reforms were not easily captured with extant Japanese forms of expression.⁴ During that period, Western terms like "democracy," "citizen," and "freedom" were translated into Japanese by combining ideographic characters (kanji) that came as close as possible to capturing their meanings. It was then that a Japanese word for "rights" was first created.⁵

The second moment of profound legal change in Japan occurred in the aftermath of World War II, when General Douglas MacArthur and the Allied troops occupied Japan. Between the end of the war and the time when the American occupying forces left Tokyo in 1955, the Meiji Constitution was replaced by MacArthur's postwar Constitution; the Emperor renounced his divinity and became a ceremonial symbol of the state; the House of Peers was eliminated, subjecting all members of the Diet to election; all citizens over 20 years of age were given the right to vote; a broad array of civil liberties was written into the Constitution; and judicial independence was constitutionally established. Since the necessary legal vocabulary had already been translated into Japanese, the reforms of the twentieth-century concentrated on giving content to some of the legal concepts.

After a heavy dose of Europeanization in the nineteenth century and Americanization in the postwar period, one might wonder whether—or to what extent—the Japanese legal system has retained an indigenous imprint. With a constitution that reads like the U.S. Constitution if it were edited by the American Civil Liberties Union, black letter laws that are often indistinguishable from their European ancestors, and legal professionals educated in the continental tradition, there seems to be little room for Japan's legal traditions to shine through. Nonetheless, these successive waves of reform, with the infusion of Western legal forms and norms that have accompanied them, have not made the Japanese legal system a mere echo of those in the West. Among the many differences is that there is dramatically less litigation in Japan than in the United States;⁶ that only 1,500 new legal professionals—attorneys, prosecutors, and judges—are trained and licensed each year in

4. Eric A. Feldman, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (New York, 1999).

5. *Ibid.*

6. John Owen Haley, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies* 4 (1978): 359–90; J. Mark Ramseyer, "Reluctant Litigant Revisited: Rationality and Disputes in Japan," *Journal of Japanese Studies* 14 (1988): 111–23.

Japan (compared to almost 43,000 new American JDs in the class of 2005);⁷ that Japanese incarceration rates are a fraction of what they are in the US;⁸ and that rather than the electorate or elected politicians selecting judges, in Japan there is a career judiciary administered by a centralized court bureaucracy.⁹ To what these differences should be attributed is a matter of some dispute, with partisans lining up behind explanations that stress political manipulation,¹⁰ cultural proclivities,¹¹ and economic interests.¹² All agree, however, that the differences are clear. And some believe that certain differences exemplify a gap between a Western-style legal system based on the rule-of-law and a less transparent—a few would even venture to say less modern—system that lags behind those in the West.¹³

In an explicit effort to close this perceived gap since the mid-1990s, the Japanese government has been pursuing an agenda of legal reform. Under the banner of strengthening the rule of law, twenty-first-century bureaucrats—with varying degrees of support from the organized bar, big business, and consumers' groups—have followed in the footsteps of their nineteenth- and twentieth- century forefathers by looking to the West for legal inspiration. Unhindered by academic worries about American hegemony or Asian values, they have embarked on a wide-ranging program of change that includes the restructuring of legal education;¹⁴ the creation of new laws involving areas like freedom of information,¹⁵ product liability,¹⁶ and

7. NALP, *Class of 2005 Selected Findings*, www.nalp.org/assets/316_errsselectedfindings05.pdf (2006). The exact figure for the class of 2005 is 42,672 graduates from 188 ABA-accredited law schools. In 2010, the number of new legal professional in Japan will be increased to 3000.

8. David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York, 2002).

9. J. Mark Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago, 2003).

10. Haley, "The Myth of the Reluctant Litigant," 359.

11. Eric A. Feldman, "The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First-Century Japan," *Michigan Journal of International Law* 27 (2006), 743–XX.

12. Ramseyer, "Reluctant Litigant Revisited."

13. Kawashima Takeyoshi, *Nihonjin no ho ishiki [The Legal Consciousness of the Japanese]* (Tokyo, 1967).

14. See generally Robert F. Grondine, "An International Perspective on Japan's New Legal Education System," *Asian-Pacific Law and Policy Journal* 2 (2001): 1–5, <http://www.hawaii.edu/aplpj/pdfs/v2-13-Grondine.pdf>.

15. Jonathan Marshall, "Freedom of Information, Legal Mobilization, and the Taxpayer Suit Boom in Japan," Harvard University Program on U.S.-Japan Relations Occasional Paper 04-06.

16. Phil Rothenberg, "Note: Japan's New Products Liability Law: Achieving Modest Success," 31 (2000): 453–XX.

corporate governance;¹⁷ the reform of entire legal codes;¹⁸ and the implementation of juries in at least some types of criminal cases.¹⁹

The breadth of the reforms has created high expectations for their consequences. Despite the inherent difficulty of predicting the specific outcomes of institutional change, reformers like those at the Ministry of Justice, Ministry of Education, Secretariat of the Supreme Court, *Keidanren* (the association representing big business), Japan Federation of Bar Associations, and influential legal academics appear to be optimistic about the likelihood of significant transformation. In their view, attorneys will be more plentiful, better trained, and better able to provide a wide range of legal services. The judiciary will attract new judges from a diverse range of backgrounds. The study of law will become both more intellectually engaged and more pragmatic. Cram schools, now essential for most students who want to become lawyers, will lose some of their importance. Citizens will become more engaged with the legal system and more conscious of being the bearers of rights. Even the working of the Ministry of Justice and the Secretariat of the Supreme Court of Japan, the most elite of Japan's legal institutions, will become more transparent.

