

Japanese Law: An Overview

by

Masaki Abe, Professor of Law, Osaka City University; and
Luke Nottage, Associate Professor of Law, University of Sydney; Co-Director of the Australian Network for Japanese Law (www.law.usyd.edu.au/anjel).

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1. Introduction

Japan is a densely populated archipelago in North-East Asia, and remains the second largest economy in the world. Despite re-opening itself to the world in the mid-19th century, to modernize its economy, society and legal system, Japan has maintained ambiguous relationships towards modernity, "the West", and law itself (Tanase, 2006; Nottage, 2006).

Japanese law was formed in the crucible of comparative law, and continues to intrigue comparative lawyers. It borrowed early on from China, from continental Europe in the late 19th century, and from Anglo-American law particularly during Japan's Occupation following World War II. In the wake of economic stagnation and accelerating deregulation over the 1990s, some commentators now proclaim "the Americanization of Japanese law" (Kelemen & Sibbitt, 2002). However, it has also been framed by international law, law reformers remain attracted to broader "global standards", and it has a long and strong indigenous legal tradition. Accordingly, Japanese law can be expected to remain an archetypical "hybrid" legal system, not readily characterized as belonging to any particular "legal family" (cf. Merryman et al, 1994).

The study of Japan's law has also led to new paradigms or theories being developed, particularly by foreign commentators writing in Western languages, to explain phenomena seemingly showing that law remains quite unimportant in socio-economic ordering. A central debate has concerned low per capita civil litigation rates, compared to other similar economies, especially in Europe and the United States. The "culturalist" theory explains this on the basis that "the Japanese don't like law" (Noda, 1976), due primarily to the legacy of a Confucian tradition – emphasizing harmonious and hierarchical social relationships (see also writings in von Mehren, ed, 1963). "Institutional barriers" theory instead argues that "the Japanese can't like law" (Haley, 1991). Access to justice is restricted by limited numbers of legal professionals, and problems in court proceedings, so claimants cannot afford to sue and thus do not obtain the outcomes nominally prescribed by the law. "Social management" theory suggests that "the Japanese are made not to like law". Institutional barriers are maintained particularly by social elites, to resolve social problems outside the courts, which might lead society in unpredictable directions. Often, alternative dispute resolution procedures and resources are inaugurated to facilitate this approach. Some of the theorists adopting this perspective, especially in its earlier incarnations, have been skeptical about this management of social problems (Upham, 1987). But others suggest that it may be justified under more communitarian approaches to contemporary

democracy (Tanase, 2006). By contrast, “rationalist” theory asserts that “the Japanese do like law”, acting in its shadow (Ramseyer & Nakazoto, 1998). Despite high barriers to bringing suit, Japanese law is predictable – at least in some areas, and compared to countries like the United States – so claimants do not even need to file suits to be able to obtain favorable settlements out of court. Much rationalist theory also relies on quantitative social science, particularly econometrics. However, more recent “hybrid” theory combines more qualitative methodology, and takes a more eclectic and nuanced approach to show how “the Japanese sometimes like law, but sometimes don’t” (Milhaupt & West, 2004; Nottage et al, eds, 2008). Thus, the Japanese legal system provides a rich testing ground for new theoretical approaches to comparative law more generally.

To better appreciate these implications for comparative law, as well as to provide basic information on the Japanese legal system, this entry first outlines Japan’s complex legal history, then sets out the foundational legal principles of its present Constitution, and finally focuses on the structure and role of the courts and the legal profession.

2. History

A coalition of some powerful tribes, governed by customary norms, began to unify Japan as a state in the 5th century. A centralized regime was gradually organized, with the Emperor at its apex, but the law was still unwritten and undifferentiated from custom. The first effort at codifying the law began in the latter half of the 7th century, when Chinese legal codes were transplanted. To strengthen its power, Japan’s Imperial Court eagerly adopted the Chinese legal system, as well as the Chinese governmental system and tax system. However, to make the transplanted law conform to the Japanese reality, both ancient customs and emerging practices came to be incorporated into the legal codes.

