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The Trials and Tribulations of Japan's Legal Education Reforms

By DANIEL H. FOOTE *

I. Introduction

A sense of momentum accompanied the start of Japan's new legal education system in the spring of 2004. Less than three years had passed since the Justice System Reform Council (the Reform Council) issued its final report in June 2001, proposing a major

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Note regarding name order: For citations in footnotes to works published in English, I have used the name order that appears in the publication. Otherwise, for Japanese names, I have followed the order normally used in Japan: i.e., family name first, followed by given name.

restructuring of Japan's legal training system centered on a new tier of graduate level law schools.¹ And less than a year and a half had elapsed since the details of the law school system were decided and enabling legislation passed.² Despite the tight timetable, sixty-eight law schools were ready to commence operations in 2004, having arranged facilities, assembled faculty, developed curricula, and taken all the other steps required to complete the chartering process; and six additional law schools undertook operations the following year.

It would be a major overstatement to suggest faculty members unanimously supported the reforms. At a number of institutions, pockets of committed faculty members seized the opportunity to push for innovative reforms. On the whole, however, most traditional faculty members were at best lukewarm, and in some cases quite hostile. Yet most of the doubts were voiced only in private.³ In the run-up to the start of the new system, university after university hosted its own symposium, trumpeting the mission of the new law school it was planning to open. At the same time, behind closed doors many professors voiced skepticism about the new system,⁴ but few went public with their opposition to the

1. SHIHŌ SEIDO KAIKAKU SHINGIKAI (司法制度改革審議会) [Justice System Reform Council], SHIHŌ SEIDO KAIKAKU SHINGIKAI IKENSHO – 21 SEIKI NO NIHON O SASAERU SHIHŌ SEIDO (司法制度改革審議会意見書 – 21世紀の日本を支える 司法制度) [REFORM COUNCIL RECOMMENDATIONS] [Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the Twenty-First Century], June 12, 2001, *available in Japanese at* <http://www.kantei.go.jp/jp/sihouseido/report-dex.html>; *available in English at* <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>. Quotes contained herein are from the English version. That version is not paginated separately, however, so the page cites are to the original Japanese version.

2. Hōkadaigakuin no kyōiku to shihō shikentō to no renkeiō ni kansuru hōritsu (法科大学院の教育と司法試験等との連携等に関する法律) [Act concerning Law School Education and its Connection to the Bar Exam, etc.], Act No. 139 of 2002.

3. At the time, when I asked why this was the case, one response I received was that faculty members feared getting on the bad side of officials of MEXT, which was assumed to be strongly in favor of the new law school system. My own speculation was that, early in the process, most observers probably assumed this reform proposal, like others in the past, would not be implemented in any event, so there was no point in risking offending anyone by taking a public stand in opposition. Thereafter, momentum built so quickly that it might have seemed pointless to oppose the plan publicly.

4. The reasons were varied. At a broad level, some questioned whether there was a need to reform the existing system at all; or, if so, whether there was a need for such dramatic restructuring; or why the United States was selected as a model.

reform plans. Notwithstanding the concerns, universities – and one bar association – rushed to open new law schools, based on a variety of motivations.⁵ At the time, the metaphor that came to mind was of a train leaving the station. Institutions raced to get on board, out of fear they would be left behind if they missed the initial opportunity.

Whatever the inner feelings of faculty members, interest among potential students was high. Together, the law schools had a total official capacity of 5,590 in 2004, rising to 5,825 in 2005.⁶ They were flooded with applicants. Nearly 73,000 candidates applied for admission in 2004.⁷ That number presumably reflected considerable

More concrete objections included the views that the Socratic method was designed for the precedent-based common law system but was not suited to Japan's Continental law based system, interactive teaching methods would not function well in Japan because Japanese students are not accustomed to voicing their opinions in front of others, and one-way lectures are much more efficient for teaching law. Another objection was that the introduction of the new system would necessitate revamping teaching materials and teaching methods, and would entail tremendous time and energy.

5. For the universities that traditionally had produced large numbers of legal professionals, establishing law schools was taken as a given. For the next tier of universities, which produced some legal professionals and aimed at producing more, the new system represented an opportunity. Some viewed the law school as an essential element of an image as a full-service university. Some regional universities viewed opening law schools as almost a civic obligation, aimed at providing opportunities for local residents to enter the legal profession without having to move away and, at the same time, aimed at strengthening the local legal profession. A few institutions, including the Daini Tokyo Bar Association, opened law schools to promote a certain vision of legal education. Despite the high initial cost of establishing law schools and high ongoing costs resulting from strict faculty-student ratios and other requirements, some institutions presumably felt that, over time, the law schools would generate profits, on the assumption that the Reform Council's reference to a 70 to 80% bar examination pass rate for law school graduates, as discussed in text at note 112 *infra*, would assure a steady flow of applicants.

6. Hōkadaigakuin no nyūgakuteiin no suii (Heisei 24nen 4gatsu tsuitachi genzai) (法科大学院の入学定員の推移 (平成24年4月1日現在)) [Shifts in Enrollment Capacity of Law Schools (as of Apr. 1, 2012)] [Shifts in Enrollment Capacity], *in materials compiled for Hōsō yōsei seido kentōkaigi* (法曹養成制度検討会議) [Expert Advisory Council on the Legal Training System] [Expert Advisory Council on Legal Training], Sankō shiryō 2, Hōkadaigakuin ni tsuite (Heisei 24nen 10gatsu 30nichi kōshin) (参考資料2, 法科大学院について (平成24年10月30日更新)) [Reference Material 2, Regarding Law Schools (updated Oct. 30, 2012)], at 65, available at <http://www.moj.go.jp/content/000103612.pdf> (last visited Nov. 29, 2012).

7. These and the other statistics on numbers of applicants, entrants, and competition rates contained in this paragraph, and nonlaw and *shakaijin* entering students in the next paragraph, are available at Shiganshasū-nyūgakushasūtō no suii (Heisei 16nendo – Heisei 24nendo) (志願者数・入学者数等の推移(平成1

pent-up demand from those who had harbored hopes of entering the legal profession but had long since given up the thought of passing the existing, hyper-competitive bar exam (for which the passing rate hovered under 3%). Demand remained robust in the following years, as well, with over 40,000 applicants each year through 2007. These figures resulted in competition rates for admission of 13/1 for 2004 and between 6.9/1 and 7.8/1 in years 2005 through 2007. For 2004, the number of entrants exceeded the total official capacity of the law schools, with 5,767 students enrolled. Enrollment remained high thereafter, as well, with 5,500 to 5,800 new entrants from 2005 and through 2007.

Notably, in the early years demand for admission was strong not only among recent graduates of the undergraduate law faculties (commonly referred to as *hōgaku kishūsha*, 法学既修者, or just *kishūsha*) but among graduates from other faculties (*hōgaku mishūsha*, 法学未修者, or simply *mishūsha*) and among those who had gained real-world experience (*shakaijin*, 社会人). *Shakaijin* comprised almost half the entering class in 2004 and over a third in 2005 and 2006; nonlaw graduates comprised over a third in 2004 and nearly 30% each of the following two years.⁸

For applicants and students in the early years, the excitement was genuine. Part of that excitement undoubtedly stemmed from rhetoric regarding the projected pass rate on the new bar exam. Language in the Reform Council's recommendations implied that the pass rate for those who successfully completed study at law schools would be in the 70% to 80% range.⁹ Accordingly, those who gained admission to law school in the first year or two were optimistic about their future prospects. Another factor underlying student interest was the teaching methods. Many students found the small classes, interactive teaching, and other aspects of the new

6年度~平成24年度)) [Shifts in Numbers of Applicants, Entrants, etc. (2004-2012)] [Shifts in Applicants], in 2 Regarding Law Schools, *supra* note 6, at 177-79.

8. The figures for *shakaijin* and nonlaw graduates are not exclusive; presumably there is a fair amount of overlap. The "nonlaw" designation requires further explanation. The *mishūsha* category includes some law graduates, as well as nonlaw graduates. Some law schools insist all students enroll for three years, regardless of their undergraduate programs. In other cases, law graduates either chose to spend an extra year at law school or were not able to qualify for the two-year program. Some sets of statistics list only *mishūsha*, without identifying their undergraduate majors. Others, including the figures relied on here, identify whether students graduated in law or in other fields.

9. See text at note 112 *infra*.

law schools much more stimulating than the large, doctrine-centered, one-way lecture classes that predominated in existing legal education.

The Ministry of Education, Culture, Sports, Science and Technology (MEXT) threw its support behind the new law schools, which it viewed as a central element in its vision for a new tier of graduate schools for training¹⁰ in the professions.¹¹ The Ministry of Justice (MOJ) and the Japanese judiciary also offered their support, which included providing prosecutors and judges to teach at the law schools. In an especially noteworthy development, the organized bar also pledged its support. At an extraordinary meeting of the general assembly of the Japan Federation of Bar Associations (JFBA) held on November 1, 2000, the JFBA leadership pushed strongly for a resolution to endorse the vision of the new system for legal education, the outlines of which the Reform Council already had laid out.¹² The resolution explicitly mentioned expansion in the size of the legal profession as one element of the reforms; and the reasons offered in support of the resolution specifically referred to the Reform Council's call to increase the annual number of bar passers from 1,000, where it stood in the year 2000, to 3,000.¹³ The resolution drew heated debate, and attendance

10. Training was the dominant focus of MEXT's vision for the schools. An early proposal by the relevant MEXT committee would have excluded research entirely from the law school mission. See MEXT, Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education], Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin buhai (法科大学院部会) [Subdivision on Law Schools], 7th Session, Dec. 11, 2001, Shiryō 2-2, Hōkadaigakuin no setchikijuntō ni tsuite/ron ten o han'ei shita kosshi (an) ni tsuite (資料2-2, 法科大学院の設置基準等について/ 論点を反映した骨子 (案) について) [Material 2-2, Regarding Establishment Standards, etc., for Law Schools/Regarding the Gist of Issues (Draft)], available at http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo4/005/gijiroku/011202/011202b.htm.

11. MEXT's categorization of professional graduate schools also includes schools in the fields of business, accounting, public policy, public health, and other fields. MEXT, Senmonshoku daigakuin ichiran (Heisei 24nen 4gatsu genzai) (専門職大学院一覧 (平成24年4月現在)) [List of professional graduate schools (as of April 2012)], available at http://www.mext.go.jp/a_menu/koutou/senmonshoku/08060508.htm (last visited Oct. 5, 2012).

12. For a discussion of that meeting, by a lawyer who has been deeply involved in the legal education reform process, see Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 SO. TEX. L. REV. 419, 429-30 (2002).

13. Nihon bengoshi rengōkai (日本弁護士連合会) [Japan Federation of Bar Associations] [JFBA], Rinji sōkai - Hōsō jinkō, hōsō yōsei seido narabi ni shingikai e no yōbō ni kansuru ketsugi (臨時総会・法曹人口、法曹養成制度並びに審

at the extraordinary general meeting was high. Of the slightly over 17,000 lawyers registered as of 2000, nearly 11,000 voted, either in person or by proxy.¹⁴ Despite bitter opposition, the resolution passed with over a two-thirds' majority, 7,437 to 3,425.¹⁵ Notwithstanding this seemingly strong endorsement by the nationwide bar, opposition to the new system, and especially to the increase in the size of the bar, remained strong, particularly in local areas. Even in those areas, however, in many cases members of the bar have taught courses or otherwise have been supportive of the local law schools.

To be sure, many concerns and much uncertainty surrounded the new legal training system. Yet the fears were accompanied by considerable hope and excitement.

As of this writing in late 2012, eight and a half years later, the mood is decidedly darker. Five of the 74 law schools have closed or merged, or will do so in the near future, and have stopped accepting new students.¹⁶ Most other law schools have reduced capacity. As a result, the total official capacity of the law schools as of April 2012 was 4,484,¹⁷ down over 40% from the peak. Demand for those spots has dropped even more. Only 18,446 candidates applied for admission in 2012,¹⁸ down nearly 75% from the 2004 peak. The resulting competition rate for admission was just 4.1/1 for 2012; and at thirteen law schools the competition rate was under 2/1. The total number of entrants also has declined dramatically, with just

議会への要望に関する決議) [Extraordinary General Assembly Meeting - Resolution concerning the Size of the Legal Profession, the System for Legal Training, and Requests to the Advisory Council] [JFBA 2000 Resolution], Nov. 1, 2000, available at http://www.nichibenren.or.jp/activity/document/assembly_resolution/year/2000/2000_4.html.

14. Membership in the JFBA is compulsory for registered lawyers in Japan, 弁護士法 [Lawyers Act], Act No. 205 of 1949, art. 8.

15. KOBAYASHI MASAHIRO (小林正啓), KONNA NICHIBENREN NI DARE GA SHITA? (こんな日弁連に誰がした?) [Who Turned the JFBA into This?] (Heibonsha shinsho (平凡社新書), 2010), at 212.

16. See, e.g., NIHON KEIZAI SHINBUN, WEB VERSION, *Surugadai, hōkadaigakuin no boshū teishi, nyūgakusha gekigen, 13nendo kara, ruikai 5kōme* (駿河台大, 法科大学院の募集停止, 入学者激減, 13年度から, 累計5校目) [Surugadai University to Suspend Recruitment for Law School, Entrants Down Dramatically, from 2013 Academic Year, 5th School to Do So], July 6, 2012, available at http://www.nikkei.com/article/DGXNASDG0604L_W2A700C1CR8000/ (last visited Nov. 7, 2012).