Although the ink has not dried on many reforms, some changes are already evident. Japanese legal academics, for example, have experienced a rapid expansion of employment possibilities in the newly created professional law schools, which have massive staffing needs and a limited pool of candidates on which to draw. Japanese students who want to become legal practitioners (attorneys, prosecutors, or judges) have since 2004 been required to attend a post-graduate law school, whereas in the past legal education was almost purely an undergraduate pursuit. Japanese attorneys are creating larger and more geographically diverse firms, taking advantage of newly loosened restrictions on the organization of legal practice. The scope of activities of the Ministry of Justice, *Keidanren*, and other organizations now includes a broad array of activities borne of the legal reform efforts.

From the perspective of the professional, that is, provider, side of the legal system, therefore, the reforms have already had an impact. But reformers have em-

17. Curtis Milhaupt, "In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan," *Colorado Law Review* 105 (2005): 2171-XX.

18. Shoza Oto, "Reform of Civil Procedure in Japan," *American Journal of Comparative Law* 49 (2002): 561-83.

19. Kent Anderson and Mark Nolan, "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspectives," *Vanderbilt Journal of Transnational Law* 37 (2004): 935-XX.

phasized that their goal is not simply to affect the privileges and prerogatives of legal professionals. Instead, reform of the legal system is intended to have concrete payoffs for ‘average’ citizens. As stated by one elite reform group, the Judicial System Reform Council, “the system must be reformed so as to enable the people to easily access the justice system as users and to obtain proper, prompt and effective remedies in response to diversified needs.”²⁰

More specifically, those payoffs are said to include easier and less expensive access to attorneys; a more robust rule of law that will foster more ever more predictable litigated outcomes; easier access to legal aid for criminal defendants; and trials that move efficiently and rapidly through the courts, among a host of other benefits. So far, however, the reforms have been little felt by those who may potentially seek justice through the legal system. That is not surprising, since many reforms have not yet been fully implemented. But if the impact of Japan’s current legal restructuring does not ultimately reach the citizenry, the reforms will have to be understood as simply a realignment of elite control over the legal system rather than a fundamental change in how the Japanese resolve their conflicts. The question raised by the reforms, therefore, is not such much *whether* they will make a difference, but *what sort* of a difference they will make. And that question echoes those asked about legal reforms in past eras; will the current spate of reforms reshape Japanese law?

II. Rights, the Rule of Law, and Legal Reform

In the view of many reformers, the calculus of legal change is straightforward. For the Japanese legal system to look more like that in the West, it needs a more robust rule of law. A stronger rule of law depends upon the widespread understanding and appreciation of rights. Consequently, the architects of Japan’s twenty-first-century legal reform have devoted a great deal of attention to two tasks: enriching the public’s understanding of the meaning of “rights,” and expanding the range of rights to which the average citizen can make a claim. As stated in the government’s blueprint for legal reform,

[T]he role of the justice system will become dramatically more important in the Japanese society of the twenty-first century. In order for the people to easily secure and realize their own rights and interests... [A] system must be coordinated to properly and promptly resolve various disputes between the people based on fair and clear legal rules. The justice system in the twenty-first century must be

20. Justice System Reform Council, “Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the Twenty-First Century,” June 12, 2001, www.kantei.go.jp/foreign/judiciary/2001/0612report.html.

one that establishes predictable, highly clear and fair rules through the resolution of disputes and effectively checks violation of the rules. At the same time, it must be one that affords a proper and prompt remedy to people whose rights or freedoms have been infringed.²¹

One can easily be misled by such rhetoric into thinking that for the past several centuries the Japanese legal system has been operating in the absence of either a concept of rights or the assertion of rights by aggrieved parties. Some scholars have erroneously made such a claim, pointing to the difficulties encountered by nineteenth-century Japanese legal scholars who endeavored to translate European legal codes into Japanese. Lacking a single Japanese character or set of characters that captured the meaning of German, French, English, or Dutch words for “rights,” scholars created a new word in Japanese, *kenri*, which combined a character that refers to power and authority (*ken*) with that for profit or interest (*ri*).

In fact, well before the creation of the word *kenri*, and centuries earlier than the founding fathers arrived on America’s shores, rights-like concepts existed in Japan and people asserted them when it was in their interest to do so.²² In conflicts over land, money, food, and employment, among others, individuals made claims to those things to which they believed they were entitled; and both formal legal rules and informal social norms were referenced to determine the outcome of rights-based disputes. Not surprisingly, the boundary between formal and informal was fluid, and with each successive wave of legal reform in Japan some “new” rights have been written into the updated constitution and codes, while others that were once legally enforceable have been stripped of their legitimacy.

Consequently, Japan’s twenty-first-century legal reforms do not involve the creation of the concept of rights in Japan; nor are the reforms ushering in a new era in which Japanese citizens will for the first time come to understand and value their rights. Instead, like legal reform in the nineteenth and twentieth centuries, what we are seeing is the articulation and formalization of certain rights, the re-conceptualization or strengthening of others, and the creation of procedures that facilitate the ability of citizens to enforce them. The potential consequences of such efforts should not be minimized. Indeed, one can imagine how the successful enforcement of a variety of newly formalized rights could affect, for example, the balance between state power and individual autonomy, the likelihood that people will pursue their grievances over personal injuries, and the ability of certain groups to retain

21. Justice System Reform Council, “Recommendations of the Justice System Reform Council.”

22. Feldman, *The Ritual of Rights in Japan*.

counsel and seek redress. Nonetheless, it is important to sidestep the flood of rhetoric suggesting that Japan is on the brink of fundamental change, in which it will cast aside (at last) its traditional roots and become (finally) a truly modern, and Western, legal system.²³ Current reforms are building on over a century of developments in the Japanese legal system, in which it has incorporated elements of both European civil law and American common law and reshaped them to fit local conditions.

