Japanese Lawyers in Transition

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1 Introduction

Japan has maintained a highly industrialized society without much reliance on lawyers and courts (Noda, 1961 : 159-183 ; Kawashima, 1963 ; Tanaka, 1976 : 254-443 ; Tanase, 1990 ; Upham, 1987 ; Haley, 1991 ; Dezalay and Garth, 1996 ; Henderson, 1996 ; Wollschläger, 1996). Recently, however, legal scholars and lawyers in Japan have been arguing that Japanese society is now in the process of "legalization," and they are discussing what role lawyers and courts can and should play, and what kind of social order Japan should seek (e.g. Tanase, 1991 ; 1995 ; 1996 ; Tanaka, 1996 ; Nichibenren, 1997 ; Hamano, 1997 ; 1998).

They do not refer to "legalization" to point at the development of an American-style litigious society. Rather, they mean by that term more frequent use of legal institutions, especially courts and lawyers in private practice as a mechanism of dispute resolution and social order, thus contrasting with extra-legal measures such as reciprocity based upon long-term relations, third-party intervention in the context of a closely-knitted community, and administrative guidance (Tanaka, 1996 : 1-28 ; Hamano, 1998). Some scholars mean by the term "legalization" mainly the increase of state intervention in the economy by means of law, which nature is substantive rather than formal if we use Weber's term (e.g. Kashizawa, 1990 : 117-133).

The Japanese legalization process in the above mentioned sense is generally considered to have begun in the 1960s (Rokumoto, 1971 ; Tanaka, 1996 : 1-2). The number of civil litigation has started to increase since the middle of the 1970s. As Christian Wollschläger (1997 : 105-106) analyses, this development may be the

beginning of a new phase of the historical trend of civil litigation in Japan.

The legalization process seems to have been even accelerated since the 1980s. Moreover, Japanese practicing attorneys have been facing waves of change and reform recently. Among them are opening the legal market for foreign lawyers (Wohl et al., 1989; Henderson, 1997: 65-67), the reform of the national legal examination system (Ôta and Rokumoto, 1993: 331-332). Certainly not to forget is the enactment of the New Code of Civil Procedure.

Attorneys took an initiative as well. Most of the local bar associations have introduced a voluntary duty attorney scheme for criminal suspects (Nichibenren, 1992; 1993; Kikan Keiji Bengo, 1996; Marushima, 1996). The idea is borrowed from the duty solicitor scheme in England and Wales. Some local bar associations have also introduced a new arbitration system for civil disputes, which is designed to provide easy access to justice for ordinary citizens (e.g. Daini Tokyo Bengoshi-kai, 1997). In 1990 the Japan Federation of Bar Association declared that "the reform of the administration of justice" [*shihô kaikaku*] must be considered as one of their long-term objectives in order to widen the juridical field, which until then had been greatly limited in Japan (Nichibenren, 1990).

2 Models of the Role of Japanese Practicing Attorneys

After the Meiji Restoration of 1868, when Japan opened herself to the West after more than 200 years of isolation, the new government tried at any cost to transplant the western legal system into Japan (Takayanagi, 1963; Noda, 1976: 41-62; Rahn, 1990: 58-129; Haley, 1991: 67-82). New legal institutions such as courts were created, and judges, and procurators were selected. The need for lawyers was also recognized, and finally the Lawyers Law of 1893 was enacted to regulate the private practitioners.[1]

From the beginning, lawyers were considered of a lower social status than public procurators[2] and judges, who both were government officials or state bureaucrats enjoying high social prestige and great influence (Rokumoto, 1988: 160-161; Ôta and Rokumoto, 1993: 316; Henderson, 1997: 43-44). In the process of modernization before the Second World War, especially in commerce and industry, private attorneys played a limited and peripheral role compared to administrative bureaucrats (Koga, 1970: 29-48). Contrary to their counterpart in England or the United States of America, Japanese lawyers in private practice were not widely used by large business corporations, which depended chiefly on administrative bureaucrats in their daily affairs. Most of the clientele of Japanese attorneys were

probably small companies and individuals.[3] It can be said that only in criminal defense activities and advocacy for the poor and the oppressed, they could preserve their identity and pride themselves as defenders of legal rights for social or political minorities against the bureaucratic state of Imperial Japan. There was a considerable antagonism between judicial bureaucrats (i.e. judges and procurators) and private practitioners (Ôno, 1970 : 32, 36-66).[4]