The effort to develop a strong centralized regime soon collapsed, as a manorial system developed. Powerful nobles obtained a sort of extraterritorial jurisdiction, and

made their own laws in their vast manors. This legal pluralism was further accelerated when the warriors who had been the guardians of the manors of nobles began to claim their own rule over manors and to make their own laws. While formal laws enacted by the Imperial Court were still nominally valid all over the country, their effectiveness was considerably curtailed. After the warrior class established their own central government in the early 12th century, legal pluralism remained prevalent. While both the shogunate, the warriors' central government, and the Imperial Court enacted laws which had ostensibly national validity, the manors of nobles and the feudalities of warriors are governed by their own laws.

The country was only really unified in late 16th century after a bloody civil war, by a powerful warrior, Hideyoshi Toyotomi. Laws with substantial national validity were enacted. Toyotomi's rule was short, however. After his death, Ieyasu Tokugawa came to power and founded a Shogunate which lasted for fifteen generations, and completed the unification of the law. Although the Tokugawa Shogunate granted warlords both legislative and judicial powers in their territories, it restricted warlords' legislative powers within demarcations set by its own laws. and put lawsuits brought by a resident of one warlord's territory against a resident of another warlord's territory under its own jurisdiction. In addition, in the middle of the 17th century, the Tokugawa Shogunate closed the country, except for limited trade with China and the Netherlands, to block the influence of Christian religion over the Japanese people and to prevent warlords from accumulating wealth and weapons by foreign trade. This isolation policy continued until the mid 19th century, with Japanese law developing without foreign influence and acquiring some distinctive features. On the one hand, Tokugawa era law remained predominantly administrative law, used by the Shogunate to help maintain national unity. On the other, largely in the form of precedents, detailed legal rules developed dealing with secured loans, commercial notes and so on. However, the ideological underpinning was that law was not available to citizens in the form of “judiciable rights”, but only through the benevolence of rulers (Henderson, 1965). More recent research, by contrast, suggests that functional equivalents to Western rights consciousness, and greater variability and dissent did exist in Tokugawa village

practice (Ooms, 1996).

The isolation policy came to an end in 1853, with the arrival of American warships. Due to related political turmoil, the Tokugawa Shogunate became weak and surrendered its power to the Emperor in 1867. This “Meiji Restoration” established a new regime, with the Emperor Meiji at its apex. The Meiji Government urged the creation of a strong monarchy, and promoted the modernization of the legal system. The main reason for the latter was to revise disadvantageous treaties that the Tokugawa Shogunate had concluded with the United States and European countries, since Japan first had to be recognized as a modern sovereign state by those countries. The Meiji Government sent officials around the world to study modern Western law. It was first attracted primarily by French law, but ultimately enacted various codes drawing more on German law towards the end of the 19th century. In particular, the Constitution of Imperial Japan (the Meiji Constitution) was enacted in 1889, on the model of the Prussian Constitution. Japan became a modern constitutional monarchy, at least in appearance. Under the Meiji Constitution, sovereignty resided in the Emperor and all governmental organs including the judiciary were regarded as mere assistants to the Emperor. The Constitution did include a bill of rights, but provided that those rights were guaranteed only within limits set by legislation. Thus, the Imperial Diet could arbitrarily restrict the constitutional rights of the people.

After Japan’s defeat in World War II, democratization of its polity and society began under the control of the Supreme Commander of the Allied Powers. The new Japanese Constitution was enacted in 1946, and came into effect the following year (Hook & McCormack, 2001). It declared that sovereignty resided in the people, and that the Emperor was nothing more than the symbol of the state and the unity of the people. It also declared that constitutional rights were inviolable, and a system of judicial review was therefore institutionalized. This Constitution has never been amended, and still lies at the very heart of the Japanese legal system. In 2000, the Diet resumed a detailed study of possible reforms, and surveys now suggest considerable public support for certain constitutional amendments. But it remains uncertain whether the final report, planned for 2005, will lead to major changes.