Although it is too early to reach any firm conclusions about the ultimate impact of recent legal changes and their influence on the assertion and protection of rights, it is possible to make some tentative observations about at least a few of the most significant reforms. They include (1) the creation of new institutions for legal education; (2) an increase in the number of licensed legal professionals; (3) the appointment of lay decision-makers in certain criminal cases; (4) improvement in citizens' access to courts and justice; and (5) enactment of new substantive laws. Together, these changes touch upon many of the core elements of the Japanese legal system, and they could in theory reshape the substance and pace of rights assertion. In fact, however, as I will discuss in more detail below, their impact is unlikely to be so sweeping.

III. Reforming Legal Education

Legal education represents the earliest, most visible and most controversial element of recent reforms. For over a century, students interested in careers as legal professionals followed a path in Japan that was modeled on continental European systems. The study of law was pursued by university undergraduates who enrolled in the faculty of law, where they generally spent their first two years getting a general education in the social sciences, and their final two years engaged in more specialized legal study. A few students with scholarly ambitions might enroll in a masters or doctoral course, or spend a year or two as the assistant (*jyoshu*) to a senior professor.²⁴ But the great majority of legally-trained undergraduates left university

23. See, for example, Carol Lawson and Simon Thornley, "Perceptions of the Current State of the Japanese Legal System: Interview with Kōji Satō, Chairman of Japan's Judicial Reform Council," *The Australian Journal of Asian Law* 4 (2002): 76–XX, at 79 ("So I believe there is a need to re-examine the inadequacies of the Japanese legal system from the foundations up.... The modern shape of the legal system was formed under the Meiji Constitution, which had been born against the backdrop of the Black Ships. The defeat in the war set the scene for the birth of the current Constitution. It was under this Constitution that great legal reforms were attempted. I believe that this time we should act on our own initiative, using our own strength and build the judiciary, as it should be.")

24. For a discussion of the internal dynamics of law faculties in Japan, see Eric A. Feldman, "Mirroring Minds: Faculty Recruitment and Promotion in Japan's Law Faculties," *American Journal of Comparative Law* 4 (1993): 465–479.

and got a job in a company, often in legal departments or other positions that took advantage of their training.

For those who were interested in becoming licensed legal professionals, the road was clear but treacherous. They were required to spend almost two years in the government's Legal Training and Research Institute (LTRI), after which they would emerge as a judge, prosecutor, or attorney. In order to be admitted to the Institute, however, they had to pass one of the world's most challenging exams. Until the early 1990s, only 500 of the approximately 25,000 examinees passed the annual exam, and even as the number of successful candidates was increased to over 1000, more people took the test and the pass rate hovered between 2% and 3%.

In an effort to break the logjam, sixty-eight new law schools were opened and admitted their first class of students in April 2004 (the number of new law schools has since increased to 74).²⁵ Although it has become *de rigueur* in Japan to deny that the new schools are modeled on those in the US, it is impossible to describe them accurately in any other way. They are three-year postgraduate institutions, staffed by legal academics and practitioners who use (or are supposed to use) the Socratic method in classes that range from constitutional law, to legal ethics, to law and society. No particular undergraduate major is required of applicants, and some "life experience" between undergraduate studies and law school matriculation is welcomed. Like their American counterparts, many of Japan's law schools offer at least some practical experience through clinical programs that have been (or are being) established to give students exposure to actual clients and cases.²⁶

Ideally, legal reformers hope these new institutions of legal education will help to create a new type of legal professional. Unlike the narrowly-focused 18-year-olds who enrolled in a university's faculty of law and spent all of their time studying law and preparing for the LTRI exam (almost everyone failed it a couple of times, and frittered away several socially unproductive years doing little but attending cram school and trying again), law students who enroll in a postgraduate law school are encouraged to be diverse. As undergraduates, they have the option of studying anything from eighteenth-century English literature to agriculture, and prior to their

25. For an excellent discussion of the creation of the new law school system, see Yoshiharu Kawabata, "The Reform of Legal Education and Training in Japan: Problems and Prospects," *South Texas Law Review* 43 (2002): 419–XX.

26. It should be noted that the new law school system is the result of conflict and compromise among parties with competing interests. Issues like the number of years that students must matriculate, how many professors from pre-existing undergraduate law departments would simultaneously be considered full time faculty at the new law schools, and the possibility of sitting the bar without attending law school, were all extremely contentious issues.

legal studies they can, for example, work for an NGO in Sri Lanka or an international agency in Geneva, or do anything else that they (and the law school admissions officers) believe is worthwhile. Consequently, reformers expect that the bar increasingly will be peopled by broadminded and diverse individuals.²⁷ And they will be ever more likely to be attentive to rights that heretofore have been neglected or misunderstood. That, at least, is the hope.²⁸

It is certainly possible that those aspiring to become legal professionals will educate themselves broadly in college, spend time expanding their horizons before law school, and play a role in bringing about a fundamental transformation in the landscape of rights in Japan. Yet it is equally possible that the new law schools will do little to catalyze meaningful change. The bottleneck in the process of training lawyers, judges, and prosecutors—the LTRI exam—has been slightly modified but is largely unchanged; training at the LTRI remains an essential step in the process of becoming a professional. Instead of spending their undergraduate years studying for the LTRI exam, however, students must now take the exam when they graduate from law school. Although the pass rate will increase significantly from the current 2%–3%, many potential law students appear to consider the risk of failure too high to justify paying for an expensive law school education, which carries a tuition price tag of \$12,000–\$18,000 per year. Judging by the number of people taking the entrance examination, applications to the new law schools have been in a tailspin since their inaugural year; in 2003, 35,499 aspiring law students sat for the nationwide law school admission exam (equivalent to the American LSAT), a figure that dropped to 21,298 in 2004 and 17,791 in 2006.²⁹

27. Lawson and Thornley, “Perceptions,” 86 (according to Koji Sato, “However perfect the [legal] system, if the quality and quantity of these people who manage the system is lacking, then it will be meaningless. Therefore, the expansion of the human infrastructure should be given first priority.”)