Despite the reform just after the end of the Second World War, which gave the bar self-governing autonomy for the first time in Japanese history, the antagonism between the two branches of the Japanese legal profession persisted (cf. Henderson, 1997 : 57). Private practitioners tended to identify themselves as the lawyers of the "opposition branch" or "opposition camp" as against the lawyers of the "governmental branch" or "ruling camp" as the judges and procurators were referred to (Rokumoto, 1988 : 161-162 ; Ôta and Rokumoto, 1993 : 317).[5] This role of opposition against the government was considered to be an idealized model by Japanese practitioners and leaders of bar associations (Miyakawa, 1992 : 3-4 ; Ramseyer, 1986 : 525-526).

In spite of the persistence of traditional ideas about lawyers, a new conception emerged which is contrary and contradictory to the above mentioned model (Miyakawa, 1992 : 4-14). Under influence of the new Constitution of 1946 and of Anglo-American legal ideas such as that of the "Rule of Law," younger generations of lawyers were inclined to take English or American lawyers as their model. In addition to that, some of the leading legal scholars and lawyers advocated the value of lawyering based upon the ideal of the "legal profession" (Ishimura, 1969 ; Ishii, 1970 ; see also Rokumoto, 1974). Under this new model of the "legal profession," a private attorney is considered to be an officer of the court and he or she is thus a colleague of the judge and the procurator. Since around 1970, this new model, which is often called "profession model," has become very influential among lawyers opposing the traditional "opposition camp" model (Miyakawa, 1992 : 5-6).

Needless to say that this "profession" model could easily be used to defend attorneys' self interest, for example to oppose liberalizing the regulation of commercial advertisement by lawyers (cf. Tanase, 1987 : 119-122 ; Miyakawa, 1992 : 7). Since early in the 1980s a third model has been presented, which mainly considers attorneys to provide legal services promoting private rights and interests without emphasizing the ideal of public service (Tanase, 1987 ; 1996 ; Nasu, 1992, see also Miyakawa, 1992 : 8-9). Although the third model seems to be supported only by a minority of the Japanese lawyers, it has contributed to demystify the ideal of the

profession and to trigger opportunities to reconsider the values and virtues of professionalism (e.g. Miyakawa, 1992 ; Yoshikawa, 1997 ; Hamano, 1997 ; Tanaka, 1997).

Behind the transition of the ideals and models of lawyers mentioned above, we are able to observe that Japanese attorneys have gained prestige and consolidated their political and social influence to a considerable extent. However, they are basically still contained within a traditional structure. The fundamental conditions of Japanese lawyers are set within the framework of institutions which segments the juridical field. I will briefly elaborate on these settings in which Japanese attorneys are located.

3 Marginality of Lawyers in Japan and its Sociological Interpretation[6]

In the paper presented at the RCSL 95 (Research Committee on the Sociology of Law of the International Sociological Association in 1995) meeting in Tokyo, Yves Dezalay and Bryant G. Garth shed light on the peripheral role of Japanese lawyers in business and society and tried to interpret the lawyers' marginality through a theoretical framework of their own (Dezalay and Garth, 1996). They regarded the marginality of Japanese attorneys not as a timeless feature, but as a socially and historically constructed structure. They did not mean to deny the existence of cultural traits or traces, but they emphasized the contingent nature of processes of forming and constructing the structures, in which lawyers and other protagonists compete, compromise or cooperate with each other in struggling for power. Dezalay and Garth presented a fresh interpretation of the Japanese "marked segmentation of the legal field——which strongly limits the autonomy of law in the field of power," which they described as a structural weakness (Dezalay and Garth, 1996 : 37). They showed convincingly the containment of Japanese lawyers and "subordination of legal practitioners and the justice system to a technocratic and paternalist ideology" in the field of power (ibid. : 43-44).[7]

While I support their interpretation of the formation of structures in the field of power in Japan,[8] I would like to stress the significance of effects of the post-war reform, which could possibly have weaken the subordination of lawyers and the judicial system to bureaucrats and technocrats.