17. Shifts in Enrollment Capacity, *supra* note 6.

18. Shifts in Applicants, *supra* note 7, at 177.

3,150 new entrants in 2012,¹⁹ down over 45% from the peak. Thus, notwithstanding the great reduction in capacity, only about 70% of the available seats were taken. The decline in *shakaijin* and nonlaw graduates also has been striking. In 2012, *shakaijin* comprised under 22% of the entering class, nonlaw graduates under 19%²⁰ (and since those categories are not exclusive, it is safe to assume overlap).

Although MEXT has been heavily involved in the push for further consolidation and other measures to reform the law school system, that Ministry continues to express its fundamental support for the law school system.²¹ The MOJ and judiciary continue to provide prosecutors and judges to teach at the law schools, and provide indirect support by hiring graduates. In many respects, the organized bar also has provided valuable support for the new law school system throughout its existence. The Japan Law Foundation (JLF), a research body established primarily under the auspices of the JFBA,²² developed one of the two alternative law school aptitude tests (with the JLF test becoming the sole law school aptitude test in 2011) and established one of the three alternative law school accreditation bodies (all three of which continue to survive, with law schools given the choice of which to use).²³ Many lawyers teach clinical and other practice-related courses at law schools across Japan; and many local bar associations have supported the educational activities of law schools. Moreover, the JFBA has

19. *Id.* at 178.

20. *Id.* at 178-79.

21. See, e.g., Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education (MEXT)], Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin tokubetsu iinkai (法科大学院特別委員会) [Special Committee on Law Schools], Hōkadaigakuin kyōiku no saranaru jūjitsu ni muketa kaizen hōsaku ni tsuite (teigen) (法科大学院教育の更なる充実に向けた改善方策について (提言)) [Regarding Plans for Improvement Aimed at Further Strengthening Law Schools (Proposal)] [Special Committee 2012 Proposal], July 19, 2012, available at http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo0/gijiroku/_icsFiles/afieldfile/2012/07/24/1323733_15.pdf (last visited Nov. 5, 2012).

22. Other affiliated organizations include the Japan Institute of Certified Public Accountants and associations for certified public tax accountants, patent attorneys, and shiho-shoshi lawyers (traditionally referred to in English as “judicial scriveners”). In a reflection of the central role of the JFBA, though, the Foundation’s official name in Japanese, translated literally, is JFBA Legal Research Foundation (日弁連法務研究財団).

23. For a discussion of the three accreditation bodies, see Daniel H. Foote, *Internationalization and Integration of Doctrine, Skills and Ethics in Legal Education: The Contrasting Situations of the United States and Japan*, 75 HŌSHAKAIGAKU 125, 170-73 (2011).

undertaken serious efforts to expand the market for legal services and to assist law school graduates in finding employment.

In other respects, however, the stance of the organized bar has shifted sharply. The greatest shift relates to the number of bar passers. As discussed in more detail later,²⁴ within just a few years after the new system began, the JFBA backed off from its support for the proposed expansion to 3,000 passers per year, first moving to a "go slow" stance, and then, more recently, advocating a rollback in the number of passers, from the 2,000 level, first reached in 2008 and maintained every year since, to just 1,500 per year or even fewer. In its battle over the size of the legal profession, the JFBA has undertaken attacks on law schools and other aspects of the new legal training system, with some bar leaders calling for a thorough reexamination of the entire system.

Presumably influenced in part by the organized bar's highly coordinated attacks, some politicians and business leaders also have voiced concerns over the new legal education system; and, by reporting on these criticisms, the mass media have helped spread the image of a system in crisis. In response to the calls for reexamination, in May 2011 a new body, charged with undertaking a comprehensive review of the legal training process, was established under the auspices of the Cabinet Secretariat, the MOJ and MEXT, among other ministries. As with the Reform Council, a majority of the members of that body, the Forum on Legal Training, came from outside academia, and a majority from outside the legal profession.²⁵ In August 2012, the Forum, with four added members,²⁶ was reconstituted as the Expert Advisory Council on the Legal Training System, under the auspices of the Ministerial Level Conference on the Legal Training System. The Ministerial Conference's charge calls for it to reach "a certain level of

24. See text at notes 185-202 *infra*.

25. See, e.g., Hōso no yōsei ni kansuru fōramu (法曹の養成に関するフォーラム) [Forum on Legal Training], Kōseiin meibo (Heisei 5gatsu tōka genzai) (構成員名簿 (平成24年5月10日現在)) [List of Members (as of May 10, 2012)], in Forum on Legal Training, Ronten seiri (torimatome) (論点整理(取りまとめ)) [Summary of Main Issues], May 10, 2012, at 43, available at <http://www.moj.go.jp/content/000101333.pdf> (last visited Nov. 28, 2012).

26. See Expert Advisory Council on Legal Training, Kōseiin meibo (Heisei 24nen 10gatsu 30nichi genzai) (構成員名簿 (平成24年10月30日現在)) [List of Members (as of Oct. 30, 2012)], available at <http://www.moj.go.jp/content/000103614.pdf> (last visited Nov. 4, 2012).

conclusions” (一定の結論) by August 2, 2013,²⁷ so the Expert Advisory Council is expected to issue its conclusions by sometime in the spring of 2013.

As if these challenges were not enough, the new legal education system is faced with yet one more major challenge: the recent introduction of an alternative route for entry into the bar, the so-called preliminary bar exam, otherwise known as the “law school bypass.”²⁸ In its first year, 2011, that bypass was a rather narrow path; in 2012 it became somewhat wider. If it continues to grow and becomes a major artery it will likely spell doom for most of Japan's remaining sixty-nine law schools.

Thus, for those involved with Japan's law schools, the optimism of 2004 has given way to considerable anxiety. This article seeks to explain how Japan's legal education system reached the current situation and, risky as the task is, seeks to offer some thoughts on where the system is headed.

II. Historical Background

In order to appreciate what the reforms were intended to accomplish and the challenges they have faced, it is important to understand the setting in which they arose. To that end, this section first examines the prior legal training system and then considers the two major concerns the reforms were designed to address: quantity – the size of the legal profession – and quality.

27. See Hōsō yōsei seido kankei kakuryō kaigi ni tsuite (法曹養成制度関係閣僚会議について) [Regarding the Ministerial Level Conference on the Legal Training System], Cabinet Decision of Aug. 21, 2012, art. 4, available at <http://www.moj.go.jp/content/000101374.pdf>.

28. For a more detailed examination of the preliminary exam and its likely impact, see text at notes 118-120, 145-148, 232-235 *infra*.

A. Pre-2004 Legal Training System²⁹

It is frequently said that the prior system of legal education consisted of two major components: undergraduate law faculties and the Legal Training and Research Institute (LTRI). Two other elements also deserve mention: the bar examination and examination preparatory schools.

In the prior system, undergraduate law faculties³⁰ constituted the largest formal category of legal education. Law traditionally has been regarded as one of the most prestigious undergraduate disciplines in Japan. Prior to the start of the new system, one hundred universities had undergraduate law faculties, which together enrolled over 45,000 students per year.³¹ At many universities, the law faculty included one or more other disciplines.³² Even at faculties that combined law with other disciplines, students typically have been divided into tracks, with courses in law dominating the curriculum for those in the law track.

The undergraduate programs typically began with one to one and a half years of general liberal arts education, with the remainder of the four-year program focused on law or the other specified disciplines.³³ Nearly all the faculty members who taught law had

29. For an examination of the new system written shortly after it took effect, with a comparison to the prior system, see Daniel H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, AUSTRALIAN J. ASIAN L., Vol. 7, No. 3, at 215 (2006). For a detailed examination of the prior legal training system, see Kahei Rokumoto, *Legal Education*, in LAW IN JAPAN: A TURNING POINT (Daniel H. Foote ed., Univ. of Washington Press, 2007), at 190. For a contemporaneous account as of the early 1960s, see Hakaru Abe, *Education of the Legal Profession in Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY (Arthur Taylor von Mehren ed., Harvard Univ. Press, 1963), at 153. For a thoughtful recent examination of the reforms, with references to much additional commentary, see Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEG. EDUC. 3 (2012).

30. Despite similarities, the "faculty" concept differs greatly from the "department" or "major" concept at U.S. colleges and universities. At most Japanese universities, from the time of entrance students are admitted to a specific faculty; each faculty sets its own curriculum, and, especially for the discipline-specific education that occupies most of the last two and a half or three years of undergraduate studies, the dividing lines between faculties tend to be quite rigid.

31. Rokumoto, *supra* note 29, at 206.

32. Historically, at the University of Tokyo and a few other leading universities a major objective was training future government officials. In keeping with that background, law and political science have been combined in the same faculty at many universities. Other universities combined law and economics in the same undergraduate faculty, or included law along with other social science disciplines.

33. For a more detailed examination of undergraduate legal education, see

spent their entire careers in the world of legal academics. Very few legal academics in Japan had undertaken advanced study in fields other than law, and even fewer had experience in legal practice. Most, following graduation from undergraduate programs in law, had served as research fellows (*joshu*, 助手 or, following a recent change in terminology, *jokyō*, 助教), or had pursued postgraduate study of law in M.A. or Ph.D. programs, in which the dominant focus was on academic research in a specific field of law. This approach resulted in a high level of compartmentalization between fields; in the words of the chair of one of the advisory councils on which I sat, in Japan one typically is not regarded as a "professor of law," but rather as a professor of a specific field of law, such as "professor of commercial law" or "professor of civil procedure."

As taught at the law faculties, legal education emphasized theory. In the Japanese context, the term "theory" continues to signify mainly the mastery of legal doctrine. At most universities, undergraduate legal education also contained various courses in fields that are referred to in Japanese as "foundational" (*kiso hōgaku*, 基礎法学), a term that roughly corresponds to perspectives-type offerings in the United States and includes courses such as jurisprudence, sociology of law, legal history, and comparative law. With rare exceptions, virtually no attention was paid to training in practice-related skills. Moreover, except in the case of a handful of the top-rated universities, very few of the graduates actually entered the legal profession or the bureaucracy. Most entered companies.

The legal profession in Japan is formally regarded as consisting of judges, prosecutors, and practicing attorneys. These constitute the so-called "three branches of the legal profession" (*hōsō sansha*, 法曹三者). In addition, Japan has several categories of so-called "quasi-legal professionals," including judicial and administrative scriveners, patent attorneys, and licensed tax accountants, which require separate licenses.³⁴ Moreover, it is accepted that working in a company legal department does not constitute the practice of law for purposes of the Lawyers Act,³⁵ and most members of company

Rokumoto, *supra* note 29, at 191-99.

34. See DAN FENNO HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* (Univ. of N. Carolina Press, 1973), at 178-85.

35. Bengoshihō (弁護士法) [Lawyers Act], Act No. 205 of 1949. Restrictions on unauthorized practice are contained in article 72 of the Act.

legal departments are not licensed lawyers.³⁶

To become a member of the legal profession, one must have passed the bar examination and then successfully completed the apprenticeship training program conducted through the LTRI. The exam, which was administered by the MOJ and offered once per year, focused primarily on candidates' mastery of doctrine in the core fields of civil, commercial, criminal, and constitutional law, and civil and criminal procedure.³⁷ Examiners were drawn from scholars specializing in those fields, along with judges, prosecutors, and practicing lawyers. Candidates were expected to demonstrate their understanding of leading academic views, as well as the statutes and judicial interpretations. The exam consisted of three stages, multiple choice, essay, and oral exams, with candidates screened out after each stage. In part as a device for eliminating large numbers of candidates through the more easily administered multiple choice test, that exam included puzzle-type questions, in which, for example, candidates had to reassemble sentences in the proper order, filling in blanks with the appropriate words or phrases to construct a valid legal proposition.³⁸

Under the prior system, passing the bar exam was a daunting step. The exam was open to anyone who had completed at least two years of college; and even those who had not gone to college could qualify by passing a separate exam.³⁹ The number of people who wanted to enter the legal profession was high. By 1970 the number of bar exam takers had reached 20,000, and it remained well over that level every year thereafter. The number of passers, in contrast, was sharply limited. Until 1991 the number of passers was capped at approximately 500 persons per year. Thus, competition was fierce. From the late 1960s on, the pass rate hovered between 1.5% and 3%.⁴⁰ After 1991 the number of passers gradually increased, but

36. See HENDERSON, *supra* note 34, at 178-79.

37. For a more detailed discussion of the bar exam, see Rokumoto, *supra* note 29, at 199-200.

38. For an archive of questions on the old bar exam, see Hōmushō (法務省) [Ministry of Justice] [MOJ], Dainijishiken shiken mondai-shiken kekkatō (第二次試験試験問題・試験結果等) [Questions, Results, etc., for the Second Stage Examination], available at http://www.moj.go.jp/jinji/shihoushiken/shiken_dainiji_shiken.html, and follow links to the exams for each year (containing multiple choice exam questions for 1996-2010, essay questions for 2002-2010).