28. That hope, however, does not appear to have been based on data or research that showed a connection between the substance or style of legal education and the values, professional aspirations, or future employment paths of graduates.

29. Eri Osaka, “Debate over the Concept of the Competent Lawyer in Japan—What Skills and Attitudes Does Japanese Society Expect from Lawyers,” paper presented at the Annual Meeting of the Law and Society Association, July 2006. The data used here corresponds to the number of people who sat the National Center for University Entrance Examinations law school entrance exam, which I believe is a reasonable (though perhaps slightly low estimate) of the total number of people applying to law school. In fact, two groups are competing to control the entrance examination business (the National Center for University Entrance Examinations [NCUEE] and the Japan Law Foundation [JLF]), and each offers an LSAT-style exams that aspiring law students can take. But the NCUEE’s exam is more widely accepted than that of the JLF, and it seems that the great majority of students interested in applying to law school take only the NCUEE exam or both the NCUEE and

Moreover, there is an entire industry devoted to helping students pass difficult standardized tests like the LTRI exam (comparable to the Kaplan and Princeton Review “cram” courses in the United States, but as multiyear commitments). Since admission to the LTRI is based exclusively on the entrance examination, students can afford to do the minimum required to pass their law school classes (especially so since, as in the United States, the law schools have strong disincentives to fail anyone) and to spend the rest of their time at a “cram school” that specializes in LTRI test preparation. Instead of a new type of legal professional, the new law schools may end up producing students just like those who made it through the old system, except a few years older and burdened by more debt. Those who are unable to pass the LTRI exam will be in even worse shape, possessing a high degree of specialized knowledge but finding a limited number of professional opportunities in which they can use it.

Just as worrisome is the potential of the new law schools to reproduce the tight hierarchy that has long plagued Japanese legal academia (and the country’s academia more generally). Until now, those who have managed to pass the LTRI entrance exam have come disproportionately from just a few elite undergraduate law faculties, particularly Waseda University, the University of Tokyo, and Chuo University. When the pass rate increases to 30% of those graduating from law school, it seems clear that students who attended a top law school will have a much better chance of passing than will those from a bottom-tier institution. Although there are no official law school rankings, the status of a law school is identical to the status of the university of which it is a part, and it is perfectly clear that there are 5 to 10 institutions that are at the top of the pyramid, and a larger number that constitute the bottom group.³⁰ What we can probably expect, therefore, is a pass rate of perhaps 70%–80% or more at some of the best law schools, whereas only 10%–20% will pass from the weakest schools. Ultimately, law schools with the lowest pass rates will fold, unless the Ministry decides first to withdraw their licenses in an act of institutional mercy killing. Attorneys, judges, and prosecutors will, as in the past, be drawn from a small group of select institutions, signaling the failure of the effort to people the bar with a broad range of different types of individuals. It is of course possible that the new law schools will overcome some of these obstacles. But it seems unlikely that the reform of legal education will be the primary catalyst of a twenty-first century Japanese rights revolution.

JLF exams. Not surprisingly, the trend in the number of those taking the JLF exam is similar to that of those taking the NCUEE exam—18,355 in 2003, 12,249 in 2004, and 9,579 in 2005.

30. The exception is Omiya Law School, the only law school that is not affiliated with a pre-existing university and thus lacks a clear place in the pecking order.

IV. Increasing the Size of Japan's Legal Profession

Closely related to the creation of new law schools is an upswing in the number of individuals who are being admitted to the legal profession. For much of the postwar era, the Ministry of Justice pegged the number of people admitted to the LTRI at 500 annually, regardless of the large volume of students who sat the exam, and regardless of the quality of their exam performance. Such strict government limitations on entry to the profession have long been a bone of contention. Defenders of the status quo assert that strict limits are critical to ensuring that everyone who gains entrance is intellectually capable and deeply committed. To increase the number of admittees, they say, is to risk compromising the deservedly high regard in which the profession is held and to amplify the possibility that the system will inadvertently propagate injustice. In contrast, proponents of an increase in the number of legal professionals argue that the constrained supply has artificially suppressed the ability of Japanese citizens to rely on the legal system to vindicate their rights. A greater number of attorneys, they believe, will better enable citizens to obtain legal counsel. And with legal counsel, people will be in a position to assert and/or protect those interests to which they believe they have a legal entitlement.