Impact of the Japan's defeat and the post-war Allied Occupation was so great that various ideas of Anglo-American law came in and spread rapidly and extensively against the traditional legal concepts, which had been mainly based upon Continental European law (Tanaka, 1976 : 249-252 ; Oda, 1992 : 32-34). Above

all, the idea of the "Rule of Law" was appealing and influential as a new legal value among young lawyers and law professors. The emergence of a new model of attorney, above mentioned, as a member of the legal profession instead of the traditional model of lawyers in the "opposition camp" is a good example. Under the new constitution, courts are vested with the power to determine the constitutionality of any law and they are outside the jurisdiction of the Ministry of Justice (Noda, 1976 : 119-124). Thus, until the 1960s, the Japanese Judiciary was not so self-restraint in handling cases involving political issues as today and liberal opinions were shown by many judges in the lower courts and several judges in the Supreme Court (Abe, 1995 : 315).

However, as shown very well by Masaki Abe (1995 : 314-318), in the early 1970s, responding to the harsh political campaign against purported leftist or communist judges by the then-ruling Liberal Democratic Party, the Japanese judicial elite made every effort to minimize political intervention into the judiciary. That was really a turning point of the history of the Japanese judicial branch in the post-war period. Since then, the judiciary has come to pay more deference to decision-making of the political branches of the government (Abe, 1995 : 318-319 ; see also Miyazawa, 1994b ; Haley, 1995).

As Abe analyzed correctly, this judicial turn to self-restraint means avoidance of politics in order to preserve and reinforce organizational autonomy of the judicial power (Abe, 1995 : 316-317 ; see also Haley, 1995 : 10-12 ; but cf. Miyazawa, 1994b : 277-280). In Dezalay and Garth's terminology, a bargain was struck between the judicial elite and the political elite in order to reestablish and confirm "the division of tasks that assigned a subordinate position to representatives of the legal order" (Dezalay and Garth, 1996 : 43). This resulted in today's inactivism of judges and powerful bureaucratic control of lower court judges by the Supreme Court General Secretariat (Miyazawa, 1994a : 192-219 ; 1994b ; Abe, 1995).

However, as Dezalay and Garth suggested, "the status quo relationship between law, business, and the state is not necessarily stable."[9] The legal field in Japan seems to be expanding slightly. In order to show the present state of lawyers in transition, I would like to focus on the mechanisms for controlling the number of lawyers and recent attempts for institutional reform.

The population of lawyers is one of the basic conditions upon which the legal field is constructed in the field of power. In Japan, lawyers have been constantly limited in number, which is rather exceptional in industrial societies. The issue of lawyer population is now taken up by government committees, bar associations,

legal scholars, and mass media, and, as a result, not only minor reforms were realized, but some major changes are on the agenda and expected to be accomplished soon.

4 Mechanism for Controlling the Number of Lawyers

One of the distinguished characteristics of the mechanisms for determining the number of Japanese fully qualified lawyers (including judges, procurators and attorneys)[10] is artificial control at the qualification level. Since the middle of the 1960s until quite recently, the new entrants into the legal profession have been maintained continuously at around 500 each year.[11] If we compare this with other highly developed countries, for example England and Wales or the United States of America, the situation in Japan seems quite exceptional. In a lot of western countries, recent rapid increase of law graduates has resulted in growing number of lawyers, especially of private practitioners. In some countries, even people made an issue of the "flood of attorneys."[12]

By contrast, in Japan, although law graduates have increased in number dramatically since the 1960s (Hômu Daijin Kanbô, 1991 : 121), that increase has not resulted in a corresponding growth of lawyers. Today, the total number of law graduates per year is around thirty six thousand,[13] but only 700 of them successfully pass the national legal examination to enter the Legal Training and Research Institute (LTRI).[14] How can Japanese manage to keep the number of lawyers at such a low level ?

Many people apply for entrance into the LTRI. Every year more than 20,000 apply, but the acceptance rate has been kept at around 2 percent since the late 1960s (Hômu Daijin Kanbô, 1991 : 64). This means that the national legal examination is extremely and even unreasonably difficult. As a result, many critics say that a lot of young students who may otherwise become good lawyers avoid even applying and choose other promising careers.[15]

Why can the acceptance rate be kept at such a low level ? This is a question often raised by foreign observers. For instance, at an international colloquium held at the University of Tokyo[16] in 1991, Professor Michael Zander of London School of Economics asked with a touch of humour, "Why do law students and others not rebel ?" In a related matter concerning the Japanese lawyer population which appears to be so well managed at a very low level, Yves Dezalay raised the question at the RCSL 95 Meeting, namely : "Who is the gate-keeper ?"