39. See Rokumoto, *supra* note 29, at 199.

40. See *id.*, Table 8.2, at 213-14.

so too did the number of takers. As of 2003, the number of passers still was under 1,200. That year over 45,000 candidates sat for the bar examination; the pass rate was under 2.6%.⁴¹

The “stars” in the prior system – the candidates most coveted by the judiciary, procuracy, and leading law firms – were those who went to the top universities and passed the bar exam on their first or second try, ideally while still in college. Even as of 1961, this was unusual. That year, only 65 of 333 passers (under 19%) had qualified while still attending university; and the median passing age was 27.1.⁴² In later years, it became even rarer for candidates to pass at an early age. In 1986, for example, of the nearly 24,000 people who took the bar exam, only one passed on the first try and only thirty-seven more on the second.⁴³ In 1989, when four passed on the first try and twenty-three on the second, the passers’ median age reached an all-time high of nearly 29, and on average they had taken the bar exam for over six and a half years.⁴⁴

The difficulty of the bar exam relates to another component of the prior system: examination preparatory schools. As it became common for successful applicants to spend several years cramming for the bar exam, most began to utilize prep schools, where the focus was squarely on the bar exam subjects and test taking techniques. According to a survey of those who passed the bar exam in 1999, all but one of the 626 respondents had utilized prep schools.⁴⁵ Fully

41. See Kyū shihō shiken dainijishiken shutsuganshasū-gōkakushasūtō no suii (旧司法試験第二次試験出願者数・合格者数等の推移) [Shifts in the Numbers of Applicants, Passers, etc., on the Second Stage of the Old Bar Examination], in *materials compiled for Expert Advisory Council on Legal Training*, *supra* note 6, 3 Shihō shiken-shihō shūshū ni tsuite (司法試験・司法修習について) [Regarding the Bar Exam and Apprenticeship Training] [Regarding the Bar Exam], Material 2, available at <http://www.moj.go.jp/content/000104499.pdf> (last visited Dec. 6, 2012).

42. See Abe, *supra* note 29, at 162.

43. See Rokumoto, *supra* note 29, Table 8.2, at 214, and Table 8.3, at 217.

44. See MOJ, Heisei 14nendo shihō shiken dainijishiken kekka ni tsuite (平成14年度司法試験第二次試験結果について) [Regarding the Results on the Second Examination of the 2002 Bar Examination], http://www.moj.go.jp/jinji/shihoushiken/press_021113-1.html (containing statistics for selected years from 1989 through 2002).

45. See Shihō seido kaikaku shingikai jimusōkyoku (司法制度改革審議会事務局) [General Secretariat, Justice System Reform Council], Hōsō yōsei seido kaikaku no kadai (法曹養成制度改革の課題) [Issues for Reform of the Legal Training System], <Sankō shiryō>, Shiryō 7, Juken no tame no yobikōtō no riyō jōkyō ni tsuite (<参考資料>, 資料7, 受験のための予備校等の利用状況について) [<Reference Materials>, Material No. 7, Regarding Circumstances of Use of Bar

two-thirds had attended prep schools for at least three years, and over one-quarter for more than five years. Ten percent attended the schools nearly every day; an additional 48% attended at least a few days per week. Thus, prep schools represented an important, but relatively hidden, aspect of the legal training process. As these figures also suggest, a substantial majority of the successful applicants devoted themselves to preparing for the exam, without entering regular employment.⁴⁶

For those who passed the exam, the final stage of training was so-called apprenticeship training conducted through the LTRI, which lay under the authority of the Supreme Court.⁴⁷ Although academics gave occasional guest lectures, the LTRI faculty was drawn from the three branches of the profession. Training through the LTRI was focused primarily on practice-related skills, with heavy emphasis on litigation and trial skills, as well as judging and criminal prosecution. Until 1999, the training period was two years. Candidates spent the first four months at the LTRI itself, primarily studying five subjects: civil judging, criminal judging, civil lawyering, criminal defense, and prosecution. Candidates spent the next sixteen months in actual apprenticeship training, with four-month rotations (field placements) in each of four separate practice settings: civil division and criminal division of a court, prosecutors office, and law firm. Following the field placements, all candidates returned to the LTRI for four more months of instruction in practice-related skills. In 1999, when the number of bar exam passers was first increased to 1,000, the training period was reduced to eighteen months. Otherwise, however, the content remained nearly the same, with each of the four-month blocks being shortened to three months. The last step in LTRI training was a final examination administered by the Examination Committee of the Supreme Court, consisting of day-long exercises in each of the five core subjects, in which the candidates were required to draft judgments or other documents based on rather extensive files distributed on the day of the exam, as well as oral exams in each of those five subjects.

Examination Preparatory Schools, etc.], distributed at the 14th session of the Reform Council, March 2, 2000, *available at* Shihō seido kaikaku shingikai zenkiroku (司法制度改革審議会全記録) [Full Records of the Justice System Reform Council], 1208 JURISUTO (2001), Furoku (付録) [Supplement] [Reform Council Supplement] (CD-ROM).

46. See Rokumoto, *supra* note 29, at 214.

47. For a more detailed discussion of LTRI training, see *id.* at 200-05.

Virtually all candidates passed, although those who failed one or more subjects were given the opportunity to take make-up exams for those subjects.

B. Major Concerns

For both sets of concerns expressed by the Reform Council, over quantity and quality, the historical roots date back decades. Those historical roots have influenced the design and progress of the reforms and the debates surrounding the new system, so it is useful to review the historical background briefly.

1. Quantity

In the prewar period, separate examinations were conducted for judges and prosecutors, on the one hand, and for practicing lawyers, on the other.⁴⁸ From 1893 on, after passing the qualifying examination judges and prosecutors were required to complete apprenticeship training, in a system administered by the MOJ; and, as fledgling government officials, they were paid stipends by the state during the training period. A system of apprenticeship training was not established for lawyers until 1933 and never went into full operation before World War II began. That training was administered by the bar associations and was unpaid.⁴⁹

A central feature of the postwar reforms was the introduction of unified apprenticeship training through the LTRI for all three branches of the profession, with authority for the training shifted to the Supreme Court. For both the Supreme Court and MOJ, the LTRI proved to be a valuable vehicle for socialization of new entrants into the profession and for imparting a shared set of norms and values, as well as for screening and recruiting new judges and prosecutors. For the bar, establishment of the LTRI held great symbolic significance, sending a message that lawyers were of equal status to judges and prosecutors. That equality in status resulted in a material benefit: *all* candidates received monthly stipends from the state during their apprenticeship training, regardless of whether they entered the judiciary, procuracy, or bar. Furthermore, the

48. Until the 1920s, graduates of the law faculties of the University of Tokyo and other imperial universities were exempted from the examination requirement for entry into the bar. See Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61, 70 (1956).

49. See *id.* at 75-77.

establishment of the LTRI effectively established a cap on the number of lawyers and thereby largely insulated them from competition.

Over time, the view gradually gained strength that Japan's legal profession was too small. A prominent early expression of that view came from the Provisional Justice System Investigation Committee [Investigation Committee], a 20-member advisory council to the Cabinet established in 1962 and chaired by University of Tokyo Professor Emeritus Wagatsuma Sakae.⁵⁰ The Committee was charged with investigating a broad range of matters relating to the justice system; but a major impetus for its creation was concern over the judiciary's difficulty recruiting judges, which was leading to delays in processing litigation. In its final report, issued in 1964, the Committee recommended raising salaries for judges and prosecutors.⁵¹ With regard to the size of the legal profession, the Investigation Committee expressed the view that "as the economy grows and society progresses, lawsuits will become more numerous and more complicated and . . . the roles played by lawyers in legal lives of the people will expand dramatically. In turn, as the legal profession grows in size, people's legal consciousness will rise."⁵² While the views of individual members on the appropriate size of the legal profession varied widely,⁵³ the Investigation Committee

50. For a summary of the Provisional Justice System Investigation Committee, including the enabling legislation and the Committee's own summary of the main points of its recommendations (which were issued in August 1964), see Rinji shihō seido chōsakai ni tsuite (臨時司法制度調査会について) [Regarding the Provisional Justice System Investigation Committee], Sankō shiryō (参考資料) [Reference Materials] for Meeting No. 2 of the Justice System Reform Council, Sept. 2, 1999, available at <http://www.kantei.go.jp/jp/sihouseido/dai2kai-append/husamura3.html>. The Investigation Committee was composed of seven Diet members, three members from each of the three branches of the profession, and four others (two academics, a business leader, and a bureaucrat).

51. See Rinji shihō seido chōsakai (臨時司法制度調査会) [Provisional Justice System Investigation Committee], Rinji shihō seido chōsakai ikensho (臨時司法制度調査会意見書) [Recommendations of the Provisional Justice System Investigation Committee] [Investigation Committee Recommendations], August 1964, reprinted as special supplement to Hōsō jūhō, Vol. 16, No. 8 (1964); available in part at <http://www.moj.go.jp/content/000036339.pdf>.

52. *Id.* at 123-24.

53. At one end was the opinion that the size of the legal profession should be tripled at least, based on the view that there were substantial unmet needs already and that the needs would further increase as people's legal consciousness rose, to the opinion that, at least outside the major urban areas, the legal services market already was saturated and suddenly adding more lawyers would result in over-

concluded that the size of the legal profession was "substantially inadequate" even as of 1964 and called for gradually raising the size of the profession.⁵⁴ Other recommendations included an expansion in areas of practice for lawyers (e.g., to advising legislative and administrative bodies and private industry);⁵⁵ taking steps to remedy the over-concentration of lawyers in major cities;⁵⁶ and increased emphasis on legal ethics.⁵⁷

The Committee's recommendations, and the concerns that inspired them, had some impact. Salaries for judges and prosecutors were raised, and the difficulties over recruitment dissipated. The number of bar passers also rose, from 380 in 1961, the year before the Committee was formed, to 508 in 1964, when the Committee issued its recommendations, and to a peak of 554 in 1966.⁵⁸ Yet most of the other recommendations went unheeded. Of especial note with respect to the concern over quantity, for nearly two and a half decades thereafter the number of passers never again reached the 1966 peak. Between 1966 and 1990, the population of Japan rose by nearly 25%, to over 123 million.⁵⁹ The increase in economic activity was even more dramatic; during that same period, nominal GDP rose over 11 times, real GDP by nearly 4 times.⁶⁰ In contrast, from 1967 till 1990 the number of bar exam passers remained steady, ranging from a low of 446 to a high of 537.⁶¹

It is frequently said that the number of passers could not be increased further due to the limited capacity of the LTRI facilities.

capacity and disorder in the legal profession. *See id.* at 124.

54. *See id.* at 123. In that connection, while stating that "the appropriate size for the legal profession in Japan is not something that can easily be determined," the Committee cited comparative statistics on the *per capita* size of the legal professions in the United States, England, West Germany, and France, and observed that, "in comparison to other nations, the size of the legal profession in Japan is extremely small." *Id.*

55. *See id.* at 125.

56. *See id.* at 75, 77-78.

57. *See id.* at 75, 78-79.

58. *See* Rokumoto, *supra* note 29, Table 8.2, at 213-14.

59. *See* STATISTICS BUREAU, MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS (JAPAN), JAPAN STATISTICAL YEARBOOK 2013, Chapter 2, Table 2-1(B), available at <http://www.stat.go.jp/english/data/nenkan/1431-02.htm> (last visited Nov. 29, 2012).

60. *See* Lawrence H. Officer & Samuel H. Williamson, *What Was the Japan GDP Then?*, MeasuringWorth, 2011, <http://www.measuringworth.com/japandata/>.

61. *See* Rokumoto, *supra* note 29, Table 8.2, at 213-14.

Yet steadfast opposition by the bar was a major factor. As is typical for bar associations throughout the world,⁶² the Japanese bar has strongly resisted increases in the size of the legal profession, offering a wide range of rationales. Many of those rationales, including assertions that expanding the lawyer population would result in lower quality and declines in ethics, are common refrains elsewhere. One of the more characteristically Japanese rationales is the view that the limits on the size of the legal profession enable lawyers to undertake social reform efforts. According to this view, lawyers are able to take on low-paying or *pro bono* activities because of their earnings from paying clients in civil cases, and increased competition would deprive them of such opportunities.⁶³

After the Provisional Investigation Committee issued its report in 1964, most aspects of justice system reform were left to discussions among representatives of the three branches of the profession. In 1970, the Committee on Legal Affairs of the Upper House of the Japanese Diet adopted a resolution stating: "Matters related to justice system reform should be achieved based on consensus by the three branches of the legal profession."⁶⁴ With this effective veto power in hand, the bar was well positioned to resist calls for increasing the size of the profession. Truth be told, though, pressure to increase the size of the bar was muted through the 1970s and early 1980s. Consumer groups and other movements occasionally voiced concern over the difficulty of obtaining effective legal representation; but there was little public clamor for raising the number of lawyers. Throughout that period, moreover, most business leaders tended to view lawyers as adversaries, so, if anything, business opposed increases in the size of the bar.

In the late 1980s the situation began to shift. This time, the MOJ was having difficulty recruiting new prosecutors. The MOJ felt one of the reasons was that, by the time candidates passed the bar exam, they were likely to have debts, family commitments, or other obligations that would lead them to opt for private practice in law firms rather than pursue a career as a prosecutor, which entails transfers throughout Japan every two or three years. To meet this

62. See, e.g., Richard L. Abel, *Revisioning Lawyers*, in *LAWYERS IN SOCIETY: AN OVERVIEW* (Richard L. Abel & Philip S.C. Lewis eds., Univ. of California Press, 1995), at 1, 2-5, 13.