Although some advocates of legal reform pressed for the abolishment of the LTRI and the abandonment of a government-mandated cap on the number of new legal professionals licensed annually, their views did not prevail. Instead, a determination was made to ratchet-up the number of individuals admitted into the LTRI. The decision to do so was not taken lightly. It was the result of a protracted negotiation between interested parties with sharply divergent interests. The liberal wing of the legal profession, for example, hoped that more attorneys in Japan would mean that public-interest lawyering would increase, while the poor, immigrants, laborers, and the downtrodden would find it easier to obtain counsel. Big business had a different reason for supporting the increase. More attorneys, representatives believed, were needed to compete better in the global economy; they assumed that the lure of a good salary and social status would lead the best and the brightest to practice corporate law. In the early 1990s the number of LTRI exam passers began to move upward; from 499 in 1990 to 738 in 1995.³¹ By 1999 the number had reached 1,000, in 2005 it was 1464, and in 2010 it will plateau at 3,000 new LTRI trainees each year. In less than two decades, therefore, the number of new legal professional license annually will have increased six-fold, from 500 to 3,000.³² Once that happens,

31. *******<http://www.moj.go.jp/> *******

32. The total number of legal professionals in Japan (lawyers, judges, and prosecutors) is expected to reach 50,000 by 2018: *Nihon Keizei Shimbum*, May 12, 2001.

******* SOME INDICATION OF THE NAME OF THE SOURCE AND WHAT IT IS SUPPOSED TO DEMONSTRATE WOULD BE USEFUL IN ADDITION TO THE URL. cf. n. 33

what should we expect? Will the dramatic growth of the legal profession enable the emergence of rights that would otherwise have gone unexpressed or unlitigated? Or will the new professionals be more loyal to personal financial gain than devoted to the first principle of the 1949 Practicing Lawyers Act, which says that the mission of lawyers is the “protection of human rights and realization of social justice”?

To the extent that the blossoming of rights and the self-interested pursuit by attorneys of financial gain are mutually exclusive, there is at least one reason to think that the scales may tip in favor of the former—the rapid increase in the number of women who are becoming legal professionals. Between 1960 and 2005, the number of female attorneys grew from 42 to 2,648.³³ That trend appears likely to continue; of the 5,766 students matriculating in the new law schools in 2004, 1,719, or almost 30%, were female.³⁴ Crucially, women are more likely than men to be employed in small firms or practice solo, and they spend a much greater portion of their time working *pro bono*. Assuming such trends remain steady, the growth of the bar is likely to involve an increase in the number of lawyers willing to work on behalf of clients who have found it particularly difficult in the past to assert their rights.

On the other hand, the longevity of current trends is uncertain. The configuration of Japanese legal practice has changed significantly in recent years, as various restrictions on law firms have been lifted and they have opened multiple offices, teamed with non-Japanese firms, and created larger and more diverse practices. Whereas a law firm with 50–100 attorneys was once considered large, there are now a number of firms with over 200 attorneys, and soon there is likely to be Japan’s first firm of almost 500 lawyers.³⁵ An increasing number of women have entered the biggest and most prestigious firms, as hiring committees have come to appreciate that they are just as likely (if not more so) as men to fully devote themselves to their work. Moreover, students graduating from the new law schools will be burdened by far more debt than those who went directly from undergraduate studies to the LTRI, which may well lead them to prefer jobs with higher salaries over those with more ephemeral, moral rewards. Consequently, both men and women are vying for jobs in rapidly growing, elite law firms; and both are increasingly likely to find

33. www.nichibenren.or.jp/jp/katsudo/toukei/suii2.html INVALID URL.

34. Eri Osaka, “Women and the New Legal Training System in Japan,” paper presented at the Annual Meeting of the Law and Society Association, June 2005. In contrast, fewer than 15% of those who passed the bar exam in 1990 and became legal professionals were women.

35. “Merger Mania May Create Japan’s Largest Law Firm,” http://www.asianlegalonline.com/asia/detail_article.cfm?articleID=3922, last visited July 14, 2006.

themselves working for the likes of Sony and Matsushita rather than on behalf of the underserved.³⁶

Litigation rates offer another vantage point from which to view the potential impact of an expanded bar. If the increase in the number of attorneys in Japan is leading to an upswing in the frequency of litigation, perhaps it suggests that at least some of those who would not otherwise have pursued their rights in court are now able to do so.³⁷ Indeed, in the four years between 1997 and 2001, new civil actions in summary courts increased from 276,810 to 323,277, and new civil actions in district courts escalated from 156,212 to 181,702.³⁸ The number of cases brought to family courts also grew, from 449,164 in 1997 to 596,478 in 2001.³⁹ Unfortunately, in the absence of more textured data on the types of plaintiffs going to court and the claims that they are making, it is difficult to know what to make of such increases. The upswing in litigation may presage a change in how citizens conceptualize or pursue rights. But it is equally likely that the increase has little or nothing to do with such concerns. It is clear that certain types of lawsuits—like those involving bankruptcy—were common during the final years of the twentieth century, and that creditor/debtor disputes are hardly the sort to warm the hearts of legal reformers. Moreover, at the same time as the volume of civil cases increased, so too did the number of criminal cases (from 13,771 to 15,651 in summary court, and 75,086 to 97,714 in district court). Thus, there appears to be a correlation between the simultaneous increase in the number of attorneys and the number of civil and criminal cases, but little reason to be sanguine about whether that correlation reflects a fundamental change in the types of cases being filed, or about how many of them involve the pursuit of individual rights.

36. The problem is compounded by the fact that Japan's system of public interest lawyering is relatively weak, and there are few US-style public interest law centers at which attorneys can work. See Setsuo Miyazawa, "Lawyering for the Underrepresented in the Context of Legal, Social, and National Institutions: The Case of Japan," in Louise G. Trubek and Jeremy Cooper, eds., *Educating for Justice Around the World* (Brookfield, Vt., 1999): 19–50; Ichiki Gotaro and Ohishi Tetsuo, "Current Issues for Legal Aid in Japan—Reform Perspective," in *ibid.*: 51–63.