3. Foundational Legal Principles

The present Constitution lays down three fundamental principles. The first is that sovereignty resides in the people, and no longer in the Emperor (Art. 1). Although the Emperor does play some indispensable roles in state affairs, such as the convocation of the Diet, those are mere rituals performed with the advice and approval of the Cabinet.

The second fundamental principle is respect for fundamental human rights. The Constitution includes a bill of rights consisting of thirty articles, and prescribes that "these fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights" (Art. 11). These include not only the rights to such civil liberties as the freedom of speech, the free exercise of religion and several procedural rights of the accused. There is also a right to welfare: "all people shall have the rights to maintain the minimum standards of wholesome and cultured living" (Art. 25, Sec. 1). However, the concrete content of this right to welfare is thought to depend on the welfare policy of the government, so welfare recipients are not entitled to claim that a particular welfare policy is unconstitutional.

The third fundamental principle is pacifism. Article 9 of the Constitution declares that "the Japanese forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes" (Sec. 1), and that "land, sea, and air forces, as well as other war potential, will never be maintained" (Sec. 2). Although there have been heated controversies on the compatibility between this Article and Japan's now very large Self Defense Force (SDF), the government has consistently asserted that the Constitution never prohibited the maintenance of a minimum necessary force for self-defense. According to surveys dating back to the 1990s, a majority of the Japanese people thinks that Japan should make a due contribution to the maintenance of world peace, and that the SDF should be regarded as constitutional if necessary for this purpose. Encouraged by such sentiment, and

pressured by the United States as its main military ally nowadays, the Japanese government has enacted various laws permitting the dispatch of SDF personnel abroad subject to certain conditions, and planning for potential military attack from abroad.

The Constitution also adopts the separation of powers as a guiding principle for the governmental system. Legislative power is vested in the Diet. It consists of the House of Representatives and the House of Councilors, with the former more important than the latter in most respects. The members of both Houses are elected, and all citizens over the age of twenty have the right to vote. Executive power is vested in the Cabinet, comprising the Prime Minister and other Ministers. The Prime Minister, the head of the Cabinet, is designated from among the members of the Diet by resolution. Then the Prime Minister appoints other Ministers, the majority of whom must be selected from among the members of the Diet. Judicial power is vested in the Supreme Court and lower courts established by law. While the Constitution provides that "the Diet shall be the highest organ of state power" (Art. 41), it also adheres to the idea of checks and balances, which forms the foundation of the principle of the separation of powers, by granting the Cabinet the power to dissolve the Diet, and courts the power to determine the constitutionality of laws enacted by the Diet.

Each member of the Diet, but also the Cabinet, may submit a bill to the Diet. In reality, among those bills which finally become laws, the number of those submitted by the Cabinet far exceeds the number of those submitted by individual Diet members. This remains true, despite more private member bills submitted since the 1990s and some notable successes among them. Bills submitted by the Cabinet are still mainly drafted by officials in ministries or similar agencies, belonging to the executive branch. Therefore, the real law-making power has lain in the hands of ministries. This differs from the United States, for example, but is consistent with the tradition of "Westminster" parliamentary democracy still followed in parts of the Anglo-Commonwealth world. Japan's law-making processes have also become much more varied and complex particularly since the late 1990s. A new Cabinet Office has impinged on deliberative councils (*shingikai*) and other law-drafting processes hitherto jealously guarded by individual ministries, there is ever greater rivalry among the latter,

and the entire system has become more transparent and politicized.