63. See, e.g., KOBAYASHI, *supra* note 15, at 56-58.

64. Quoted in *id.* at 118.

perceived problem, in discussions at the Three Branches of the Legal Profession Consultation Committee, which met from 1988 to 1991, the MOJ, with the support of the Supreme Court, pushed for a preferential quota for young exam takers.⁶⁵ The JFBA strongly opposed this proposal, and as a compromise, representatives of the three branches agreed on an increase in the number of passers from the prevailing level of 500 passers per year to 700, with a pledge to monitor results to see whether the proportion of younger passers increased.⁶⁶

As it turned out, the proportion of younger passers did rise somewhat,⁶⁷ but that did not end pressure to raise the size of the legal profession. In 1991, the Legal Training Reform Consultation Council, charged with reexamining the bar exam and the entire legal training process, was established under the auspices of the MOJ. The Council included academics, a journalist, and representatives of business, labor, and a consumer group, as well as the three branches of the profession.⁶⁸ Over opposition by the bar, an "overwhelming majority" of the Council agreed on the need for a "major increase" in the size of the legal profession, specifically identifying four areas of unmet needs: (1) high levels of unrepresented parties even in existing litigation; (2) the need for representation in smaller matters, which lawyers were unwilling to handle; (3) needs for legal services in small cities and towns, where very few lawyers practiced (with the Council expressly finding that the root cause was not lack of demand, but lack of access); and (4) increasing needs for lawyers in fields other than litigation, such as preventive lawyering and provision of legal advice.⁶⁹ It bears note that by this time, some business leaders had come to appreciate the role lawyers could play as advisors and business facilitators.⁷⁰ In its final report, issued in late 1995, the Council recommended a prompt increase in the number of bar passers to 1,000 per year; an intermediate-term target of 1,500 per year to be achieved in the near future; a shortening of

65. See *id.* at 54-56.

66. See *id.* at 78.

67. See, e.g., MOJ, *supra* note 44 (statistics from 1989 through 2002).

68. See Gotō Hiroshi (後藤博), *Hōsō yōsei seidotō kaikaku kyōgikai no kyōgi no keii ni tsuite* (法曹養成制度等改革協議会の協議の経緯について) [Regarding the Circumstances of the Deliberations of the Legal Training Reform Consultation Council], 1084 JURISUTO 33, 34 (1996).

69. *Id.* at 34-35.

70. See, e.g., KOBAYASHI, *supra* note 15, at 98-100.

the length of apprenticeship training; and certain changes to the bar exam.⁷¹

The bar continued to resist adamantly.⁷² In December 1994, as it became increasingly clear the Council would recommend a major rise in the number of passers, the JFBA leadership convened an extraordinary general meeting, at which it sought approval for an action plan endorsing a "substantial" increase in the number of passers – reportedly with the figure of 1,000 per year in mind. The proposal met fierce opposition, with opponents insisting 700 per year should be the absolute limit, and later calling for a compromise at 800 passers per year.⁷³ In October 1997, the JFBA accepted what the Council had proposed nearly two years earlier: a prompt move to 1,000 passers, a future target of 1,500, and a shortening in the LTRI term.⁷⁴ By then, though, the JFBA's continued recalcitrance had cemented the view among many observers that decisions over the size of the bar and other matters related to justice system reform could not be left to the profession.⁷⁵

2. Quality

Concerns over the quality of legal training also date back decades. Writing in the early 1960s, Abe Hakaru, who was then President of the LTRI, raised a number of issues. With respect to undergraduate legal education, one concern was that "the content of the law has become more complex and varied" but the length of time devoted to study of law had decreased.⁷⁶ In consequence, there was too much to cover and too little time. As other issues, Abe pointed to the tendency of university education to focus on academic theory, "particularly that of the professor lecturing,"⁷⁷

71. See Gotō, *supra* note 68, at 37. For the full text of the final report, see Hōsō yōsei seidō kyōgikai (法曹養成制度等改革協議会) [Legal Training Reform Consultation Council], Ikensho (意見書) [Statement of Views], Nov. 13, 1995, reprinted at 1084 JURISUTO 57 (1996).

72. To be sure, the bar was not monolithic in its opposition. Many lawyers at large firms, for example, had come to recognize the need for more lawyers in order to adequately staff teams to handle major international transactions.

73. See KOBAYASHI, *supra* note 15, at 94.

74. See *id.* at 121.

75. For a detailed examination of the debates within the bar and the impact of the bar's recalcitrance on outside opinion, see *id.* at 80-118.

76. Abe, *supra* note 29, at 161.

77. *Id.* at 160.

with little attention to the facts of cases and little in the way of practical training; the dominance of the one-way lecture method; and the lack of much discussion of "the social background."⁷⁸ With respect to the bar exam, even as of the early 1960s Abe noted "undesirable consequences" of the years of intensive study many candidates invested. "It is certainly true," he wrote, "that this laborious preparation for the [bar] examination enlarges to some degree the student's knowledge of law, but one may doubt whether it actually assists the development of either a good legal sense or a capacity for legal thinking."⁷⁹ Furthermore, he observed, given "the tendency to concentrate on courses preparatory to the examination at the sacrifice of courses in social sciences and the liberal arts,"⁸⁰ "students are deprived of a grounding in general culture and other social sciences."⁸¹ Nor did the LTRI escape criticism. While noting that "the demand for lawyers to perform preventive and advisory functions is gradually increasing," Abe conceded that the LTRI was "extremely weak" in those fields, instead continuing to emphasize only litigation and trial skills.⁸²

In the mid-1960s, the University of Tokyo Faculty of Law undertook a thorough reexamination of its undergraduate program in law. In 1967, that Faculty proposed extending the term of study required for graduation from four to five years, with the principal reason reportedly being the desire to give students "more time to digest the knowledge made available and to cultivate further the attitude of studying and thinking for themselves."⁸³ While phrased in terms of student mastery of the attitude of intellectual self-reliance, in this proposal one can again see the common complaint of too much to cover and too little time.

By the time the Three Branches of the Legal Profession Consultation Committee and the Legal Training Reform

78. *Id.*

79. *Id.* at 162.

80. *Id.*

81. *Id.* at 163.

82. *Id.* at 177.

83. Rokumoto, *supra* note 29, at 207, quoting Tanaka Hideo (田中英夫), *Tōkyō daigaku hōgakubu no kyōikukeikaku saikentō ni tsuite* (東京大学法学部の教育計画再検討について) [On the Reexamination of the Educational Program of the Faculty of Law, The University of Tokyo], in TANAKA HIDEO (田中英夫), *EIBEI NO SHIHŌ* (英米の司法) [The Judicial Systems of England and the United States] (Tokyo: Univ. of Tokyo Press, 1973), at 572, 584.

Consultation Council undertook their deliberations in the late 1980s and early 1990s, the impact of the low passing rates on the bar exam, the years of cram study undertaken by many exam takers, and the heavy reliance on examination preparatory schools had become serious concerns. Critics worried that the combination of these factors was resulting in exam-centered tunnel vision and an overly narrow legal profession.⁸⁴

III. The Reforms⁸⁵

A. Recommendations of the Justice System Reform Council

In 1999, deliberations over justice system reform were entrusted to the Reform Council, an advisory council appointed by the Diet and reporting directly to the Cabinet. Notably, only three of the thirteen Reform Council members came from the legal profession.⁸⁶ In its final recommendations, issued in June 2001, the Reform Council identified strengthening the legal profession – the “human base” of the justice system – as one of the three “pillars” of reform.⁸⁷ In fact, at the implementation stage, the Headquarters for Justice System Reform placed legal training first on the agenda.

Characterizing “the way of thinking that . . . the number of successful candidates on the national bar examination is a matter to be decided by deliberation among the three branches of the legal

84. Tokyo lawyer Yanagida Yukio offered another noteworthy critique of Japanese legal education in the leading law journal *Jurisuto* in 1998. Yanagida observed that Japanese undergraduate legal education was not well suited either for those who did not enter the legal profession or for those who did. Nor, in his view, was LTRI training adequate for the needs of Japan's legal profession. Based on his own experiences as a visiting professor at Harvard Law School, Yanagida proposed a new model based largely on that School's model. See Yanagida Yukio (柳田幸男), *Nihon no atarashii hōsō yōsei shisutemu – Hābādo rō sukūru no hōgaku kyōiku o nentō ni oite* (日本の新しい法曹養成システム—ハーバード・ロースクールの法学教育を念頭において) [A New Legal Training System for Japan – With Legal Education at Harvard Law School in Mind], 1127 *JURISUTO* 111 (1998), 1128 *JURISUTO* 65 (1998).

85. For early discussions of the reform process, by two very knowledgeable informers, see Kawabata, *supra* note 12; Setsuo Miyazawa, *Education and Training of Lawyers in Japan – A Critical Analysis*, 43 *SO. TEX. L. REV.* 491 (2002).

86. See REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, Appendix (list of members). The other members were three legal academics, two nonlaw academics, two business leaders, a labor union leader, a consumer organization leader, and a novelist.

87. See *id.* at 9, 11-12.

profession" as "already a relic of the past," the Reform Council stated, "The essential task is to secure and improve, both in quality and in quantity, the legal profession needed by the people of Japan."⁸⁸ With regard to quantity, the Council characterized the Japanese legal profession as "extremely small" and concluded, "It is clear that substantially increasing the size of the legal profession is an urgent task."⁸⁹ In reaching this conclusion, the Council expressed the view that the legal profession was too small to "respond adequately to the legal demands of society."⁹⁰

As one example of the unmet needs, the Reform Council highlighted "the necessity to redress the imbalance in lawyer population across geographical regions."⁹¹ The Provisional Investigation Committee had noted the same concern in 1964. If anything, the problem had gotten worse in the intervening years. As of 1964, 65% of all practicing lawyers were members of the local bar associations in just four cities: Tokyo, Yokohama, Osaka, and Nagoya.⁹² By 2001, that proportion had risen to over 70%.⁹³ The Reform Council captured the concern over lawyer scarcity well with the phrase "zero-one regions," using that phrase as shorthand for regions having either no lawyers at all, or just one lawyer. As of 2000, of the 253 court districts in Japan, 72 were zero-one districts. More strikingly, out of 3,371 registered cities and towns in Japan, 3,023, or nearly 90 percent, were zero-one regions.⁹⁴

Making comparative reference to the size of the legal profession in the United States, Britain, Germany and France, the Reform

88. *Id.* at 58.

89. *Id.* at 56.

90. *Id.*

91. *Id.* at 57.

92. See Shiryō 14, Bengoshikaibetsu kaiinsū no suii (資料14, 弁護士会別会員数の推移) [Material 14, Shifts in the Numbers of Members, by Bar Association], Sankō shiryō (参考資料) [Reference Materials] for Aug. 8/9, 2000, concentrated session of the Justice System Reform Council.

93. See JFBA, BENGOSHI HAKUSHO (弁護士白書) [White Paper on Lawyers], 2003 ed. (2003), at 21.

94. See Shiryō 4, Bengoshi to shihō shoshi no chiikiteki bunpu (jimusho no fuzaihiiki no kazu no hikaku (Shingikai jimusōkyoku) (資料4, 弁護士と司法書士の地域的分布 (事務所の不在地域の数の比較) (審議会事務局)) [Material 4, Regional Breakdown of Lawyers and Shihō Shoshi (Comparison of Numbers of Regions Without Offices) (Reform Council Secretariat), Material for Aug. 8, 2000, Session of Reform Council, reprinted in Reform Council Supplement, *supra* note 45.

Council set specific targets for the number of bar exam passers: 1,200 in 2002, 1,500 in 2004, and 3,000 by around 2010. According to the Council's calculations, if those targets were met, the number of legal professionals in active practice would reach 50,000 by 2018.⁹⁵ That in turn would place Japan's *per capita* legal profession at approximately the same level as that of the lowest of the comparables cited, France (albeit still only at France's level as of the date of the statistics cited, 1997). The Reform Council stressed that the 3,000 figure was not a cap, closing with the following sentence: "[S]ecuring 3,000 successful candidates for the national bar examination annually is a goal to be achieved 'deliberately and as soon as possible,' and this number does not signify the upper limit."⁹⁶

With regard to quality, the Reform Council expressed rather lofty expectations. According to its recommendations, "The legal profession bearing the justice system of the 21st century [must] be equipped with such basics as rich humanity and sensitivity, broad education and expertise, flexible mentality, and abilities in persuasion and negotiation. It will also need insight into society and human relationships, a sense of human rights, knowledge of up-to-date legal fields and foreign law, an international vision and a firm grasp of language."⁹⁷ As if this list were not long enough, in subsequent pages of its recommendations the Council stated that the legal profession should embody the following qualities: specialized legal knowledge; creative and critical thinking ability; capacity for legal analysis geared to solving real-world problems; broad and diverse backgrounds; mastery of basic practice skills and the ability to link theory and practice skills organically; basic understanding of cutting-edge legal fields; a sense of responsibility to society; and high ethical standards.⁹⁸

The Council voiced great pessimism about the possibility of satisfying these needs either by simply increasing the number of bar exam passers or reforming undergraduate legal education, while leaving the basic structure unchanged.⁹⁹ The Council characterized "conventional legal education at universities" as "not necessarily

95. REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 57-58.

96. *Id.* at 58.

97. *Id.* at 56.

98. *See id.* at 63-64.