37. According to Setsuo Miyazawa, law offices opened with financial assistance from the Japan Federation of Bar Associations have attracted a large number of clients. Email correspondence, July 4, 2006.

38. See Statistical Training and Research Institute, *Historical Statistics of Japan*, Chapter 28-13: "Cases Newly Received, Cases Disposed and Cases Pending of Civil and Administrative Cases (1948–2002)," <http://www.stat.go.jp/data/chouki/zuhyou/28-13.xls>

39. *Ibid.*

V. Procedural Changes in the Japanese Legal System

Japan's New "Jury" System

The two reforms discussed above—the creation of law schools and the increased size of the bar—are the most visible changes in the Japanese legal system, and both can plausibly be seen as having some bearing on the further development of rights in Japan. Several additional dimensions of the legal reform agenda also have the potential to influence the blossoming of new rights in Japan or the reinvigoration or rehabilitation of old ones. The effort to broaden the locus of judicial decision-making, for example, reduces the monopoly of judges on determinations of guilt and innocence in criminal trials. Although introducing lay decision-makers into the legal process is frequently described as marking a radical new direction for the Japanese legal system, it is not a new idea. In fact, Japan had a jury system for 15 years, from 1928 until 1943. Over the past several decades there has been considerable discussion about reinstituting a jury system, but it took the current wave of legal reform to put the idea firmly on the political agenda. It gained traction in part because of a belief that the elite career judiciary is unable to empathize with those whose lives are less privileged, and also because reformers hoped that bringing laypersons into the judicial decision-making process would make them more familiar with and appreciative of the workings of the legal system.

Beginning in 2009, cases that involve intentional crimes that leads to the victim's death, or in which the possible penalty is life imprisonment or death, will be heard by a panel consisting of 3 judges and 6 jurors (*saiban-in*, or what are being called lay assessors).⁴⁰ A guilty verdict will require a minimum of 5 votes, at least one of which must be cast by a professional judge. The impact of this new system of judging is unclear.⁴¹ The Japanese criminal justice system is widely regarded as being extremely effective at apprehending and convicting the perpetrators of crimes, and there appear to be far fewer erroneous convictions there than in many other nations.⁴² If panels with lay assessors are not needed to keep the innocent out of

40. For a general discussion of the new system, see Anderson and Nolan, "Lay Participation."

41. Along with the introduction of a lay assessor system, pretrial procedures were changed to facilitate discovery and enable continuous trials; the videotaping the interrogation of criminal suspects was authorized; access to state-appointed defense attorneys was broadened; and new legal assistance centers were created. See Setsuo Miyazawa, "Blessing or Curse? A Preliminary Analysis of Japan Legal Assistance Centers from a Comparative Perspective," presentation prepared for the 2005 Annual Meeting of the Law and Society Association.

42. Johnson, *The Japanese Way of Justice*, PAGE REFERENCE.

prison, perhaps they will improve the safeguarding of procedural rights by being more willing than career judges to stand up to prosecutors, who have a tendency to disregard due process concerns in their quest for “truth.” But one can just as plausibly argue that lay assessors will be swayed by and/or willing to go along with the inclinations of professional judges by following the lead of the senior judge on the 3-judge panel.⁴³ Deference to professional elites is not uncommon in Japan, and the complexity of criminal trials will inevitably make lay assessors dependant upon the career judges. Consequently, although the lay assessor system will offer a new face to decision-making in certain types of serious criminal cases, its substantive impact is deeply uncertain.⁴⁴

Processing Civil Claims

Using laypersons to decide certain criminal cases is one of many procedural reforms that is being (or has been) introduced by reformers. The processing of civil claims is another focus of reform, and one that could at least in theory have an impact on the successful assertion of rights. To many critics of the Japanese legal system, the most glaring problem with civil litigation is the slow speed at which cases make their way through the courts. Of particular concern are cases that require technical expertise, like those related to complex patent issues or cutting-edge science. In such cases parties have long struggled to find willing experts; low damage awards translate into low expert witness fees, and there is no stable of “professional” experts on which they can rely. The result is that many conflicts involving experts have until recently festered in courts of first instance, often for longer than three years, which is more than three times the length of time it takes to resolve the average civil case.⁴⁵

Legal reformers have articulated the problem of slow civil justice as an infringement of plaintiffs’ rights, and their solutions have sought to accelerate the

43. In Germany, which has a system very like that which Japan is implementing, some commentators have lamented the degree to which lay assessors defer to professionals. See Markus Dirk Dubber, “American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure,” *Stanford Law Review* 49 (1997): 547–XX.

44. Robert M. Bloom, “Jury Trials in Japan,” Boston College Law School Legal Studies Research Paper No. 66, March 16, 2005, <http://ssrn.com/abstract=688185>, claims that “Japan’s unique cultural attributes present a large challenge to establishing meaningful citizen participation in the Japanese judicial system.” To make the case, he asserts that Japanese “people are used to being governed;” “Japanese culture puts a high value on group relationships;” “The concept of harmony is a cornerstone of Japanese culture;” and “The Japanese have a high level of respect for authority figures, a definite legacy of the Confucianism influence” (pp. 23–4). In my view, Bloom has reached the right conclusion but for the wrong reasons. He exaggerates the power of culture, and downplays the importance of politics, expertise, and power.

