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Globalization of Business Lawyering in Japan

BY YOSHIMICHI MAKIYAMA

Introduction

The development of a legal system under globalization has impacted the legal practice of cross-border transactions. Businesses are confronted with several legal systems in foreign jurisdictions, as well as, foreign languages. On the other hand, the role of the legal system of each country becomes relatively diminished in the area of cross border transactions. The legal risk may materialize as uncertain knowledge and recognition of foreign legal systems and international law. From this perspective, it is more important to understand the roles of lawyers who support solving legal issues in transnational business.

Cross-border transactions involve several different jurisdictions where the lawyers need to consider both global and local aspects. One should also consider the two major legal systems: common law and civil law.

Japan is the civil law country that has a well-developed legal structure and practice under the civil law system. However, international transactions are likely to adopt common law principles. Compared with legal practice mainly within existing statutes in civil law countries like Japan, lawyers in the common law countries tend to create their own legal structures. Therefore, it is crucial for the lawyers who practice in civil law countries to learn and understand common law concepts.

It is essential for Japanese lawyers is to create ways to form a bridge between different jurisdictions, especially with common law countries. With regard to legal education and training, one of essential methods for young lawyers in Japan is to take an LL.M., or other degree, at law schools in common law countries, such as the United States.

I. Reform of the Legal Training System in Japan

Legal Training System in Japan

In order to enter the legal profession in Japan, one must complete the following process:

- (1) Law School (a professional graduate school);
- (2) National Bar Examination; and
- (3) A one-year training course of legal apprentices.

The training course of legal apprentices has the purpose of preparing legal professionals with the knowledge and skills of a wide range of legal practices, high professionalism, and ethical standards. The training is based on the legal theory and basic practical foundation that law students have acquired at law schools.

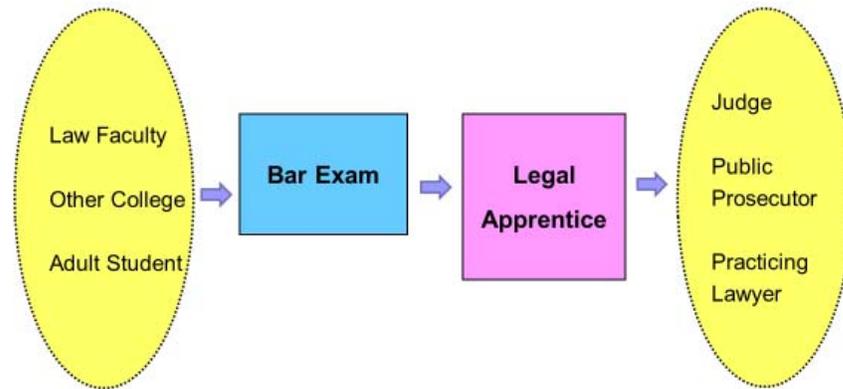
Those who pass the final national examination and complete the training course are qualified to become assistant judges, public prosecutors or practicing attorneys.

Former Training System for Practicing Attorneys

Before the reformation in 2001, the former training system for legal apprentices started in 1947.¹ Under the former training system, legal apprentices acquired a broad perspective and improved their ability to analyze cases fairly and objectively, while learning the different viewpoints used by legal professionals to examine cases. The former system also had the goal of enhancing mutual understanding among legal professions.

The current unified training system is unique when compared internationally, and has been highly evaluated in Japan.

1. *The Legal Training and Research Institute of Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/institute_01/index.html.