99. *See id.* at 61-62.

sufficient in terms of either basic liberal arts education or specialized legal education," and further noted the absence of professional training.¹⁰⁰ The Council also expressed deep concern over the impact of the low pass rates on the bar exam. "Amid the increasingly fierce competition to pass the bar examination," the Council stated, "students have become increasingly dependent on preparatory schools." This had resulted in what the Reform Council referred to as the "double school" phenomenon, in which college students divided their attention between university and preparatory school, and the "university flight" syndrome, in which students ignored their university classes in order to concentrate on studies at the preparatory schools.¹⁰¹

For the vast majority of those who sought to enter the legal profession, the prior system almost mandated a form of tunnel vision. Candidates' efforts – and, in turn, the training offered by the preparatory schools – were narrowly focused on the subjects covered by the bar exam and on test-taking techniques. When coupled with the relatively limited range of subjects tested on the bar exam, the heavy emphasis on doctrine, and the puzzle-like form some questions had taken, the system seemed geared to producing narrowly-focused candidates who had spent years concentrating on a limited range of legal subjects – quite the opposite of the broad, well-rounded, and diverse legal profession envisioned by the Reform Council.¹⁰²

The Reform Council summed up its views as follows:

[I]n order to overcome the problems of the current system . . . , it is essential to develop a new legal training system not by focusing only on the "single point" of the national bar examination but by organically connecting legal education, the national bar examination, and apprenticeship training as a "process". . . . As the core of the new system, it is considered to be important and effective to establish law schools, . . . providing education especially for training legal professionals¹⁰³

100. *Id.* at 61.

101. *Id.*

102. It goes without saying that the prior system also resulted in a significant drain of societal resources. For decades, thousands of talented and highly committed individuals had spent many years of their lives cramming for the bar exam, with the great majority failing in the end.

103. REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 62.

The Reform Council then set forth a rather detailed outline of the legal training system it had in mind.¹⁰⁴ The law school model it proposed bore many similarities to the U.S. system. Law school was to be a graduate-level professional school consisting, in principle, of a three-year term.¹⁰⁵ To ensure diversity, students were to come from a broad range of academic disciplines and to include people with real-world experience.¹⁰⁶ To enhance critical analytical skills, creativity, and skill in advocacy, law school classes were to be kept small, with extensive use of interactive discussions rather than one-way lectures.¹⁰⁷ Education was to bridge theory and practice; to that end, the curriculum was to include practice-oriented education and the faculty was to include substantial numbers of members with broad professional experience.¹⁰⁸ In the future, moreover, faculty members responsible for courses in the core fields were expected to be qualified as legal professionals.¹⁰⁹

To ensure the quality of the law schools and the education they provide, the law schools would need to obtain initial certification through a chartering process and undergo regular reaccreditation.¹¹⁰ To ensure student commitment and attainment, strict grading and evaluation standards were to be utilized.¹¹¹ At the same time, to afford students the ability to devote themselves to their studies at law school rather than feel compelled to spend much of their time attending preparatory schools, the law schools were to provide "thorough education such that a significant ratio of successful

104. *See id.* at 63-70.

105. *See id.* at 65.

106. *Id.* at 65-66.

107. *See id.* at 66-67.

108. *See id.* at 66-69.

109. *See id.* at 68-69.

110. *See id.* at 70. As later decided, law schools must obtain reaccreditation every five years by one of three separate accreditation bodies. *See* Gakkō kyōiku hō (学校教育法) [School Education Act], Act No. 26 of 1947, art. 109(3); Gakkō kyōiku hō sekōrei (学校教育法施行令) [School Education Act Enforcement Ordinance], Government Ordinance No. 340 of 1953, art. 40. The accreditation bodies also conduct annual reviews of certain key data. *See, e.g.,* Daigaku hyōka-gakui juyo kikō (大学評価・学位授与機構) [National Institution for Academic Degrees and University Evaluation] [NIAD-UE], Hōkadaigakuin hyōka kijun yōkō (法科大学院評価基準要綱) [Outline of Standards for Law School Evaluation], Oct. 2004 (Sept. 2010 revision), at 47 (Chapter 3, Standard 7), available at http://www.niad.ac.jp/ICSFiles/afieldfile/2010/09/30/no6_2_kijyunyoukou_22.pdf.

111. *See* REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 67.

graduates (e.g., 70% to 80%) can pass the new bar exam.”¹¹²

Without offering a detailed blueprint, the Reform Council recommended a new bar exam be designed, taking into account the educational programs offered by the law schools. As one possible approach, the Reform Council suggested the use of questions similar to “performance exams” in the United States, in which candidates would be provided a “long period of time,” given “cases composed of diversified and complex facts, not necessarily bound by the traditional subject categories,” and “required to demonstrate how to solve problems, how to prevent conflicts, how to design plans, and the like.”¹¹³

One further point bears note. The Reform Council explicitly recommended that there be no fixed limit on the number of law schools. In addition to diversity among students, diversity among law schools would be welcomed. The Reform Council encouraged each law school to establish its own identity and “foster diversified legal professionals of the type it regards as ideal,” and stressed that any law school meeting the minimum standards for chartering and accreditation was to be recognized.¹¹⁴ This stance was in keeping with the principles of “fairness, openness, and diversity,” which the Reform Council proclaimed as lying at the heart of its vision.¹¹⁵ The difficulty of drawing lines may also have come into play. The Reform Council made specific reference to the goal of achieving broad geographical distribution of law schools throughout Japan, and it seems highly likely that universities with strong ties to politicians would have raised a clamor if they had been excluded.

B. U.S.-Style System?

Given the above characteristics, many Japanese refer to the law school system as a U.S.-style system. Even as envisioned by the Reform Council, though, the new system differed from the U.S. system in many fundamental respects. The new law schools were engrafted on to the existing system, with both the LTRI and the undergraduate law faculties remaining in place. The strong support for the LTRI by all three branches of the legal professions ensured its survival. And, given the very large number of undergraduate law

112. *Id.*

113. *Id.* at 72-73.

114. *Id.* at 70.

115. *Id.* at 69-70.

faculties and the training they provided to tens of thousands of students who went on to a wide range of careers, the Reform Council expressly supported their continued role. Despite the Council's pronouncement that the term for the law schools "in principle" would be three years, those who had already completed undergraduate law programs could qualify for a "shortened" two-year term;¹¹⁶ and, since law faculties had been the traditional undergraduate choice for those seeking a career in law, it was inevitable that, at least initially, the two-year program would be the norm at many law schools.

The bar exam represented another major difference between the Reform Council proposal and the U.S. model. Despite the Reform Council's firm calls for substantial increases in the number of passers, complete with concrete numbers and timelines, and its reference to a pass rate of 70% to 80%, the reality is that even under the Council's proposal the number of passers would be capped, so the pass rates would be dependent on the number of law schools and graduates.

Two other aspects of the bar exam bear note. In part to reduce pressure on pass rates from the proliferation of repeat bar exam takers, and in part to avoid the waste of resources from people spending many years cramming for the exam, the Reform Council proposed a limit of, e.g., three tries, on the number of times candidates could take the bar exam.¹¹⁷ Furthermore, in response to charges that, whereas the existing bar exam was open to anyone, the new system would limit entry into the legal profession to those who could afford the time and money required for law school,¹¹⁸ the Reform Council recognized an exception to the requirement that candidates complete law school, stating that: "Proper routes for obtaining the qualification of legal professional should be secured for those who have not gone through law schools for reasons such as financial difficulty or because they have sufficient practical

116. *Id.* at 65.

117. *Id.* at 72.

118. As noted earlier, see text at notes 42-46 *supra*, while the prior system technically was open to anyone, in actual practice the bar exam was such a high barrier that, apart from a handful of exceptionally talented candidates (or exceptionally talented test-takers), the great majority of those who ultimately passed the bar exam took several years to do so. For them, the process entailed not only the direct cost of preparatory schools but the opportunity cost of devoting years to preparation.

experience in the real world.”¹¹⁹

As Kawabata Yoshiharu, a lawyer who has been deeply involved in the reform process, observed, the latter provision (which resulted in the so-called law school bypass) was inserted under pressure from the then-ruling Liberal Democratic Party (LDP). As he explained, after the Reform Council issued an interim report setting out the basic parameters of the proposed law school system, “some parties asked the [LDP] to prevent the emergence of a new system of law schools.” He continued:

Those parties included bar exam preparatory cram schools with a direct interest in maintaining the present legal education and training system, those who strongly believe in deregulation, people who insisted [on expanding the number of passers much more rapidly], legal scholars who want to maintain their positions as professors at undergraduate law faculties and focus on research rather than teaching, and lawyers who opposed a large increase in the population of legal professionals.¹²⁰

In response to calls such as these, the LDP insisted that, apart from law schools, an alternative route for qualifying for the bar examination should be maintained; and the Reform Council complied in its final report.

C. Subsequent Adjustments

Following the issuance of the Reform Council's recommendations, various other bodies undertook further deliberations and concrete planning. These included, with respect to the overall scheme, the Expert Consultation Committee on Legal Training, under the Headquarters for Promotion of Justice System Reform;¹²¹ with respect to the law school system, the Subcommittee on Law Schools, Committee on Universities, Central Council on Education, under MEXT;¹²² and, with respect to the bar exam, the

119. REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 73.

120. Kawabata, *supra* note 12, at 430-31.

121. Hōsō yōsei kentōkai (法曹養成検討会) [Expert Consultation Committee on Legal Training] [Kentōkai]. For the announcement of that Committee's establishment, see Shihō seido kaikaku suishin honbu jimukyoku (司法制度改革推進本部事務局) [Secretariat, Headquarters for Promotion of Justice System Reform], Kentōkai no kaisai ni tsuite (検討会の開催について) [Regarding Establishment of Expert Consultation Committees], Dec. 17, 2001, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/kaisai.html>.

122. Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education],

National Bar Examination Administration Commission, attached to the MOJ.¹²³

While largely following the blueprint laid out by the Reform Council, these and other bodies refined and adjusted the recommendations in various ways. Some of the more notable adjustments are as follows: To eliminate ambiguity and protect against backsliding, concrete numerical standards or targets were established for, e.g., percentage of nonlaw and *shakaijin* students (30% target, with special duty to justify if below 20%);¹²⁴ maximum class size (80 students, with limited exceptions);¹²⁵ percentage of full-time faculty members with at least five years of practice experience (20%);¹²⁶ etc. To help ensure the law schools would develop an ethos of training for the profession, and not slip back into the traditional focus almost entirely on theory, provisions were included to mandate that law schools be independent from the law faculties,¹²⁷ including limitations on the percentage of shared faculty members. To ensure the quality of the faculty, an evaluation process was established, focused not only on the adequacy of the faculty as a whole, but on the suitability of each individual faculty member for the specific courses he or she was scheduled to teach (based on factors such as number of years of prior experience

Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin buhai (法科大学院部会) [Subdivision on Law Schools].

123. MOJ, Shihō shiken kanri iinkai (司法試験管理委員会) [Bar Examination Administration Commission], established pursuant to Shihō shiken hō (司法試験法) [Bar Examination Act], Act No. 140 of 1949, art. 12 (prior to amendment by Act No. 138 of 2002). As of January 1, 2004, this Commission was replaced by Shihō shiken iinkai (司法試験委員会) [Bar Examination Commission], established pursuant to Bar Examination Act (as amended by Act No. 138 of 2002), art. 12.

124. See Kentōkai, Daisansha hyōka (tekikaku nintei) kijun no arikata ni tsuite (iken no seiri) (第三者評価 (適格認定) 基準の在り方について (意見の整理)) [Regarding the Standards for Third Party Evaluation (Suitability Determination) (Summary of Views)], Mar. 28, 2002, at 2 (item 3), available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryous.pdf>. This stipulation was later included in a Ministerial Notice issued by MEXT. See Senmonshoku daigakuin ni kanshi hitsuyō na jikō ni tsuite sadameru ken (専門職大学院に関し必要な事項について定める件) [Matters Stipulated with respect to Essential Items for Professional Graduate Schools], MEXT Ministerial Notice No. 53 of 2003 [MEXT Notice 53], art. 3.

125. See Kentōkai, *supra* note 124, at 4 (item 6).

126. See MEXT Notice 53, *supra* note 124, art. 2, para. 3. For this purpose, the phrase "full-time" (*sennin*, 専任) was further defined to include practitioners teaching at least six credit hours per year.

127. See, e.g., NIAD-UE, *supra* note 110, at 34 (Chapter 2, Standard 9-1-1).

teaching the course in question, number of publications in the field, etc.).¹²⁸

One important set of debates related to the curriculum. The Reform Council had announced broad principles regarding the curriculum and had recommended the establishment of minimum standards for required subjects, but had stressed that, "in terms of actual subjects to be taught and their contents, the originality and diversity of inventive efforts by each law school shall be respected."¹²⁹ The bodies involved in subsequent planning endorsed the same policy of specifying minimum standards only, with law schools to be given freedom to decide other matters regarding the curriculum.¹³⁰ But views differed on what the minimum standards should be.

Concrete curricular planning was entrusted to working groups for each of the main fields of law. With the exception of the group considering practice-related subjects, these groups consisted largely of traditional legal academics in the respective fields. Imbued as most were with the belief that a key problem with existing legal education was that there was too much to cover and too little time, the groups proposed extensive curricula for each of their respective fields. The original proposals from the three groups responsible for the fields of civil (including civil law and procedure and commercial law), criminal (criminal law and procedure), and public law (constitutional and administrative law), which are the core subjects tested on the bar exam, would have amounted to a total of some eighty required credit hours in just the first two years of law school.¹³¹ After the respective groups cut "as far as they possibly

128. See *Senmonshoku daigakuin setchi kijun* (専門職大学院設置基準) [Standards for Establishment of Professional Graduate Schools], MEXT Ministerial Ordinance No. 16 of 2003, art. 5 (requirement for evaluation of faculty members). See, e.g., NIAD-UE, *supra* note 110, at 30 (Chapter 2, Standard 8-1) (regarding certification of faculty member suitability), 44 (Chapter 3, Standard 4) (regarding process for evaluating faculty member suitability).