In addition to the Constitution and statutory laws enacted by the Diet, formal sources of law include the following. The first comprise rules and regulations enacted by the Cabinet, ministries, and agencies belonging to the executive branch. These rules and regulations are valid only insofar as they are enacted within the authorities specifically delegated to respective organs by statutes. The second source is rules enacted by the Supreme Court, concerning judicial procedures, matters related to lawyers, the internal discipline of the courts, and the administration of the judiciary. But the Diet is also empowered to enact laws concerning those matters, and a law enacted by the Diet prevails over a rule enacted by the Supreme Court, if incompatible. The third source is international treaties. The Cabinet is empowered to conclude international treaties, but it has to obtain Diet approval beforehand or, depending on circumstances, subsequently. Although commonly thought that international treaties are superior to statutory laws, there are diverse opinions on the relationship between the Constitution and international treaties. There is no judicial precedent, however, concerning the relationship between international treaties and domestic laws. A fourth source of laws is ordinances enacted by local governments. The Constitution grants local governments the rights to enact their own ordinances insofar as they are not incompatible with statutory laws enacted by the Diet. In some areas, such as protection of consumers and the environment, this has allowed quicker progress at the local level. But Japan's system of public finances, once again under review, has tended to constrain the exercise of this constitutional authority.

Formally, judicial precedents are not a source of law. Even a decision of the Supreme Court is no more than the final judgment of the particular case at issue, having no legal binding effect on future similar cases. (However, to overrule its own precedent, the Court must sit as a Grand Bench, comprising all fifteen Justices.) Lower courts can freely interpret laws without being bound by past decisions of the Supreme Court. However, lower courts are generally obedient to the precedents of the Supreme Court, and the Supreme Court itself is very cautious about overruling its own precedents. Thus, its precedents are the most important clues for predicting how any given case will

be decided, and thus constitute a de facto source of law. If there is no relevant precedent of the Supreme Court, the precedents of high courts occupy the same position. Japan's superior courts have established many important precedents by interpreting abstract provisions in statutes, especially in such areas as tort law (Nottage, 2004), and hence it is impossible to understand the present condition of the Japanese law without sufficient knowledge of those precedents.

Another aspect of Japanese law that has long been of comparative interest is the practice of "administrative guidance" (*gyosei shido*). One form involves directives from, for example, an organ of the national government to local governments. More controversial has been actions by public officials to persuade a private entity voluntarily to cooperate in a purpose they see as desirable, relying on broadly worded legislation (Haley, 1991). However, in 1985 the Supreme Court clarified that the essence of such administrative guidance was voluntary compliance, so that if officials persisted in such actions despite clear refusal to comply, a private entity thus sustaining loss could claim compensation. Although claims and success rates remain low for claims against central government officials, they have been much higher versus local authorities. The Supreme Court's view was restated in the Administrative Procedures Act (APA), which also for example allowed recipients of administrative guidance to request the guidance in writing. It was enacted in 1993, when the Liberal Democratic Party (LDP) lost power after almost half a century. Combined also with Public Comment Procedures required by a Cabinet decision from 1999 to 2006 and by amendments to the APA since 2006, and the Official Information Disclosure Act applicable since 2003 to most central government entities, the use of administrative guidance against businesses has become more circumspect than ever (Uga, 2007).

4. Court Structure

The Supreme Court is the highest body of the judicial branch, dealing with appeals filed against judgments of high courts. It comprises the Chief Justice and fourteen Justices. Hearings and adjudications in the Supreme Court are made either by

the Grand Bench, or by one of three Petty Benches each made up of five Justices. Each case is first assigned to one Petty Bench. Only if the Petty Bench assigned a case finds it necessary to answer questions concerning the interpretation of the Constitution, or to overrule a precedent of the Supreme Court, will the case be transferred to the Grand Bench. The vast majority of cases are decided by Petty Benches. The Court has a high caseload, despite reforms to the Code of Civil Procedure in effect since 1998 allowing discretion to hear civil appeals, at least compared to many Anglo-Commonwealth final courts of appeal.

In addition, the Supreme Court is vested with rule-making power and ultimate authority regarding judicial administration. This includes the power to assign lower court judges to particular positions in particular courts. Each lower court judge is assigned to a particular position in a particular court, transferred to another position in another court for every three to five years, and gradually promoted to better positions. While all matters concerning judicial administration are formally determined by the Conference of Supreme Court Justices, most substantial decisions are made by the General Secretariat of the Supreme Court, with the Conference only approving the decisions of the General Secretariat. The latter's senior members are selected from among lower court judges, and they make up an elite class within the judiciary.