Reform of Legal Training System

The law school system started in 2004 and the first-ever National Bar Examination was implemented in 2006.²

Motivations and goals for the reforms were multi-faceted and depended on each stakeholder's perspective:

- (1) Improving the quality of legal education in Japan and reducing reliance on preparatory or cram schools;
- (2) Creating more business-oriented lawyers who could operate in international contexts and new legal fields; and
- (3) Educating lawyers who would improve access to justice in Japan through research and experience.³

Japanese universities operated post-graduate law courses prior to 2004, but the reforms saw the advent of a new American-style juris doctor degree at more than 70 universities. These universities maintained their undergraduate law faculties but began offering two or three year courses aimed at providing professional legal education. Students who pass an entrance examination, usually based on previous undergraduate legal

2. See *The Legal Training and Research Institute of Japan*.

3. *The Legal Training and Research Institute of Japan*; Japan Fed'n of Bar Associations, WHITE PAPER ON ATTORNEYS 2016, at 36 (2016) <https://www.nichibenren.or.jp/en/about/whitepaper2016.html>.

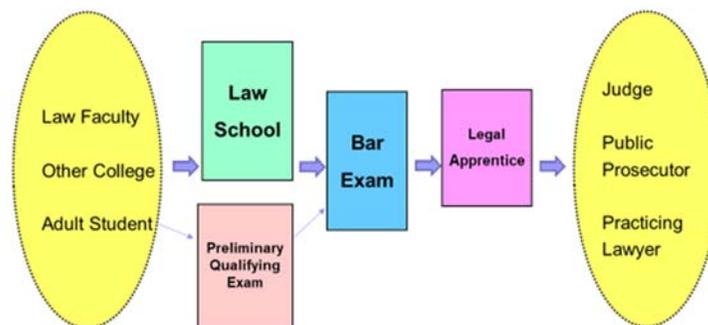
studies, are entitled to accelerate their law school studies within two years. The majority of students, however, opt for a degree over three years to give them more time to study for the national bar examination.

Since 2006, a prerequisite for taking the National Bar Examination is graduation from a post-graduate law school or, passing the new preliminary qualifying examination since 2011.⁴

The new preliminary qualifying examination was introduced after the pre-reform National Bar Examination ceased to operate in 2010. The preliminary qualifying examination is supported by politicians who argue that it creates equity for those who cannot afford law school or cannot attend law school due to other commitments, including work.⁵

In conjunction with the elimination and relaxation of national regulations and changes in socio-economic circumstances in Japan and abroad, the law and the judiciary are expected to play a more important role in creating a society with more freedom and fairness.⁶

Reform was carried out with the governmental objective of developing a number of legal professions equipped with advanced legal expertise, a wide-ranging education, a global perspective, a well-rounded character, and professional ethics, who are capable of meeting a variety of requests from the public.



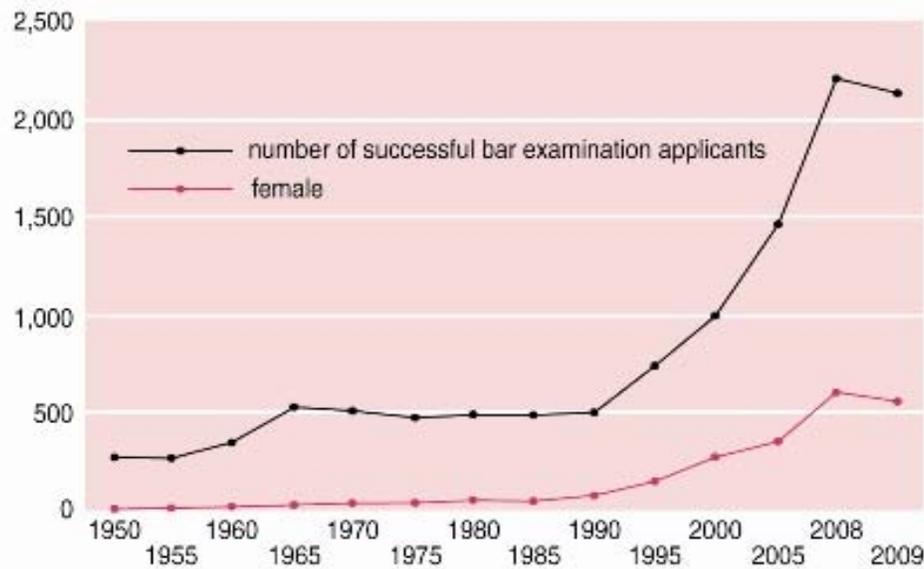
4. See WHITE PAPER ON ATTORNEYS 2016.