129. See REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 66.

130. See *Kentōkai, Hōkadaigakuin no daisansha hyōka (tekikaku nintei) no arikata ni suite (iken no seiri)* (法科大学院の第三者評価(適格認定)の在り方について(意見の整理)) [Regarding Third Party Evaluation (Suitability Determination) for Law Schools (Summary of Views)], Mar. 28, 2002, available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryou4.pdf>.

131. See *Hōkadaigakuin ni okeru kyōiku naiyō-hōhō ni kansuru kenkyūkai* (法科大学院における教育内容・方法に関する研究会) [Study Group on Educational Content and Methods for Law Schools], *Hōkadaigakuin ni okeru minjihō karikyuramu no arikata* (moderuan) (法科大学院における民事法カリキュラムの

could," the minimum required standards still called for fifty-four credit hours in those courses,¹³² and authorized law schools to increase the overall required credits for those three broad fields by up to 15%.¹³³ This meant that well over half the ninety-three credit hours required for completion of law school must be allocated to those subjects; and, as a practical matter, many law schools used the option of imposing additional credit requirements for those fields, meaning those courses occupied two-thirds of the standard overall course load.

When I argued that these "bare bones" standards still seemed excessive, leaving too little room for courses in other fields, clinics, or the types of innovative programs the law schools were expected to establish, Japanese observers assured me that, rather than serving as a minimum floor, in the Japanese context the standards would have much greater significance as a cap. If these standards did not exist, they warned, many law schools would devote even larger proportions of the curriculum to required courses in the bar exam subjects. As those comments reflect, from the outset knowledgeable Japanese observers recognized that the content of the bar exam would drive much of law school education.

Concrete planning for the bar exam followed the Reform

あり方【モデル案】) [Civil Curriculum for Law Schools (Proposed Model)], 3-1. Karikyuramu no zentaizō (3-1.カリキュラムの全体像) [3-1. Overall Picture of Curriculum], Apr. 24, 2001, available at http://warp.ndl.go.jp/info:ndljp/pid/286794/www.mext.go.jp/b_menu/shingi/chousa/koutou/003/toushin/010401/minzi/031.htm (for Civil Law, Commercial Law, and Civil Procedure, 38 to 44 total proposed required credits in first two years); Hōkadaigakuin ni okeru keijihō karikyuramu no arikata (moderuan) (法科大学院における刑事法カリキュラムのあり方【モデル案】) [Criminal Curriculum for Law Schools (Proposed Model)], 3 Karikyuramu no zentaizō (3.カリキュラムの全体像) [3. Overall Picture of Curriculum], Apr. 24, 2001, available at http://warp.ndl.go.jp/info:ndljp/pid/286794/www.mext.go.jp/b_menu/shingi/chousa/koutou/003/toushin/010401/keizi/03.htm (for Criminal Law and Criminal Procedure, 22 total proposed required credits in first two years); Hōkadaigakuin ni okeru kyōiku naiyō-hōhō (kōhō) no arikata ni tsuite (法科大学院における教育内容・方法(公法)のあり方について) [Regarding the Educational Content and Methods for Law Schools (Public Law)], 2-1 Karikyuramu no zentaizō (2-1カリキュラムの全体像) [2-1 Overall Picture of Curriculum], Oct. 26, 2001, available at http://warp.ndl.go.jp/info:ndljp/pid/286794/www.mext.go.jp/b_menu/shingi/chousa/koutou/003/toushin/011001/02-1.htm (for Constitutional Law and Administrative Law, 14 total proposed required credits in first two years).

132. See *Kentōkai*, *supra* note 124, at 6-7 (item 8).

133. See, e.g., NIAD-UE, *supra* note 110, at 7 (Chapter 2, Standard 2-1-5) (authorizing increase of up to eight additional required credits, in addition to minimum of 54 required by the basic standards).

Council's lead in limiting the number of times candidates could take the exam, to three tries within five years after completion of law school.¹³⁴ In terms of content, however, the design for the new bar exam consisted of relatively modest refinements to the existing exam, rather than the full-fledged redesign hinted at by the Reform Council. The oral exam was eliminated, but the multiple choice and essay portions were retained.¹³⁵ In the multiple choice stage, the number of puzzle-type questions was greatly reduced. Essay questions typically included detailed fact patterns, calling for application of law and procedure in concrete situations,¹³⁶ with relatively little focus on academic theory as such, as had been common on the old bar exam.¹³⁷ Notwithstanding the Reform Council's explicit suggestion that the new bar exam might utilize a performance test-type approach, the exam does not include professional skills. While the Expert Consultation Committee called for further consideration of that approach, the National Bar Examination Administration Commission chose not to include such questions. The use of performance test-type questions evidently was rejected as being infeasible.

The core subjects tested on the new bar exam remained essentially the same as for the old exam: civil law, commercial law, and civil procedure in the civil sphere; criminal law and criminal procedure in the criminal sphere; and constitutional and administrative law in the public law sphere.¹³⁸ In connection with the Reform Council's suggestion that the exam might include questions "not bound by the traditional subject categories," it was agreed that within the civil, criminal, and public law spheres respectively, questions might involve a mix of the specific subjects

134. See Kentōkai, Shin shihō shiken no arikata ni tsuite (iken seiri) (新司法試験の在り方について (意見整理)) [Regarding the New Bar Examination (Summary of Views)], March 28, 2002, at 2 (item 4), available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryou6.pdf>.

135. See *id.* at 1-2 (item 3).

136. For an archive of questions on the new bar exam, see MOJ, Shihōshiken no jissai ni tsuite (司法試験の実施について) [Regarding the Implementation of the Bar Examination], available at http://www.moj.go.jp/jinji/shihoushiken/jinji08_00025.html, and follow links to the exams for each year.

137. For an archive of questions on the old bar exam, see MOJ, *supra* note 38 (containing multiple choice exam questions for 1996-2010, essay questions for 2002-2010).

138. See Bar Examination Act, *supra* note 123, art. 3.

within those spheres,¹³⁹ but broader combinations – such as, for example, questions including elements from both criminal and administrative law, or commercial law and constitutional law – were rejected. These, too, were deemed infeasible, with one reason being that it would be difficult for the bar examiners – who include academics specializing in the respective fields – to compose and grade such questions.¹⁴⁰ Even the modest change to allow mixed questions within the respective spheres did not survive for long. Although the rules still permit mixed questions to that limited extent, in 2010 the Bar Examination Commission expressed its sympathy for the difficulty bar examiners were having in creating such questions and approved a shift to three questions in the civil sphere and two each in criminal and public law, with no requirement for use of any mixed questions.¹⁴¹ As a major bar exam prep school was quick to point out, this in effect signaled a return to the pattern of separate questions centered on each of the seven core subjects.¹⁴²

Despite repeated pleas, the inclusion of legal ethics also was rejected, with a variety of rationales offered for why inclusion would not be appropriate.¹⁴³ In addition to the seven core required

139. See, e.g., Kentōkai, Summary of Minutes for 8th Session, June 4, 2002, *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai8/8gaiyou.html>.

140. See, e.g., Kentōkai, Minutes for 5th Session, March 7, 2002, *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai5/5gijiroku.html>.

141. See Shihō shiken iinkai (司法試験委員会) [Bar Examination Commission], Minutes for 65th Meeting, April 28, 2010, *available at* <http://www.moj.go.jp/content/000053035.pdf>.

142. See Sorimachi Katsuhiko no rīgaru danku (反町雄彦のリーガルダンク) [Sorimachi Katsuhiko's Legal Dunk], *Shihō shiken iinkai kaigiroku* (司法試験委員会会議録) [Record of the Meeting of the Bar Examination Commission], July 6, 2010, https://blogs.yahoo.jp/sorimachi_katsuhiko/2604455.html. For a more detailed analysis of the shift in stance, see JFBA, “Heisei 23nen shinshihō shiken no jisshi nitteitō ni kansuru iken boshū no jisshi ni tsuite” ni taisuru ikensho (「平成23年新司法試験の実施日程等に関する意見募集の実施について」に対する意見書) [Statement of Views with respect to “Invitation for Public Comment regarding Dates, etc., for the 2011 New Bar Examination”], July 6, 2010, *available at* <http://www.moj.go.jp/content/000052998.pdf> (expressing concern that the shift in number of questions and time allotments signaled a retreat from use of questions spanning fields or incorporating both substantive law and procedure).

143. The rationales shifted over time. One objection was that issues of ethics are too abstract and subjective to be amenable to testing. At the other extreme was the argument that ethics questions were likely to test only rote memorization. A third was that the study of professional responsibility in Japan was not sufficiently well developed to be amenable to inclusion yet. See, e.g., Kentōkai, Summary of Minutes

exam subjects, however, candidates were required to select one “elective” subject from among eight choices.¹⁴⁴ In another telling reflection that Japanese observers understood the impact the bar exam would have on law school education, when the relevant committees were considering what elective subjects to include, academics from a wide range of fields undertook lobbying campaigns to have their fields listed.

Another major debate relating to the bar exam concerned the so-called bypass, through which candidates could qualify for the legal profession without attending law school. As noted earlier, the Reform Council indicated that this alternate route to qualification should be provided “for those who have not gone through law schools for reasons such as financial difficulty or because they have sufficient practical experience in the real world.”¹⁴⁵ When the relevant follow-up committees considered this issue, though, they concluded that it would be impractical to establish appropriate standards for assessing financial hardship or prior experience. Instead, they decided to institute a preliminary exam, open to anyone, designed to assess whether the applicants had attained the same level as those who had completed law school.¹⁴⁶ The preliminary exam would not commence until 2011, however. For the period between 2006 (when the first cohort of law school students graduated¹⁴⁷) and 2010, the old bar exam and the new bar

for 3rd Session, Feb. 5, 2002, *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai3/3gaiyou.html>; Summary of Minutes for 6th Session, March 28, 2002, *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai6/6gaiyou.html>.

144. The choices are: Labor Law, Insolvency, Intellectual Property, Economic Law, Taxation, Environmental Law, Public International Law, and Private International Law. *See, e.g.*, MOJ, Heisei 25nen shihōshiken ni kansuru Q&A (平成25年司法試験に関するQ & A) [FAQ regarding the 2013 Bar Examination], Question No. 3, *available at* http://www.moj.go.jp/jinji/shihoushiken/shiken_shinshihou_shikenqa.html.

145. *See* text at note 119 *supra*.

146. The Expert Consultation Committee noted the difficulty in setting standards to evaluate hardship and experience. As a possible alternative, that Committee suggested that the contents and methods for the preliminary examination might be adjusted “so as not to impair the principle that the new system is to be centered on law schools.” *See* Kentōkai, *supra* note 139, at 2-3 (item 6). In the end, the Bar Examination Administration Commission elected not to impose any limits on eligibility based on hardship or experience. *See* Bar Examination Act, *supra* note 123, art. 5.

147. Technically, in Japan the word “graduation” (*sotsugyō*, 卒業) is used for undergraduate programs; the word “completion” (*shūryō*, 修了) is used for

exam would run in parallel, with the number of passers on the old bar exam gradually decreasing.¹⁴⁸ The preliminary exam, it was decided, would go into operation only after the old exam was phased out.

The LTRI was retained. To accommodate the increased number of apprentices, the term was shortened from eighteen months to one year and the structure of the program revised considerably. Of the one-year term, two months are spent in training at the Institute itself, the other ten months in rotations of two months each at five placements: civil and criminal division of court, prosecutors office, law firm, and a so-called "elective" placement, in which apprentices can choose from a range of options (including labor, intellectual property, insolvency, and family law, or elect further experience in one of the four standard tracks).¹⁴⁹ The stipend system had been slated to switch to an interest-free loan system from the LTRI class entering in late 2010. After bitter opposition by the JFBA,¹⁵⁰ the stipend system was extended for one additional year; the loan system took effect from late 2011.¹⁵¹

IV. Challenges Facing the New System

As the above summary reflects, the new system faced many challenges. To implement the legal training reforms, a vast range of

graduate-level programs, including the new law schools. I have chosen to use "graduation" and "graduates" as the more natural expressions in English.

148. See Shihō seido kaikaku suishin honbu komon kaigi (司法制度改革推進本部顧問会議) [Advisory Council, Headquarters for Justice System Reform], Material No. 8 for 4th Session, May 16, 2002, Shihō shiken no shikumi (司法試験の仕組み) [The Structure of the Bar Examination], available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryou8.pdf>.

149. For an overview of the new LTRI system, see Saikō saibansho (最高裁判所) [Supreme Court (Japan)], Shin shihō shūshū no gaiyō (新司法修習の概要) [Overview of the New Apprenticeship Training], May 25, 2011, reprinted in Regarding the Bar Exam, *supra* note 41, Material 37.

150. See, e.g., JFBA, Website: Shihō shūshū kyūhisei no iji o (司法修習給費制の維持を) [For Maintaining the Stipend System for Legal Apprentices], <http://www.nichibenren.or.jp/activity/training/kiyuu-hisei-izi.html>. The JFBA framed its opposition primarily in terms of the financial burden on apprentices and their duty to devote their entire time to study. It may be more than coincidental, however, that the financial burdens for the Government of Japan related to the stipend system served as a barrier to substantial increases in the number of apprentices.