Until World War II, the Ministry of Justice had authority over judicial administration. During the Occupation, this authority was transferred to the Supreme Court to guarantee the independence of the judiciary from the executive branch. While the independence of the judiciary was certainly reinforced, the independence of individual judges was not. There is a risk that judges who have overruled the precedents of the Supreme Court or otherwise have been disobedient to the Supreme Court or its General Secretariat will be disadvantaged in their placement and promotion. The Court Organization Law does provide that a judge shall not be transferred against his or her will. But if a judge ever refuses the decision of the General Secretariat to transfer him or her to a particular position in a particular court, the judge will never be transferred to a better position in the future. So it is wise for a lower court judge not to reject the decisions of the General Secretariat, even if to do so is inconsistent with his or

her own conscience. This situation has undermined the Constitution's declaration that "all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and laws" (Art. 76, Sec. 3).

As to the judiciary's structure, the Constitution provides only that "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law" (Art. 76, Sec. 1). The lower courts established by law are high courts, district courts, family courts, and summary courts. High courts are intermediate appellate courts which have jurisdiction mainly over appeals against judgments rendered by district courts or family courts. In criminal cases originating in summary courts, however, appeals come directly to high courts. There are eight high courts and six branch offices. In high courts, all cases are handled by a collegiate body consisting of three judges, with no dissenting judgments.

District courts are courts of general jurisdiction which deal with most of civil, criminal, and administrative law cases in the first instance. In civil cases, district courts also have jurisdiction over appeals against judgments rendered by summary courts. They are situated in 50 locations, with branch offices in 203 locations. In district courts, most cases are disposed by a single judge. When a collegiate body consisting of three judges in a district court finds that a case brought to the court should be handled by a collegiate body, the case is handled by the collegiate body. In addition, the Court Organization Law requires that certain kinds of criminal cases and appeals against judgments of summary courts should be handled by a collegiate body consisting of three judges.

Family courts are specialized courts dealing with family affairs and juvenile delinquency cases in the first instance. Family courts and their branch offices are established at the same places where district courts and their branch offices are located. In addition, there are seventy-seven local offices of family courts, in which cases are handled by a single judge.

Summary courts are courts of limited jurisdiction which deal with civil cases involving claims not exceeding 1,400,000 yen and minor criminal cases designated by law in the first instance. There are 438 summary courts. In summary courts, all cases

are handled by a single summary court judge.

In all of these courts, litigants are not required to be represented by qualified lawyers, except for very serious criminal cases, while representation by non-lawyers had been strictly prohibited until recently. In serious criminal cases, a court should appoint a lawyer for a defendant unable to afford one. In minor criminal cases, a defendant who cannot afford to hire a lawyer is entitled to a court-appointed lawyer if desired. The fees of court-appointed lawyers are paid from the public purse. As for civil and administrative law cases, legal aid is available to the poor, but the budget for legal aid remains very limited. Partly for this reason, civil cases in which both parties are represented by a lawyer are only about 40 per cent of all civil cases handled by district courts and merely about one per cent of all civil cases handled by summary courts.

District courts, family courts, and summary courts not only adjudicate cases but also provide mediation services. In a mediation procedure, a mediation committee, comprising a judge and two or more mediators selected from among citizens who have broad knowledge and experience, mediates between the parties. In general, a mediation procedure is commenced on the request of a party, and is not obligatory. However, for certain types of cases involving family disputes, a party must first ask for family mediation provided by family courts before bringing a lawsuit. Generally, the proportions of court-annexed mediation cases have increased since the 1990s.

One of the notable characteristics of the Japanese legal system is that lay participation in the judicial procedure has been very limited. Lay citizens have really only participated in judicial procedures as mediators as mentioned above, or as councilors for family courts and summary courts. Councilors merely assist and give their opinions to judges or summary court judges. Neither mediators nor councilors are entitled to decide cases.