45. <http://courtdomino2.courts.go.jp> INVALID URL.

pace of certain types of cases, especially those involving experts and even more specifically those that concern medical malpractice.⁴⁶ A new procedure for recruiting experts (called the *senmon-iin* system as opposed to the earlier *kantei-nin* system) has increased the ability of judges and parties to find willing specialists. In addition, the creation of specialized courts like the medical malpractice divisions of the district courts in Tokyo, Osaka, and elsewhere, and those that handle intellectual property cases, has enabled certain judges to become more skilled at handling technical litigation. The initial results are salutary; the time it takes the Tokyo District Court to resolve medical malpractice cases, for example, dropped from 41.4 months in 1994 to 27.3 months in 2004, and similar results have been achieved in other jurisdictions.

Accelerating the pace of civil trials, however, does not necessarily benefit plaintiffs' rights. There are some circumstances in which plaintiffs may prefer slow court procedures. In social movement litigation involving environmental pollution, HIV infection, tobacco, and more, plaintiffs use lawsuits to publicize their grievances, and the longer a case remains on the docket the more effectively it can be used to politicize a cause.⁴⁷ Still, in the majority of cases that involve medical malpractice and other personal harms, Gladstone's observation that "justice delayed is justice denied" rings true, and the reforms will have a concrete impact on both plaintiffs and defendants whose disputes are resolved in a timelier manner than in the past. Even so, the numbers are small; in 2005, just over 1,000 cases involving medical malpractice were filed in Japanese district courts, and a more rapid civil process neither implies that plaintiffs are more likely to prevail nor affects the low damage awards that make malpractice litigation so unattractive to most potential litigants. But at least for the few who do bring their claims to court, the misfortune that brought them into the legal system will not be prolonged unnecessarily by the slow operation of the system itself.

Changes in Substantive Laws

Legal education, the licensing of legal professionals, the introduction of lay assessors in certain criminal trials, and the adoption of procedures meant to speed up the pace of civil trials changes are process-related legal reforms. There is also a host

46. Eric A. Feldman, "Shihō Seido Kaikaku to Iryō Kagu Soshō—Seigi, Taisaku, Kanteinin Seido [Legal Reform and Medical Malpractice Litigation in Japan: Justice, Policy, and the Expert Witness System]", trans. Takao Suami, *Horitsu Jiho* 76 (2004): 16–XX.

47. See for example, Frank Upham, *Law and Social Change in Postwar Japan* (Cambridge, Mass., 1987); Eric A. Feldman and Ronald Bayer, eds., *Blood Feuds: AIDS, Blood, and the Politics of Medical Disaster*, (New York, 1999); Eric A. Feldman and Ronald Bayer, eds., *Unfiltered: Conflicts over Tobacco Policy and Public Health* (Cambridge, Mass., 2004).

of recent changes in Japan that are targeted at the substance of the legal system. Although a detailed discussion of each of them is beyond the scope of this paper, it would be remiss not to mention a few. They include, for example, the 1994 Product Liability Law,⁴⁸ the 1999 Freedom of Information Act,⁴⁹ and a rash of changes in Japanese corporate law that touch on many key areas of corporate governance.⁵⁰ It is possible, of course, that some of the new or substantially modified laws will have an impact on the landscape of rights in Japan. Whereas once there was no legal doctrine or framework that allowed individuals to demand information from the government, for example, now there is a law that gives Japanese citizens a legal right to obtain certain information that was previously unavailable. Where a single provision of the Civil Code governed legal conflicts over accidental harms for almost a century, now there is a set of legal doctrines that enables those harmed by dangerous products to seek relief in the courts.⁵¹ Those are two of the many possible ways that new laws may affect the conceptualization, assertion, and enforcement of rights in contemporary Japan. Not surprisingly, the laws often promise more than they deliver; it turns out that the Freedom of Information Act is a relatively weak tool for extracting information from the state, and the Product Liability Law has a host of procedural and doctrinal weaknesses. As with other changes discussed in this chapter, therefore, one should be cautious about proclaiming the beginning of a new era of rights on the basis of recently enacted black-letter laws.

VI. Conclusion

It is too early to pronounce judgment on the consequences of legal reform. Social change is incremental, not instantaneous, and it often unfolds in unpredictable and idiosyncratic ways. As a result, this preliminary assessment of the meaning and reach of the current changes and their impact on rights seeks to deflate some of the rhetoric of the recent reforms and replace it with more modest expectations. But it does not and could not offer a confident conclusion about the impact of Japan's legal reform, just as one cannot credibly announce the winner of the World Series in June.

48. Products Liability Act (Seizōbutsu sekinin hō), Law No. 85 (1994).

49. Statute Concerning the Disclosure of Information Possessed by Administrative Organs (Jōho Kōkai Hō), Law No. 42 (1999).

50. Ronald J. Gilson and Curtis J. Milhaupt, "Choice as Regulatory Reform: The Case of Japanese Corporate Governance," *American Journal of Comparative Law* 53 (2005): 343–XX.

51. Civil Code of Japan, Section XX

Certain commentators and media pundits, however, have rushed to judgment nonetheless. In some cases, they suggest that the flurry of legal reforms in the late twentieth and early twenty-first centuries are profoundly reshaping Japan by making it into a place with a newly powerful rule of law and increasingly robust legal rights.⁵² In others they have taken the opposite position, asserting that legal reform is a charade that will have few positive consequences.⁵³ Such commentaries frequently imply that reform is necessary and desirable, but they differ in their evaluation of whether it is attainable.