151. See Saibanshohō (裁判所法) [Courts Act], Act No. 59 of 1947 (as amended), art. 67-2.

matters needed to be addressed, both nationwide and at the individual law schools. At each level, the tasks were further complicated by the need to coordinate with existing bodies and programs. From the start, for example, law schools faced issues regarding how to coordinate their programs with undergraduate law programs, and how to integrate nonlaw graduates with law graduates. The continued existence of the LTRI raised other coordination matters, including deciding what types of practice-related education should be conducted at each stage. Needless to say, funding implications affected nearly every aspect of the system.

The goal of the reforms went far beyond simply seeking to change the structure of Japanese legal education. At a more fundamental level, the reforms sought to change thinking patterns: for legal education and, more broadly, for the legal profession itself. For faculty members, the reforms sought to change the prevailing mindset with regard to educational methods, from one-way lectures to interactive give-and-take, and with regard to educational content, from a heavy focus on mastery of doctrine to education bridging theory and practice. For students, the reforms sought to instill an ethos of being active participants in the educational process, rather than passive learners. For legal education and the profession as a whole, the reforms sought to promote openness and diversity.

Among the many challenges facing the new legal education system, it is perhaps this shift in mindset that was the most daunting. For those involved in the system, though, by far the gravest concern related to the bar exam. Despite the rhetoric, from the outset it was obvious the passing rate would fall well below the 70% to 80% level. With a continued cap on the number of bar exam passers but no cap on the number of law schools, the 70% to 80% pass could be achieved only if the number of law schools remained small. Yet by early in the deliberation process it had become clear many institutions were planning to establish schools. Thus, while some students in the first year or two evidently were attracted by the rhetoric (including students who gave up secure jobs), from the outset faculty members and other informed observers were well aware such high passing rates were unachievable.¹⁵²

For the administration and faculty of Japanese law schools, concerns over the impact of the bar exam were exacerbated by the

152. See, e.g., Foote, *supra* note 29, at 237-38.

specter of the law school bypass, especially after it was announced that the preliminary exam would be open to everyone. In what may prove to be a prescient observation from late 2002, well over a year before the new system started, Miyazawa Setsuo wrote: "The most dangerous scenario [for the new law schools] is that the bypass through the preliminary examination will be made larger than the route through the law schools It remains to be seen whether and how universities will succeed in preventing such scenarios through their efforts in the next few years."¹⁵³ As Miyazawa's comment reflects, the scheduled 2011 start date for the preliminary exam loomed large, placing even greater pressure on law schools to prove their value by that date. At least at the start, though, law schools could take some comfort in the expectation that, before the preliminary exam started, the number of passers was to have reached 3,000. That still would not be sufficient to achieve a 70% to 80% pass rate; but, with under 6,000 students per year and likely attrition along the way, one might have expected that considerably over half the law school graduates would pass the exam within their allotted three tries. Or so we thought at the time.

V. Early Returns: Achievements of the New System

Despite the many challenges, the new system achieved many successes. One broad set of achievements related to educational methods. As mandated by the governing standards, faculty members have utilized interactive methods rather than simply relying on one-way lectures. While to some faculty members "interactive" evidently means little more than the recitation method, in which students are expected to recite the correct answer when called upon,¹⁵⁴ many other faculty members have developed highly

153. Miyazawa, *supra* note 85, at 498.

154. A worrisome warning sign of this tendency came at a symposium in mid-2001 sponsored by JFBA, aimed at providing helpful lessons on interactive teaching methods prior to the advent of the new law school system. For one of the "model" classes presented that day, the faculty member had assigned a long list of questions to the students in advance, and the class consisted entirely of a recitation of their answers, read from scripts the students had prepared in advance. JFBA, Hōkadaigakuin setsuritsu-un'ei kyōryoku sentā (法科大学院設立・運営協力センター) [Center for Cooperation in Law School Establishment and Operation], Symposium: Hōkadaigakuin, Moderu kariikyuramu no kōsō to jikken (法科大学院、モデル・カリキュラムの構想と実験) [Law Schools: Conceptions and Experiments in Model Curriculum], Apr. 14, 2001 (Bengoshi kaikan, Tokyo).

effective teaching styles, in which they push students to probe and to think for themselves. As this reflects, fostering critical thinking has been given considerable weight.

Moreover, in what I regard as a very important development, more attention has been given to teaching itself. This was especially true in the first few years of the new system, when many faculty members were still struggling with the question of what was meant by "the Socratic method" or "interactive teaching." At that time, faculty members frequently shared personal experiences and ideas. And, in what was a novel development for many Japanese universities, law schools also established systems for course evaluations by students. The establishment standards require law schools to undertake systematic efforts aimed at improving teaching methods;¹⁵⁵ and, to ensure that requirement is followed, the accreditation bodies mandate steps such as peer review programs, student evaluations, and faculty development workshops.¹⁵⁶ Given this prod, most law schools still undertake all of those measures. Now that faculty members feel they have adjusted to the new teaching methods and curriculum, however, at many schools those programs have become little more than a formality.

Another set of achievements relates to students. At least initially, one of the most notable student-related developments was the law schools' ability to attract students with diverse educational backgrounds and life experiences. Sadly, in a point to which I will return in more detail below, over time that achievement has eroded.¹⁵⁷

A number of other student-related achievements remain intact. Before the new law schools started, many Japanese professors voiced the belief that Japanese students would be reluctant to express their views in front of others and were skeptical about whether students would participate in class. Those doubts have largely been laid to rest. Just as in the United States, some Japanese students are shy about speaking publicly, but many others have

155. Pursuant to the overall governing standards for establishment of professional graduate schools issued by MEXT, accreditation bodies must certify that the schools undertake faculty development efforts. See *Senmonshoku daigakuin setchi kijun* (専門職大学院設置基準) [Establishment Standards for Professional Graduate Schools], MEXT Ministerial Ordinance No. 16 of 2003, art. 11.

156. See, e.g., NIAD-UE, *supra* note 110, at 21-22 (Chapter 2, Standard 5).

157. See text at notes 239-40 *infra*.

welcomed the opportunity to take part actively. Another stereotype was that Japanese students do not study hard and frequently skip class. That stereotype certainly has been laid to rest. Part of the reason for the continued high levels of student commitment presumably is compulsion, through the strict grading standards followed by Japanese law schools (and monitored by the accreditation system). I like to think the high levels of student commitment relate at least in part to the sense that the interactive classes at law schools are more stimulating than the one-way lectures of the past.

Attention to practice constitutes another important achievement. Mastery of doctrine remains at the heart of Japanese law school education. Yet, in contrast to traditional undergraduate legal education, law schools have paid considerable attention to education that bridges theory and practice, with extensive use of actual cases and incorporation of practice-related perspectives even in the core doctrinal courses. Law schools also have developed a wide range of practice-related courses. As mentioned earlier, the governing standards require that at least 20% of faculty members have significant practice experience (so-called practitioner-teachers, 実務家教員).¹⁵⁸ At many law schools, practitioner-teachers and traditional “researcher-teachers” (研究者教員) collaborate on some courses. In addition, many law schools have encouraged researcher-teachers to become members of the bar and obtain practice experience themselves.¹⁵⁹ Moreover, a majority of Japanese law schools have established legal clinics, some of which are quite extensive.¹⁶⁰

In keeping with the Reform Council’s expressed desire that law schools should develop their own identities, many law schools

158. See text at note 126 *supra*.

159. Under a subsequently revised provision of the Lawyers Act, full-time faculty members who had taught law at recognized law faculties for at least five years were entitled to apply for qualification as lawyers, without passing the bar exam. See MOJ, Bengoshi shikaku nintei seido (弁護士資格認定制度) [Certification System for Qualification as Lawyers], April 6, 2012, available at http://www.moj.go.jp/housei/gaiben/housei07_00004.html (last visited Nov. 4, 2012).

160. For a detailed examination of the development of clinics at Japanese law schools, see Shigeo Miyagawa, Takao Suami, Peter A. Joy & Charles D. Weisselberg, *Japan’s New Clinical Programs: A Study of Light and Shadow*, in *THE GLOBAL CLINICAL MOVEMENT* (Frank S. Bloch ed., Oxford Univ. Press, 2010), at 105.

established specialized programs. In their mission statements,¹⁶¹ over half the law schools highlighted a commitment to international matters. Others proclaimed their commitment to a wide range of fields, including intellectual property, taxation, company legal affairs, human rights, welfare law, and ethics, with specialized programs in such fields at many schools.¹⁶²

In a report issued in April 2009, the Special Committee on Law Schools, established under the auspices of MEXT, undertook an evaluation of the state of law school education. As concerns, the Committee found that "one segment" of law school graduates "has not attained sufficient understanding of the fundamentals of core fields of law and has not sufficiently mastered ability in legal thinking," "one segment of graduates has not attained sufficient ability in logical exposition," and "the content of legal skills education is uneven from law school to law school."¹⁶³ On the whole, however, the Committee praised the law schools highly. "Looking at the new law school system as a whole," the Committee concluded, "in the great majority of law schools establishment of an educational program that bridges theory and practice is proceeding steadily, so as to fulfill the functions anticipated by the... reforms."¹⁶⁴ Based on evaluations by instructors at the LTRI, who were in position to observe apprentices who had entered through both old and new systems, the Committee reported:

[I]n terms of aptitude and ability judicial apprentices who have completed law school education not only are, overall, not inferior to judicial apprentices of the past, but excel in the following respects:

161. See, e.g., KAWAI JUKU RAISENSU SUKŌRU & KYŌDŌ HENSHŌ SENTĀ (河合塾ライセンススクール&共同編集センター), HŌKADAIGAKUIN PĀFEKUTO GAIDO 2007/2008 (法科大学院パーフェクトガイド2007/2008年版) [Perfect Guide to Law Schools, 2007-2008 edition] (2007).

162. See *id.*

163. Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education], Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin tokubetsu iinkai (法科大学院特別委員会) [Special Committee on Law Schools], Hōkadaigakuin kyōiku no shitsu no kōjō no tame no kaizen hōsaku ni tsuite (hōkoku) (法科大学院教育の質の向上のための改善方策について (報告)) [Regarding Ameliorative Measures to Improve the Quality of Law School Education (Report)] [Special Committee 2009 Report], April 17, 2009, at 1, available at http://www.mext.go.jp/component/b_menu/shingi/toushin/_icsFiles/afieldfile/2009/04/20/1261059_1_1.pdf.

164. *Id.*

- (a) Possess self-initiated, enthusiastic commitment to learning.
- (b) Have mastered methods for learning, and have high ability to conduct research on legal materials
- (c) Excel in communication ability and presentation ability.
- (d) Have achieved a definite understanding of the social mission the legal profession should discharge, through learning related to legal ethics, etc.
- (e) Possess learning related not only to the core fields of law, but to a broad range of other fields valuable for practice, such as intellectual property and financial law.¹⁶⁵

In 2012 the Special Committee on Law Schools issued another evaluation of law schools. This time, citing assessments by "members of the legal profession and a broad range of others who have connections with legal practice," the Committee reiterated strengths such as self-initiated commitment to learning, high ability in legal research, ability in legal drafting, and excellent communication skills, and added, "the principles of developing a legal profession strong in both quantity and quality, at which the new legal training system is aimed, are being realized."¹⁶⁶ The report noted numerous other strengths, as well, including skills in identifying and adjusting relevant interests and ability in logical persuasion. The report went so far as to state that, through education "strongly focused on bridging theory and practice," conducted in "small classes . . . in a highly interactive manner," the law schools are achieving a shift away from the large lecture approach and "have great significance as a leading model for university reform."¹⁶⁷

VI. Trials and Tribulations

Given these achievements, why all the hand wringing over the state of Japan's legal education reforms? More pointedly, if these positive assessments are accurate, why have applications and enrollments dropped so dramatically?

As the Special Committee on Law Schools observed in its 2012 report, there is very little public awareness of the merits of the new system. Indeed, as the first of its recommended steps for

165. *Id.*

166. Special Committee 2012 Proposal, *supra* note 21, at 1.

167. *Id.*

improvement, that Committee highlighted the need for an active public relations campaign to raise awareness of the achievements of law school education.¹⁶⁸ Who might orchestrate such a PR campaign is another matter. The most logical choice would seem to be the Japan Association of Law Schools;¹⁶⁹ but unless conducted skillfully, a campaign by that Association, or by individual law schools themselves, likely would be dismissed as self-serving. Yet not only has there not been a meaningful campaign to promote awareness of the merits of law schools, the legal education reforms have been subjected to considerable negative publicity, including criticisms orchestrated by the JFBA.

Presumably, the lack of public recognition regarding the strengths of law school education, coupled with the negative publicity, constitute part of the reason for the declines in applications and enrollment. For those considering law school, though, it seems likely that, rather than views about the nature of law school education itself, concerns over economic prospects play the key role in deciding whether to apply and enroll. In this connection, the cost of law school and the shift from the stipend to the loan system for LTRI apprenticeship training likely have had some impact. There can be little doubt that two other factors are even more important: prospects for future employment and, above all, concerns over passing the bar exam.¹⁷⁰ These factors, in turn, tie into debates over the future of Japan's legal profession and pitched battles over the size of the legal profession. To a great degree the law schools find themselves as pawns in these debates and battles.

With respect to perceptions of future prospects, three themes are deeply interconnected: the number of bar exam passers and

168. *Id.* at 12-13.

169. Hōkadaigakuin kyōkai (法科大学院協会) [Japan Association of Law Schools]. See, e.g., <http://www.lawschool-jp.info/about.html>.