5. *The Legal Training and Research Institute of Japan*; WHITE PAPER ON ATTORNEYS 2016.

6. *The Legal Training and Research Institute of Japan*.

Present Training System after Reform

There is increasing pressure on law schools and the number of applications has declined dramatically from a peak of 72,800 applicants in 2004 to 11,450 applicants in 2014. In 2015 the situation for law schools was even worse than in 2014, however, with only 54 law schools reportedly recruiting new students.⁷



II. Globalization of Business Lawyering

Development of a Legal System under Globalization

The Japanese legal practice of cross-border transaction cannot avoid impact from development of a legal system under globalization. International businesses are always facing a variety of foreign legal systems and jurisdictions, as well as, foreign languages, even though it has impaired and diminished the role of the national legal system in Japan.

We often realize certain legal risk accompanied by uncertain knowledge and recognition of various multi-national legal systems and international law. In this regard, it is important to understand the roles lawyers play who

⁷ *The Legal Training and Research Institute of Japan*; WHITE PAPER ON ATTORNEYS 2016.

resolve legal issues within international business.

Trans-Border Practice

In these days, legal services are directly and indirectly influenced by globalization. Lawyers who specialize in international capital and financial transactions in global markets are no longer the only ones to engage in trans-border legal practices.

Lawyers should consider trans-border legal and ethical issues if they are involved in multi-national practice. This means that lawyers are required to understand, not only, applicable substantive and procedural law, but also, the role and ethical standards of lawyers in other countries. Therefore, enhancing lawyer competence to provide better services for the clients handling international business is the main motive for research on comparative laws and ethics.

Lawyers who engage in trans-border legal practice need to be aware of the behavior of foreign lawyers who provide legal services based upon different legal backgrounds and ethical norms.

Law Schools under Globalization

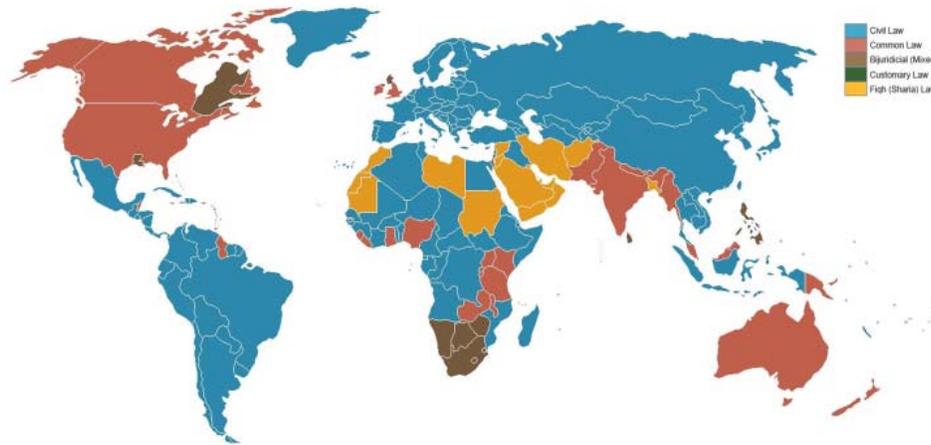
Law schools, as well as, law students should recognize their contribution and responsibility for legal practice under globalization. In doing so, they should consider international and comparative approaches in their law school education in order to develop skills and knowledge of international practice. For the purpose of legal services for multinational clients, it is significant to pay attention to their specific concerns with legal system practice in particular jurisdictions.

III. Legal Differences – Common Law / Civil Law

Common Law and Civil Law

Cross-border transactions involve a number of different jurisdictions and need to consider both global and local aspects. The two major legal systems are the common law system and the civil law system.

Japan has a civil law system which has a well-developed legal structure and practice. Japan has uniquely developed its own way of lawyering under its civil law system. However, international transactions are likely to adopt common law principles.