It is not easy to explain convincingly, especially to foreign people.[17] Various

factors, as well cultural as institutional, are intertwined. This has much to do with the "enigma" of how Japanese can do without many lawyers in a highly industrialized society. Although it should be analyzed in the wider context of Japanese society, I can present a rather simple explanation by narrowing my focus on the institutional mechanisms that determine the number of lawyers.

In order to qualify as a lawyer, one must pass the national legal examination and go on to enter the LTRI.[18]

Since 1965 the number of successful candidates for the LTRI has been around 500, which corresponds to the seating capacity of the hall at the Institute (Nihon Hôritsuaka Kyôkai, 1982: 67-70, 97-99; Ôta and Rokumoto, 1993: 320). The capacity of the Institute has been "a *de-facto* ceiling" (ibid.). Some leading legal scholars argued for the increase of the number again and again, but failed.[19]

For the purpose of increasing the number of lawyers, one has to enlarge the capacity of the Institute or reform the basic scheme of the education and training at the Institute, which would mean an increase in the National Budget. In this respect one should note that the judicial apprentices of the Institute are receiving salaries from the Government. The Japan Federation of Bar Association, which is not only the professional association at a national level but also a powerful pressure group, has been guaranteed the possibility to participate in the decision-making process for major institutional reform concerning judicial matters. The Federation was constantly opposing, or at least showed no interest in, the increase of lawyers until recently. The other two major players, namely the Ministry of Justice and the General Secretariat of the Supreme Court were also inactive, until the late 1980s, in increasing the number of new entrants into the legal profession in spite of their heavy caseload and backlog.[20]

Looking from a wider perspective, neither political parties nor the mass media had launched a campaign for increasing the number of lawyers until recently. The administrative bureaucracy also remained silent, which was quite natural because the increase of lawyers should be a great threat for their power and influence. In this sense, the extremely low acceptance rate of the national legal examination is interpreted as a sort of national policy, although consensual in nature.

In sum, the national legal examination and the educational and training system of the LTRI are the institutional mechanisms determining the number and the pace of increase of practicing attorneys. These two mechanisms are intertwined within political processes in a broad sense, and the mechanisms for controlling the number of the Japanese lawyers are centralized and apparently managed well.[21]

5 Prospects for Widening of the Law's Domain in Japan

The situation has been changed since the late 1980s. Just after the introduction of the Foreign Lawyer Act of 1986, which allowed branch offices by foreign law firms to operate under limited conditions, the Ministry of Justice began to campaign for reforming the legal examination.[22]

The Ministry's major objective seemed to recruit young bright law students, especially candidates to become procurators. The Ministry of Justice had faced a chronic shortage of supply for procurators for many years (Hômu Daijin Kanbô, 1987 : 68). In addition, the General Secretariat of the Supreme Court and some members of the Bar, including senior partners of large Japanese law firms specializing in international business matters, were also concerned about the shortage of young lawyers. Due to the rapid expansion of the international legal market in Japan, lots of young attorneys in the 1980s were absorbed into that market (cf. Hamano, 1996 : 221 n. 6). Some major firms succeeded in recruiting bright graduates from the LTRI, who might otherwise have started their career as a judge. Still, the shortage of supply of young attorneys was evident for senior partners of large law firms in Tokyo. In this case of shortage of young recruits, elite of the bar, the bench, and the Ministry of Justice shared an interest of increasing the number of young entrants into the profession.

The environment surrounding the legal profession was also changing at that time. Rapid internationalization of the Japanese economy in the 1980s made it evident that the Japanese judicial system had to become more effective and accessible and that the national bar examination had to be reformed in order to attract promising law graduates (Hômu Daijin Kanbô, 1987 : 3-8). The Japanese businesses elite and the mass media criticized conservative and self-approving attitudes toward the issue of the lawyer population as assumed by the Japanese legal profession, especially by the Bar.[23]

In the process of negotiation among the Bar, the Supreme Court, and the Ministry of Justice, an agreement was reached in 1990 to raise the number of entrants into the LTRI up to 700 per year as a first step in the reform (Hômu Daijin Kanbô, 1991 : 12, 34-35). In the next stage, the Supreme Court and the Ministry of Justice proposed to raise the number up to about 1,000 per year within a few years and to 1,500 in the near future (Mura, 1995). The JFBA at first proposed to raise the number to only 800 per year (Mura, 1995), but finally agreed to increase the

level with approximately 1000 per year starting in 1999 on the condition that the increase of the capacity of judges and procurators be realized at the same time (Nichibenren, 1995 : 97-101 ; Mura, 1995 ; 1996b : 39-41). As a result, the number of successful candidates to the legal examination will be raised to about 1000 annually for the time being.[24]

The progress in handling the issue of the population of lawyers can not be understood properly without taking into consideration the wider context.