In contrast, this chapter has focused less on whether to celebrate the “success” of reform or bemoan its “failure” than on evaluating its potential, promise, and pitfalls. The current historical moment in Japan offers a unique opportunity to examine the process and outcome of top-down institutional design—often inspired by Western models and practices—as it unfolds. Much has been written about the interaction of structure and culture in the Japanese legal system, and about whether one is better served by the discipline of anthropology or economics when analyzing Japanese legal phenomenon.⁵⁴ A large literature has also emerged on globalization

52. See, e.g. Tom Ginsburg and Glen Hoetker, “The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation,” *Journal of Legal Studies* 35 (2006): 31–XX, at 50 (“Japan’s institutional reforms appear to be having the desired effect of encouraging greater use of the legal system.”); Bruce Aronson, “Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case,” *Cornell International Law Journal* 36 (2003): 11–XX, at 18 (“[T]he Daiwa Bank Case dramatically highlights and strengthens an underlying trend that began during the 1990s, in which the formal legal system has gradually come to play an increasingly important role in Japanese corporate governance.”); Carl F. Goodman, “The Somewhat Less Reluctant Litigant: Japan’s Changing View Towards Civil Litigation,” *Law and Policy of International Business* 32 (2001): 769–XX, at 798 (“Although not likely to immediately open the floodgates of litigation in Japan, these signs signal a changing attitude in government circles toward the “rule of law” and the role of litigation in enforcing that ‘rule of law.’”).

53. Shunkichi Takayama, an outspoken member of the Tokyo Bar Association, has called the effort to improve the legal system “a reform for the business world and the Liberal Democratic Party,” *Nihon Keizei Shinbun*, February 1, 2001; Koichiro Fujikura, “Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission,” *Tulane Law Review* 75 (2001): 941–XX, at 946–7 (“One of the expected impacts of reform is certain to occur: many existing law faculties, private as well as public, will effectively be driven out of the legal education market or will be forced to become mere preparatory schools for newly created professional law schools.”); Luke Nottage, “Reform in Japanese Legal Education: Reformist Conservatism and Failures of Imagination in Japanese Legal Education,” *Asian-Pacific Law and Policy Journal* 2 (2001): 28–XX, <http://www.hawaii.edu/aplpj/pdfs/v2-16-Nottage.pdf> (“[C]hanges in legal education, being discussed and implemented in Japanese law faculties at present, are unconvincing.”)

54. See, e.g. Frank Upham, “Political Lackeys or Faithful Public Servants: Two Views of the Japanese Judiciary,” *Law and Social Inquiry* 30 (2005): 421–55.

and the export of Western legal norms and practices.⁵⁵ Now, as the legal reform process moves forward, we have the opportunity to address those issues in unprecedented laboratory-like conditions. Observing the impact of legal reform on the many dimensions of rights—how they are defined, when they are articulated, who makes claims to them, and how courts resolve conflicts over them—is thus a window on a set of questions that have long been, and will continue to be, a core theme in the study of comparative law.

Inevitably, there will be lessons to be learned from the reforms about the relationship between legal culture and institutional structure. Increasing the number of attorneys and improving access to courts could lead not only to more litigation, but also to a change in public perceptions about the desirability and appropriateness of using the courts to resolve disputes. Perhaps the greater propensity to litigate will be accompanied by a social shift that will lead more citizens to embrace the formal legal system, but it is also possible that there will be a backlash, with litigation taking on increasingly negative connotations. Whatever the outcome, legal reform in contemporary Japan, with its emphasis on the conscious institutional restructuring of the legal system, will inevitably affect (just as it is affected by) legal culture and consciousness.

Uncertainty about the ultimate consequences of legal reform, however, ought not dampen one's willingness to identify what appear to be at least some of the concrete results of change. They are many. Clearly, the number of attorneys is (and will continue to) increase. Students and faculty in the new law schools are engaged in more participatory, Socratic-style education. Some law students and lawyers are being educated as undergraduates in academic departments other than faculties of law, a development which may enrich the legal profession. At least a small number of citizens will experience the criminal justice system first-hand through their role as lay assessors. And some aggrieved individuals will rely on new legal doctrines, perhaps product liability law or the freedom of information act, to redress their harms.

Many of those changes may appear to be normatively desirable. But other potential consequences of reform could strike readers as less salutary. By increasing the size of the bar and making litigation an increasingly attractive route for dispute settlement, people may be drawn away from current alternative dispute resolution mechanisms that are more efficient and effective than the courts.⁵⁶ Although reform, at least to some, is intended to realign certain elements of the power structure, the

55. Feldman, "The Culture of Legal Change," 743.

56. Or, alternatively, recent reforms aimed at improving ADR may lure potential litigants away from the courts. See, *inter alia*, Aya Yamada, *infra*.

more likely result is that entrenched interests like the Ministry of Justice, private cram schools, and elite universities will become more, not less, powerful. Trumpeting reforms of the legal system that are unlikely to bring about real change deflates whatever momentum may have existed to achieve substantive reform. Because the pilots of the reform effort are elites, their engagement with the conceptualization, articulation, and enforcement of rights in Japan echoes that of other eras, when demands from below were muted and the position of the disadvantaged and dispossessed was unchanged.

Of only one thing can we be sure; the turbulent era of legal reform that started in the late twentieth century and continues during this first decade of the twenty-first will leave its mark on many aspects of the Japanese legal system. It will inevitably exact costs and provide benefits, both intended and unintended, to all who are subject to the laws of Japan. Should we understand the reforms as heralding a fundamental change in Japan's embrace of new or different conceptions of rights? A recent study of political forecasting aptly describes the skeptical view of political prognostication, which counsels modesty on the part of those who try to foresee the future: "Even the most astute observers will fail to outperform random prediction generators—the functional equivalent of dart-throwing chimps—in affixing realistic likelihoods to possible futures."⁵⁷

57. Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton, N.J., 2005).