Juries were introduced for serious criminal cases in 1928, but the system fell into disuse. A variant has recently been revived, in the form of a lay assessor (*saiban'in*) system enacted in 2004, to begin in 2009. It draws more on continental European models, involving laypersons sitting with judges to decide matters of both

law and fact (Anderson & Nolan, 2004). Also, from 2009, Prosecution Review Boards including laypersons will be able to force public prosecutors to bring criminal proceedings, if they refuse to do so following recommendations by two boards.

In addition, another round of reforms to the Code of Civil Procedure, in effect from 2004, opens more avenues to the courts. The amendments allow parties to seek opinions from expert advisors before formally lodging suit; encourage more use of expert witnesses (*kanteinin*) during proceedings; and introduce a system of “expert commissioners” (*semmon i'in*) who can provide explanations in writing or orally before the parties and, with their consent, even attend settlement conferences to facilitate settlement or witness examinations to ask questions (Nottage, 2005b).

Likewise aimed at engaged more people in Japan’s justice system, the 2004 Law to Promote the Use of Out-of-Court Dispute Resolution Procedures allows the Minister of Justice to establish a system for accrediting Alternative Dispute Resolution (ADR) institutions operated by private organizations. Accredited institutions would have to report on their activities, but would achieve suspension of limitation periods while conducting their mediation procedures. Outside the formal court system, many ADR systems have been institutionalized in Japan, but most of them have been operated by or involve national or local government officials. Only some have been operated by private organizations. Most of them provide only mediation services, but some of them also provide arbitration services, and arbitration law was amended in 2003 to bring century-old legislation into conformity with global standards (Nottage, 2004; McAlinn & Nottage, 2005).

The Constitution provides that "no extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power" (Art. 76, Sec. 2). Thus, no judicial body can exist outside the hierarchy with the Supreme Court at its apex. While some quasi-judicial bodies which adjudicate particular types of dispute do exist as parts of the executive branch, their judgments are not final. Parties can sue to seek revocation of the judgments in either a district court or a high court, depending upon the organs which made the first decisions, and the Supreme Court has the final say. Those quasi-judicial bodies include the Fair Trade Commission, the

Marine Accidents Inquiry Agency, the National Tax Tribunal, and the Patent Office.

5. Legal Professionals

To qualify as a lawyer (*bengoshi*) with full rights to give legal advice and represent clients – and also to be appointed as a judge or public prosecutor (Johnson, 2002) – one must pass the National Legal Examination (*shiho shiken*), and then be trained at the Legal Research and Training Institute. University legal education still takes place primarily at the undergraduate level. Every year, about 45,000 students graduate with a Bachelor of Laws. However, most of them do not become lawyers, instead finding employment in governmental organs or private corporations, because it has been extremely difficult to pass the National Legal Examination. In 2004, while more than 40,000 people took the Examination, less than 1,500 examinees passed. The number of successful examinees is intentionally limited. The number was 500 in 1990, then gradually increased to 1,000 in 2000, and to around 1500 in 2004. It was expected rise to around 3,000 per annum in 2010, as part of a broader program of judicial reforms underway since 2001 (<http://www.nichibenren.or.jp/en/>). Another aspect of the judicial reform program concerning the training of prospective legal professionals was the inauguration of 68 new postgraduate “Law Schools” from April 2004. However, although it is easier for their (carefully selected) students to pass a “New Legal Examination” (*shin-shiho shiken*), it remains one of the most difficult in Japan (Nottage, 2005a).

Those who pass the Examination enter the Legal Research and Training Institute, where they get practical legal training as legal apprentices at public expense. The period of the training had been for two years, was shortened to one and half years in 1998, and further shortened to one year from 2006. Those who graduate from Institute are regarded as qualified lawyers. Among them, more than 80 per cent go into private practice, about 8 become judges, and others become public prosecutors. While it is common that retired judges and public prosecutors move into private practice, it is rare for private practitioners later to become judges or public prosecutors. In 2007, there

were about 2,500 judges, 1,600 public prosecutors, and 25,000 private practitioners.