First, one of the leading associations representing private sector business interests, *Keizai Dôyûkai,* made an announcement in 1994, which recommended that the capacity of the judiciary should be expanded to cover unmet legal needs (Keizai Dôyûkai, 1994). *Keizai Dôyûkai* diagnosed the present condition of the Japanese judiciary and the legal system in general as "a serious malaise."

This announcement was remarkable, for Japanese business elite had rarely shown such a sincere interest in the judiciary and lawyers before. The change in their attitude may be the prelude to a new era. Not long after the announcement, in December 1994, the government established the Administrative Reform Committee [*Gyôsei Kaikaku Iinkai*], which had a sub-commission for de-regulation [*Kisei Kanwa Syô-iinkai*]. One of the major issues on the agenda of the sub-commission has been to increase the population of lawyers. The sub-commission criticized severely the monopoly and restrictive practices by Japanese attorneys (Suzuki, 1995 : 176-177).[25] In December 1995 the Administrative Reform Committee published a report of proposals and opinions, in which it recommended that a substantial increase of the number of lawyers, judges, and procurators be realized.[26] The Government has taken the institutional reform leading toward a substantial increase of the lawyer population as one of the measures of the de-regulating program of the Japanese economy.[27]

Second, the administrative bureaucracy seems to be facing major changes in the 1990s. Authority of the administrative bureaucrats is now under constant attack after the end of the so-called "bubble" economy of the late 1980s (see e.g. Tabb, 1995 : 198-224). The legitimacy of the authority and power of the administrative bureaucrats, especially those of the Ministry of Finance is being shaken. As John O. Haley shows, the frequent or almost constant resort to informal enforcement by the administrative bureaucrats in Japan is best explained by two factors : the predominance of promotional as opposed to regulatory policies and the weakness of formal law enforcement (Haley, 1991 : 139-168). On the one hand, under recent economic conditions, preservation of the so-called catch-up industrial

policy, which has been long-standing and consciously sought in post-war Japan, has lost public support based upon national consensus, so that promotional policies are losing ground to regulatory policies. On the other hand, evidently responding to the recent transformation of economic conditions, institutional changes are in progress to formalize administrative procedures and reinforce coercive powers for law enforcement. As a result, the system of "consensual governance" is now in a period of transition. It is too early to predict the degree and pattern of transformation of the system and the process of change should be understood in the long run. Still, at least we can observe a gradual expansion and widening of the juridical field in the Japanese economy, however slightly it may be.[28]

Third, results of my empirical survey show that a considerable number of practicing attorneys in Tokyo have moved in on an area of business law matters such as anti-monopoly law and complicated legal counseling (Hamano, 1995). Considering the traditional identity of Japanese lawyers as advocates for the oppressed, this new tendency should be noted. At the RCSL 95 Tokyo meeting, I suggested that Japanese private attorneys can partially take the place of administrative bureaucrats with respect to their functions in economy. This is, in a sense, a "territorial battle" in Dezalay's words (1991). Although it might be a struggle for power among social elite, as suggested by Dezalay at the Tokyo meeting, I should emphasize the significance of this battle in respect of the societal ordering and functioning of the legal machinery in Japan.