(From Wikipedia: LegalSystemsOfTheWorldMap.png)

19

Civil Law

Under civil law system, lawyers are generally subject to extremely well-developed legal structures at the level of the nation state. Typically, the civil law tradition is based upon a civil code that emphasizes formal uniformity, reasonability, and predictability.

From the civil law perspective, law is regarded as an aggregation of consistent, self-contained, and rigid declarations, thereby making the approach to law an analytical and intellectual construct. However, there is a certain separation between logically-interconnected propositions and the reality of business.

If the code does not fully cover the incidents, we consider legal doctrine and principle and are mindful of theoretical categories, nuances, and distinctions in the course of an academic approach.

Common Law

Under the common law system, statutory law is traditionally not as developed as civil code under a civil law system. Lawyers often need to create their own structures. Consequently, the role of lawyers is more important in a common law system than in a civil law system thereby leading to an increase in the number of lawyers.

Common law tradition emphasizes on *ad hoc* and piece-meal interpretations. Further, judicial decisions of case law tend to be more flexible and adaptable, and the construction of case law is useful for supporting client interests.

Accordingly, common law systems have historically sustained a more entrepreneurial view which has contributed to the development of an intimate connection with corporate clients in order to support their interests in a proactive manner.

Common Law vs. Civil Law

Lawyers in common law countries have historically and traditionally been more entrepreneurial and business-oriented than lawyers in civil law countries.

Thus, exploration of timely commercial solutions is more emphasized, rather than theoretical and technical solutions. The lawyers are involved in business transactions and structures at an earlier stage, which leads to establishing and operating large corporate law firms in common law jurisdictions.

Due to differences between civil law and common law systems, the global law firm should respond to different levels of keeping the practices and legal services based upon individual jurisdiction. In addition, some jurisdictions may use local legislation and informal understandings to restrict the activities of foreign lawyers and global law firms.

It is significant for the lawyers who practice in civil law countries to understand common law concepts and to compare it with civil law in order to realize that lawyers in common law countries tend to create their own legal structures.

Anglo-American Law

Under globalization, New York state law and English law dominate commercial transactions. Growth and diffusion of legal services under

Anglo-American law has led global activities of law firms worldwide.

This challenges modern lawyers to bridge American, English, and local law in civil law countries and implement globalization into legal education and training. Young lawyers outside the Anglo-American system find it essential to take certain degrees, such as an L.L.M., at a major American or English law school, unless they are already familiar with common law and global legal practice.

National Systems of Professions

Legal professionals are qualified within a distinct jurisdiction. Practice of each law firm in any jurisdiction is affected by the local law, and the legal profession is intimately bound to the political and juridical system of their original jurisdiction. Lawyering and the legal profession are limited to the characteristics of its national context. Independent jurisdictions are involved in conflicts with different legal contexts and also specific settlements restricted time and location.

Cultural Differences

It is important to note that nationally based cultural differences affect individual lawyers and their clients. Differences in cultural norms, beliefs and expectations reflect in legal services, as well as, legitimate interpretation, performance, practice, and evaluation.

Several nationally specific influences are involved in the process of professional formation and these influences impact the training and practice of professionals from early stage.

Global law firms should limit the impact of national characteristics in legal systems when providing transnational and integrated legal services, which include mixed practices under common law and civil law systems.

Global law firms prefer active advocates of legislative change that favors their operation and work as servers of transnational corporations. In order to smooth the operation of firms in different national contexts, transnational law firms and their clients should be assisted by organizations such as the World Trade Organization (“WTO”).

Organizational Professionalism

One should pay attention to the effects of sharing a culture of autonomy,

independence, and discretion and its impact on global legal practices and services.

Management of law firms under globalization should consider local sensitivities and norms in respective jurisdictions in light of cultural differences. In this regard, we have to reconstruct and reframe the organization of global law firms to recognize and acknowledge not only the demand of managerial and executive control and power, but also to sustain global principles of legal practice and organization.