A legal apprentice desiring to become a judge applies to the Supreme Court just before the end of apprenticeship at the Institute. The Constitution prescribes that "the judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court" (Art. 80, Sec. 1). In fact, the Cabinet has never refused to appoint a person put on the list submitted by the Supreme Court, and the Conference of Supreme Court Justices only approves a list made by the General Secretariat. Those who are admitted to the judiciary are first appointed as assistant judges for a term of ten years. After ten years, almost all assistant judges are promoted to full judges. Like the appointment of new assistant judges, promotion decisions are formally made by the Cabinet based on the list submitted by the Supreme Court, but the real decisional power again rests with the General Secretariat. The term of a full judge is also ten years, and hence those who want to continue their judicial work have to apply for readmission every ten years. The procedure of readmission is the same as the first admission. During their tenure as assistant and full judges, judges are frequently transferred among courts and gradually promoted to better positions. Decisions to transfer and promote judges are within the Supreme Court's authority for judicial administration, and substantial decisions are made by the General Secretariat.

Exceptions to this judicial personnel management are Supreme Court Justices and summary court judges. These, unlike ordinary judges, need not be qualified as lawyers (by completing the Examination and the Institute apprenticeship). The Chief Justice of the Supreme Court is designated by the Cabinet and appointed by the Emperor among those over the age of forty and have sufficient legal knowledge. The appointment by the Emperor is mere ritual. Other Supreme Court Justices are appointed by the Cabinet. At the beginning of 2008, six Supreme Court Justices were those selected from among lower court judges, four from among *bengoshi* private practitioners, and the remaining five were two former public prosecutors, two former officials, and a former professor of law. Most summary court judges are former court clerks whose careers award them with qualification as summary court judges. There are about 800 summary court judges who are not qualified lawyers.

The total number of qualified lawyers – including judges, public prosecutors, and private practitioners – is about 29,000. The ratio of such lawyers to the total population is about 1 to 4,400, one of the lowest among developed countries. However, many quasi-lawyers must also be considered, especially when adopting a functionalist approach to comparative law. There are about 7,700 patent attorneys (*benrishi*), who advise on certain intellectual property matters, and have been granted joint rights of representation (with *bengoshi*) in lawsuits concerning certain intellectual property cases since 2003. There are about 19,000 judicial scriveners (*shiho shoshi*), whose main functions are drafting legal documents and filing them with courts, public prosecutors, and the Ministry of Justice's Legal Affairs Bureaus which manage the registration of persons' legal status and title to real estate on behalf of those who are not represented by lawyers. Since 2003, judicial scriveners also have been granted right to represent litigants in summary court proceedings. There are also about 39,500 administrative scriveners (*gyosei shoshi*), who draft legal documents to be submitted to organs belonging to the executive branch on behalf of their clients. There are about 70,500 tax attorneys (*zeirishi*), whose primary roles are the calculation of taxes and drafting of documents to be filed with the tax offices on behalf of their clients. Since 2002, tax attorneys may also assist their clients in lawsuits concerning tax matters provided their clients are represented by lawyers. About 550 public notaries (*koshonin*), appointed from retired public prosecutors and the like, authenticate and preserve certain legal documents, such as contracts, which may gain additional force in civil litigation. Some notaries are also involved in ADR.

In addition to these and other quasi-lawyers, many people who hold a Bachelor of Laws but are not qualified lawyers are employed by governmental authorities and private corporations, where they are engaged in law-related jobs such as examining legal documents submitted by citizens or drafting contracts. Corporate legal department staff have steadily increased in numbers and sophistication since the 1970s.

6. The Role, and Rule, of Law

It has long been said that Japan is a country where the law plays a very limited roles. It is true that most disputes are settled either by negotiation between parties or through mediation services provided by courts or other ADR procedures, before developing into lawsuits. However, as mentioned at the outset, theories differ in explaining this behaviour, with varying implications.