Under these circumstances, the Japanese business and political elite may come to realize that the segmentation and marginalization of law's domain, which has been the structure of the field of power in Japan, is weakening the basis of their very power and rule, i.e. growth of the Japanese economy. The end of rapid growth of the Japanese economy and its recent accelerating involvement into global economy seems to be giving impetus to transformations in the structure of the field of power and law in Japan. The reform to increase the lawyer population may be the first step toward widening the domain of law and lawyers in Japan, which is necessary for a more internationalized and de-regulated economy.[29]

As Frank Upham showed recently, the globalization of economy has not changed the fundamental nature of Japanese legal informality.[30] However, recent movement toward judicial reform is notable, because some of the Japanese business elite have decided to commit themselves to the reform, using the rhetoric of the "Rule of Law." I agree that the changes are slow and the results are yet to be seen, but it has to be noted that the judicial reform in progress can be a beginning of great

change. For instance, some of the members of the Bar are apparently trying to take the initiative in the next stage of the reform to introduce a new system of recruiting more judges from among private practitioners (e.g. Takano, 1997; Toyokawa, 1997; Hamada, 1997; but for a contrasting view, see Kainô, 1997). Against a background of changing economy and politics, major actors are competing and struggling now in the field of law and power. The results of struggle will bring about a construction of a new structure.

Notes

This essay is a revised version of the paper presented at the joint meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association at the University of Strathclyde in Glasgow, Scotland, on July 10-13, 1996. I wish to express my special thanks to Dr. Dimitri Vanoverbeke for checking the language of the essay.

1 For the details of the pre-history of Japanese attorneys and the development of new institutions of legal advocate in the early years of the Meiji era, see Okudaira (1914: 1-608); Takikawa (1984); Hattori (1963: 112-128); Koga (1970); Ôno (1970); Noda (1976: 145-146); Haley (1991: 100); Henderson (1997: 41-46).

2 Instead of the term "public procurator," "public prosecutor" is sometimes used to translate the Japanese "kensatsu-kan" into English. See e.g. Oda (1992: 99). For public procurators and criminal procedures in Japan, see Nagashima (1963); Noda (1976: 149-151); Tanaka (1976: 556-557); Oda (1992: 99, 398-403); Haley (1991: 121-138).

3 Reliable empirical data is scarce as to the corporate legal practice in the prewar period. A few renowned attorneys were known to be retained or employed by major business corporations. For example, Yoshimichi Hara was once a legal consultant retained by House of *Furukawa*, one of the leading *zaibatsu* firms before the Second World War. See Mitani (1980: 214, n. 1, relying upon Hara's autobiography). Hara gave legal advice to *Ôji Seishi Kaisya* and *Mitsui Gômei Kaisya* as well (Hara, 1935: 241, 242). Another famous lawyer, Chû Egi, was a legal adviser retained by *Mitsui Bussan Kaisya* (Hara, 1935: 242). However, they might be exceptions and most of the Japanese attorneys were probably practicing mainly for individuals and small companies. Anyway, careful analyses based upon historical sources are yet to be done.

4 Hattori (1963: 145-146) points out that active cooperation between judges and advocates was lacking in administration of justice before the war.

5 The term "opposition branch" and "governmental branch" are used in Rokumoto

(1988 : 162). The term "opposition camp" and "ruling camp" are used in Ôta and Rokumoto (1993 : 317). These terms correspond to the Japanese "*zaiya hôsô*" (which means literally "lawyers in the field") and "*zaichô hôsô*" (meaning literally "lawyers in the palace").

6 The term "marginality" is well known as Jane Kaufman Winn used the term in analyzing the functioning of law in Taiwan. See, Winn (1994). I use the term, not because I fully commit myself to her theoretical perspective, but because I can not find any other suitable term. "Peripherality" may be used but I am afraid it may sound rather strange as an English word.

7 Dezaly and Garth, relying on works by Haley (1991) and others, attribute the formation of the present structure of the legal field in Japan mainly to the fact that the containment of attorneys and legal controls in 1930s was consciously pursued by the political elite and a compromise was struck between the elite of the bar and the bureaucrats (Dezalay and Garth 1996 : 40-42). They also explain the results of the reform just after the end of the Second World War, which "concretized" the segmentation of the legal field (ibid. : 42). Their theoretical perspective seems to underemphasize cultural factors and historical legacies since pre-modern times. Cf. Rokumoto (1986) ; Wollschläger (1997).

8 I must say that their thesis should be examined by historical studies based upon first-hand material. See also Wollschläger (1997 : especially footnote [40] at 102, 132 -133) for his critical comments upon Haley's former conclusion (1978) that institutional incapacity, especially deficiencies of the court system, were responsible for the sudden drop of the number of civil litigation in Japan in the 1930s. Wollschläger suggests that the institutional incapacity, if that ever existed at all, should best be interpreted as an additional cause to the fundamental historical trends of the low rate of civil litigation per population, which can be traced back to the Tokugawa period. Wollschläger (1997 : 131) also notes that the civil litigation wave since the early years of the Meiji period until around 1890 was caused by the *Matsukata* finance crisis and concludes that it only was an accidental and exceptional event. It seems to me that this thesis also should be tested upon detailed historical sources.

9 See Dezalay and Garth (1996 : 45) in a different context.

10 There are various law-related professions or quasi-lawyers in Japan. Cf. Ôta and Rokumoto (1993 : 315) ; Henderson (1997 : 29-40). The Japanese term for "legal profession" is *hôsô,* which represents fully qualified lawyers under the Japanese law.

11 The great majority of new entrants into the Japanese legal profession each year is composed of graduates of the LTRI. As the acceptance rate of the final examination at the Institute is very high, what is determinative is the number of the entrants into the Institute, in which capacity is limited since around 1965 until recently.

12 In Germany, for example, people say "Anwaltsschwemme." See e.g. Hommerich

(1988).

13 See Jurisuto Zôkan (1987: 120). I must note that some of the law faculties of Japanese universities have students not majoring in Law. The total capacity for Faculty of Law students per grade is about 37,000 in the early 1990s. This is a prescribed capacity, which implies that the real number of students must be much larger.

14 For a general account of institutional mechanisms for recruiting lawyers including the LTRI, see Ôta and Rokumoto (1993: 318-320); Ramseyer (1986); Haley (1991: 106-111).

15 As early as 1963, Justice Hattori, who became Chief Justice of the Supreme Court later, noted that "the legal profession as a whole does not necessarily recruit the most promising graduates of the law departments" and that one of the important reasons is that "so few applicants pass the examination that many capable individuals, who might otherwise be attracted, seek other careers." See Hattori (1963: 142-143).

16 The 1991 International Colloquium of the International Association of Legal Science was held at the University of Tokyo, Faculty of Law, on "The Social Role of the Legal Profession." For the proceedings of this colloquium, see Rokumoto (1993).

17 See e.g. Haley (1991: 110-111). Haley finds difficulties in "explaining the causal factors behind the government restrictions" on the number of persons admitted to the LRTI and he presents a few tentative explanations.

18 The Law provides several exceptional ways to qualify as a lawyer other than the way mentioned in the text. See Bengoshi-hô (Attorneys Act), Law No. 205 of 1949, § 5.

19 One of the most well-known advocates for increasing the number of lawyers was Akira Mikazuki, Emeritus Professor of Law at the Faculty of Law, University of Tokyo. In 1987, the Ministry of Justice appointed him as a member of a panel [*Hôsô Kihon Mondai Kondankai*] to discuss the lawyer population problem. Later he was appointed Minister of Justice.

20 The opposition and passivity by the Bar can be easily understood. Most attorneys may well have wanted to protect vested interests in the current system and stuck to the Malthusian strategy, which was believed to benefit solo and small-sized practices. But why have the judicial bureaucrats of the General Secretariat of the Supreme Court and the Ministry of Justice not done much to increase the prescribed capacity of the judges and the procurators? Lacking in empirical studies, we can only speculate and present hypothetical explanation. The relatively weak position in the governmental and political process, especially vis-à-vis the Ministry of Finance, may have much to do with the inaction by the Judicial Branch (i.e. the General Secretariat of the Supreme Court) and the Ministry of Justice. However, it is too early to conclude that the Ministry of Finance is controlling the mechanism. I suggest that the elite judges

at the General Secretariat of the Supreme Court, who are in charge of managing the Japanese judicial system, may be satisfied with the present number of judges and procurators as long as a steady flow of promising young recruits is obtained. Miyazawa (1994b : 279) goes further. He concludes that "the reduction of the size and authority of the Japanese judiciary can be understood as a rational behavior from the perspective of elite judges. An expanded judiciary will make it more difficult for them to control other judges and increase chances for the public to challenge the government. Elite judges seem to find satisfaction in their role as a rear guard of the status quo of the government." This hypothetical interpretation is to be examined according to empirical sources. Henderson (1997 : 56) simply comments on this issue saying that "the real reason for the small bar is that, once a member, lawyers also prefer a small bar and the bureaucracy has no incentive to implement a rule-of-law."