As well as courts being infrequently utilized to resolve private disputes, the law plays a very limited role in another sense: the judiciary is very reluctant to exercise its constitutionally vested power to revoke the decisions of other branches of the government. Statutes enacted by the Diet are hardly ever found unconstitutional, and cases in which decisions of organs belonging to the executive branch are nullified are also rare. Almost all politically important decisions are virtually immune from judicial scrutiny, and hence the judiciary has been nearly a non-entity for most of Japan's political history. Again, explanations and appraisals differ concerning this phenomenon. A "rationalist" theory argues that it results from the long reign of the LDP, which led not only bureaucrats within the executive branch but also the judiciary to comply with the Party's clear policy preferences in politically important situations, even without direct interference by the Party (Ramseyer & Rasmussen, 2003). Econometric evidence is presented to show that judges that go against such preferences in "politically charged cases" (like the constitutionality of the SDF) tended to be assigned by the Supreme Court to less prestigious postings. However, some contest that conservatism is instead related primarily to Japan's civil law tradition regarding judicial administration (Haley, 1998). Further, data analysis has not been forthcoming regarding more common types of cases, also arguably politically charged, such as product liability claims against manufacturers. It can also be difficult to distinguish clear policy preferences for the LDP, since its various factions have tried to appeal to a broad array of voters. Anyway, this theory emphasizes that the Japanese judiciary got the (conservative) message around 1970, when the Supreme Court refused to promote a left-wing assistant judge and alerted others that it would unfavorably on a left-wing organization which many young judges had joined (including the former Chief Justice Akira Machida, who served in that position from 2002 to 2006). Accordingly, it should

also concede that the judiciary would have received a different (more liberal) message from the LDP's fall from power in 1993, and the related array of political, socio-economic, and legal changes. Hence, although the data analysis presented may support the more general proposition that actors engaged with Japan's legal system act in their rational self-interest, rather than just out of cultural conditioning, it seems risky to rely on this to predict what general attitudes and roles Japan's judiciary will adopt in the foreseeable future.

More generally, law has begun playing a more visible role in political and socio-economic ordering in Japan. The globalization of the economy and the society weakens the influence of cultural traditions, and accelerating deregulation makes bureaucratic management of disputes difficult to maintain. In addition, there are pressures from foreign countries to make the Japanese legal system meet global standards, which have always held an attraction for law reformers in Japan anyway. Some Japanese corporations and their main peak associations are also demanding a more usable legal system, to protect themselves, develop new business, and perhaps also impose to gain an edge over less legally sophisticated competitors (Kitagawa & Nottage, 2007). Citizens' groups and others have jumped on this bandwagon too.

In response to all these pressures, the Diet enacted the Law concerning the Establishment of the Judicial Reform Council in 1999, and the Council recommended major reforms in 2001. The Prime Minister then established an Office for the Promotion for Judicial Reform, within the new Cabinet Office, and the former generated many legislative reforms before its term expired in late 2004. Many outcomes have been noted above, centering on speeding up and improving court proceedings, expanding ADR and the legal profession, ameliorating legal education, and promoting more citizen participation in the justice system. In addition, the Comprehensive Legal Support Act was enacted in 2004, creating a new independent agency (the Japan Judicial Support Center) from 2006. Branches of this agency (nicknamed '*Ho Terasu*') manage legal aid for civil cases and court-appointed lawyers for criminal cases, provide fee-charging legal services in rural areas where the numbers of lawyers are limited, support the victims of crimes, and provide legal information to

the general public. Instead of suspects only being entitled to request court-appointed lawyers after they are prosecuted, court-appointed lawyers are now available promptly after arrest for those who are suspected of certain serious crimes. Legal aid for civil cases has also been expanded.

If all these reforms find traction and the capacity of the legal system is really strengthened, people and corporations will become more willing to use the legal system. The more the legal system is utilized, the more the legal system will gain in prestige. (Already, there is evidence that graduates from elite law faculties are forsaking careers in the top ministries, to enter private practice: Milhaupt & West, 2004). Ultimately, backed by more prestige, the judiciary should become more active in intervening into politics, even without frequent changes in ruling parties or coalitions, and private disputes should also be resolved more obviously in the light of the law.

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