21 Ramseyer (1986 : 530) describes the mechanisms to determine the number of new lawyers in Japan as a "bureaucratic control" over admissions ("the Ministry of Justice and Finance effectively determine the number of new lawyers by determining the number of places in the Legal Training and Research Institute.") See also the footnote (126). I would like to emphasize that the "control," if one may use this term, must be understood in the context of Japanese informal and consensual decision making processes described as "bureaucratic informalism" (Upham, 1987) or "consensual governance" (Haley, 1991 : 166-168). My explanation in the text might be helpful to show one aspect of such informalism and consensual governance.

22 In 1987, the Ministry of Justice established an ad-hoc panel named "Hôsô Kihon Mondai Kondankai," for the purpose of examining the national legal examination. The panel was composed of 13 members and held 10 sessions for about a year. The final report of the panel was published in March 1988. Based upon the report, the Ministry of Justice published a tentative plan for the reform of the legal examination in April 1988. One of the major proposals of the plan was the increase of the entrants into the LTRI up to about 700, Hômu Daijin Kanbô (1991 : 10). See also Hômus Daijin Kanbô (1987) ; Ôta and Rokumoto (1993 : 331-332).

23 See e.g. Keizai Dôyûkai (1994) ; Miyake (1995) ; Suzuki (1995).

24 See Hôsô Yôsei Seidotô Kaikaku Kyôgikai (1996, 67) ; Mura (1996a : 120-121) ; Matsuo (1996 : 123, 125). In order to raise the number of the entrants into the LTRI, shortening of the two years of training at the Institute was proposed by the Ministry of Justice and the Supreme Court. The bar had been very critical about the proposal. However, the Japan Federation of Bar Associations finally decided, at the extraordinary general meeting on 16 October 1997, to support the proposal of shortening of the term of training at the LTRI from two years to one year and a half. See *Nihon Keizai Shinbun,* 17 October 1997, p. 39.

25 For a critical comment on the report of the Administrative Reform Committee, see

e.g. Odanaka (1997).

26 For an excerpt of the opinion about the legal services from the report of the Administrative Reform Committee on 14 December 1995, see *Jiyû to Seigi,* vol. 47, no. 2 (1996), pp. 134-135.

27 On 29 March 1996, the Cabinet decided to revise the Program for promoting de-regulation of the Japanese economy. A great increase of lawyers including judges and procurators is shown as one of the specific measures for de-regulation. See *Jiyû to Seigi,* vol. 47, no. 6 (1996), pp. 179-181. On 28 March 1997, the Cabinet decided again to revise the Program so as to enlarge the specific measures for de-regulation with respect to providing legal services. See *Jiyû to Seigi,* vol. 48, no. 5 (1997), pp. 155-158.

28 As to the expansion of the juridical field in the Japanese economy, we can identify three major actors or players. These are judges, attorneys, and kigyô-hômuin (staff members of corporate legal section). Corporate legal staff in Japan is distinctive in that most of them are non-lawyers. Although many of them have a law degree, several are graduates from faculties other than the law faculty. There is no certified qualification system. They are trained mainly on the job. Some of them have also studied law abroad. These non-lawyer corporate legal staff, especially in major business enterprises, must be considered as the constituents of the system of consensual governance and extra-legal ordering in the Japanese economy. They are, in a sense, functional substitutes for attorneys, but they are salaried workers in a company usually in a life-long employment system, so that they are built into a continuous and personal network across the Japanese economy and administrative bureaucracies as closely as ordinary Japanese businessmen. They should be considered as having been a factor preventing the development of the Japanese legal profession. In the process of widening the juridical field, however, Japanese corporate legal staff may partly compete and partly cooperate with attorneys in private practice. For corporate legal staff in Japan, see Ôta and Rokumoto (1993: 327-328); Yoneda (1995); Hamano (1995: 221-222 n. 5).

29 I do not mean that the basic structure of "public law regime" of Japan as compared with "private law regime" of the West (see Haley, 1991: 10-11) will transform itself, but that private initiative in law enforcement will be more reinforced if the juridical field becomes wider. That will mean a greater significance of lawyers in private practice.

30 Focusing on the issue of the regulation of the Japanese retail industry, Frank Upham analyzed the impact of the Structural Impediments Initiative on the Japanese legal system. See Upham (1996).

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