170. For a detailed recent analysis of the decline in applicants, see Tokushū, *Henshūbu kikaku: Dēta de miru "hōsō shigansha no gekigen" – utsu te ha aru no ka?* (特集, 編集部企画: データで見る「法曹志願者の激減」 – 打つ手はあるのか?) [Special Issue, Prepared by the Editorial Staff: "The Dramatic Decline in Applicants for the Legal Profession" as Viewed through Data – Can Anything Be Done?], NIBEN FRONTIER, Dec. 2012 Issue, at 19 (2012). That analysis identified the low pass rates on the bar exam as the most important reason for the decline; but the article, which appeared in the monthly journal of the Daini [Number Two] Tokyo Bar Association, could not resist placing the blame squarely on the law schools, with the characterization: "the low pass rates resulting from the out-of-control proliferation (乱立) of law schools," *id.* at 25 (emphasis added).

resulting pass rate; the battle over the size of the legal profession; and the debate over the direction of demand for legal services. The following section addresses those themes in order.

A. Bar Exam Statistics

The new bar exam commenced in 2006. For the first three years the number of passers rose steadily. In 2006, when only *kishūsha* – law graduates in the shortened two-year course – were eligible, 1,009 passed.¹⁷¹ In 2007, when the first cohort of *mishūsha* joined, 1,851 passed; and, in 2008, 2,065 passed.¹⁷² Through 2010, the old bar exam was conducted in parallel with the new bar exam; and, while the number passing the old exam gradually declined, fairly sizeable numbers of candidates passed the old exam those three years, as well. Thus, the total number of bar passers rose from 1,558 in 2006 to 2,209 in 2008;¹⁷³ and, given the steady increases up to that point, it seemed as though the target of 3,000 passers-by 2010 might be reached. Then the number of passers hit a plateau. Between 2009 and 2011, the number of passers on the new bar exam fluctuated between 2,043 and 2,074, and the overall number of passers declined, to just 2,069 in 2011.¹⁷⁴ (In 2012, the number rose slightly, to 2,102, of whom 58 had qualified through the preliminary exam bypass route.¹⁷⁵)

The pass rates on the new bar exam have never come close to the 70% to 80% figure mentioned by the Reform Council. In 2006, when only *kishūsha* were eligible, the overall pass rate was 48.25%.¹⁷⁶ That year, out of 44 law schools with 10 or more graduates taking the exam, only 15 achieved pass rates over 50% (topped by Hitotsubashi University School of Law, at just over 83%).¹⁷⁷ The following year, when the *mishūsha* cohort joined and the first group of repeaters sat for the exam, the overall pass rate dropped to

171. See Regarding the Bar Exam, *supra* note 41, at 7.

172. See *id.*

173. See *id.* at 5, 7.

174. See *id.* Even though the old bar exam had been phased out by 2011, six of the 2010 candidates had passed all but the oral exam portion. Following standard practice, they were permitted to retake the oral exam in 2011, and all six passed.

175. See *id.* at 7.

176. See *id.*

177. See *id.* at 25.

40.2%.¹⁷⁸ As the number of exam takers and repeaters increased in subsequent years, the pass rate plummeted, reaching a low of 23.5% in 2011 before rising slightly, to 24.6% for law school graduates, in 2012.¹⁷⁹ In 2012, graduates of only four of the 74 law schools had pass rates over 50% (again led by Hitotsubashi, at 57%), and only thirteen had pass rates over 30%. At the other extreme were twenty schools with pass rates under 10%.¹⁸⁰

Another troubling development is the wide disparities in pass rates between *mishūsha* and *kishūsha*. In 2007, the first year in which a *mishūsha* cohort sat for the bar exam, the pass rate for *kishūsha* was 46% and that for *mishūsha* 32.3%.¹⁸¹ In every year since then, the pass rate for *kishūsha* has been about twice that for *mishūsha*; in 2012 the respective pass rates were 36.2% for *kishūsha* and 17.2% for *mishūsha*.¹⁸² The *mishūsha*/*kishūsha* categories are not identical to the nonlaw faculty graduates/law faculty graduates categories. Approximately 10% of the *kishūsha* are graduates of faculties other than law. Among the *mishūsha*, the proportion of law faculty graduates is much more prominent, at nearly two-thirds.¹⁸³ When broken down by categories, the pass rates for nonlaw faculty graduates are not so much lower than for law graduates; 35.8% for nonlaw and 40.8% for law graduates in the *kishūsha* category, and 18.6% and 19.5% respectively in the *mishūsha* category.¹⁸⁴ Nonetheless, the nonlaw graduates in the *kishūsha* category presumably either have studied law on their own or worked in law-related fields; for those who have not had much contact with law previously, the odds are steep.

B. Battle over the Size of the Legal Profession

Without access to confidential information, one cannot say for certain why the number of bar exam passers stalled after 2008. It hardly seems coincidental, though, that by then the JFBA had begun to mount a vigorous counteroffensive regarding the size of the legal

178. See *id.* at 7.

179. See *id.* at 30, 31 (including those who qualified through the preliminary exam, the overall pass rate in 2012 was 25.1%).

180. See *id.* at 31.

181. See *id.* at 51.

182. See *id.* at 51-52.

183. See *id.*

184. These percentages were calculated from the statistics contained in *id.*

profession.

As mentioned earlier, before the new legal training system started, the JFBA leadership was supportive, and the JFBA membership endorsed the reforms, including the expansion in the size of the legal profession. Even then, however, there was considerable dissension within the bar. As the reality of competition began to hit, backlash by the bar intensified. The size of the legal profession became a dominant issue in the biennial elections of the JFBA president; and successive JFBA administrations undertook a steadily escalating campaign to limit the rise in the size of the legal profession. The JFBA has issued several proposals on the issue, including "urgent proposals" in 2008 and again in 2011. The bar has utilized glossy brochures and has undertaken appeals to the mass media and lobbying campaigns to politicians, as well as making its case forcefully in presentations to the various bodies and advisory councils that have been considering legal training and related issues. Not surprisingly, the campaign has made selective use of data, at times bordering on demagoguery and fear mongering.

The JFBA stance on the size of the profession gradually hardened. An explanatory statement specifically referring to the 3,000 passer target accompanied the resolution adopted in 2000 endorsing the Reform Council's vision.¹⁸⁵ In looking back through the minutes of the Citizens' Council to the JFBA, as late as 2007 "access to justice" remained a major topic. By 2008, the tenor had changed. The 2008 Urgent Proposal continued to proclaim JFBA support for the Reform Council vision, stating: "This Federation firmly supports the basic ideal of justice system reform to have law and justice reach to every corner of society." But the proposal then proceeded to demand "careful deliberation regarding the quantitative goals themselves" and "a 'pace-down' in the increase in the size of the legal profession for the time being."¹⁸⁶

In another proposal the following year, the JFBA again affirmed its "active support" for the reforms and pledged to "continue to exert our utmost efforts toward the achievement of a legal profession 50,000 strong [the number specifically referred to by the

185. See JFBA, *supra* note 13.

186. JFBA, Hōsō jinkō mondai ni kansuru kinkyū teigen (法曹人口問題に関する緊急提言) [Urgent Proposal regarding the Problem of the Size of the Legal Profession] [2008 Urgent Proposal], July 18, 2008, available at <http://www.nichibenren.or.jp/library/ja/opinion/report/data/080718.pdf>.

Reform Council, not as the ultimate target, but as its projection for the year 2018], so as to assure the number of legal professionals needed by the people of Japan.”¹⁸⁷ In the next paragraph, though, the proposal characterized “the new legal training system” as “not yet in a mature state,” and asserted that “concerns regarding the quality of new entrants into the legal profession have been expressed from all quarters.”¹⁸⁸ It went on to propose that “for a number of years from and after [2009], the determination of the passers on the bar exam should be undertaken carefully and strictly, with the current number of passers as the target,” with a footnote reciting the numbers of passers in 2007 and 2008, 2,099 and 2,209 respectively.¹⁸⁹

By the time of the 2011 Urgent Proposal, the JFBA flatly declared that the Reform Council’s reference to 3,000 passers by the year 2010 “lacks validity,” proposed a “further pace-down,” and called on the government and other relevant bodies “to reduce substantially” the number of passers.¹⁹⁰ In March 2012, the JFBA issued yet another proposal, declaring the 3,000 passer goal “unrealistic,” calling for its “thorough reconsideration,” and demanding a prompt reduction in the number of passers to 1,500 per year, with the possibility of further reductions in future years. In that proposal, the JFBA even included projections based on a rollback to just 1,000 passers per year (showing that at that level Japan’s legal profession would peak at the 49,000 level in 2043 and then begin to decline).¹⁹¹

The rationales for limiting the size of the profession also evolved over time. An early line of resistance amounted, essentially, simply to the observation that competition within the

187. JFBA, *Tōmen no hōsō jinkō no arikata ni kansuru teigen* (当面の法曹人口の在り方に関する提言) [Proposal regarding How the Size of the Legal Profession Should Be for the Time Being], March 18, 2009, at 1, available at <http://www.nichibenren.or.jp/library/ja/opinion/report/data/090318.pdf>.

188. *Id.*

189. *Id.*

190. JFBA, *Hōsō jinkō seisaku ni kansuru kinkyū teigen* (法曹人口政策に関する緊急提言) [Urgent Proposal regarding the Policy on the Size of the Legal Profession], March 27, 2011, available at <http://www.nichibenren.or.jp/activity/document/opinion/year/2011/110327.html>.

191. JFBA, *Hōsō jinkō seisaku ni kansuru teigen* (法曹人口政策に関する提言) [Proposal regarding the Policy on the Size of the Legal Profession], Mar. 15, 2012, available at <http://www.nichibenren.or.jp/activity/document/opinion/year/2012/120315.html>.

legal profession was becoming more severe.¹⁹² While many lawyers undoubtedly viewed that development with great concern, standing alone that observation did little to persuade nonlawyers that limitations were needed.¹⁹³ Other rationales included the argument that there were so many new entrants senior lawyers no longer could provide adequate mentoring¹⁹⁴ and that the increases would result in excessive competition, which in turn would lead to a decline in ethics.¹⁹⁵ Another early set of arguments was that recent bar passers were having difficulty finding employment, so the number of passers should be capped.¹⁹⁶ That argument might have some merit as a ground for limiting the number of law school students in the first place (and, indeed, has been reconfigured in much that way since). As initially formulated, though, it seemed rather insensitive to characterize an effort to limit graduates' chances on the bar exam as an expression of concern for *their* well-being.

Another set of contentions relates to the inadequacy of efforts to achieve other reforms endorsed by the Reform Council. These include, for example, recommendations for substantial increases in the numbers of judges and prosecutors, as well as lawyers. As the JFBA has pointed out, the number of lawyers rose 70% in the decade from 2002 to 2012, but the numbers of judges and prosecutors increased by only 24% and 23% respectively.¹⁹⁷ A further matter that galls many Japanese lawyers is the so-called *hōsō ichigen* (法曹一元) issue. That phrase, which translates roughly to "legal profession unification," is shorthand for a U.S.-style judiciary, in

192. See, e.g., JFBA, Shimin kaigi (市民会議) [Citizens' Council], Minutes, Session 18, May 15, 2008, at 25-26 (comments of Vice President Murayama Akira (村山晃副会長)), available at http://www.nichibenren.or.jp/library/ja/judical_reform/data/shiminkaigi18.pdf.

193. See, e.g., *id.* at 29-30 (comments of Council Chair Nakagawa Hidehiko (中川英彦議長)).

194. Whether senior members of the bar had in fact provided adequate mentoring to young lawyers in the past was not specifically addressed.

195. The assertion of declining ethics seems somewhat ironic, given the MEXT Committee's findings that law school graduates were more attuned to issues of professional responsibility and ethics than those who had passed the old exam.

196. See, e.g., Shimin kaigi, Minutes, Session 18, *supra* note 192, at 9-11 (comments by Vice President Murayama).

197. See Expert Advisory Council on Legal Training, Session 2, Sept. 20, 2012, Shiryō 6, Nihon bengoshi rengōkai teishutsu shiryō (【資料6】日本弁護士連合会提出資料) [Material 6, Material Submitted by JFBA], available at <http://www.moj.go.jp/content/000102272.pdf>.

which judges are appointed from the ranks of experienced lawyers rather than being recruited directly into the career judiciary upon completion of LTRI apprenticeship training. Such a judiciary has long been a cherished goal of the Japanese bar.¹⁹⁸ The 2000 JFBA resolution endorsing the justice reform plans made specific reference to achievement of *hōsō ichigen* as one of the reasons for the bar's support; and some subsequent attacks on the increase in the size of the legal profession have cited the *hōsō ichigen* issue, implying that the bar was misled into supporting the increased number of passers by the false expectation of achieving *hōsō ichigen* in return.¹⁹⁹ Yet, given the limited connection of *hōsō ichigen* to the primary motivation for opposition to the increases in the size of the legal profession, concern over competition, it is doubtful whether achievement of that goal would have made much practical difference to the debate over lawyer population.²⁰⁰

The most potent arguments for limiting the number of bar exam passers fell into two major categories: the view that the market for legal services already was oversaturated and there was insufficient demand to support more lawyers (discussed in Subsection VI(C) below), and the argument that the new legal training system had resulted in a decline in quality. While the JFBA has referred to other

198. For a detailed examination of the *hōsō ichigen* debate, see KOBAYASHI, *supra* note 15, at 155-83, 206-12. In fact, the *hōsō ichigen* issue was the object of heavy debate during the deliberations of the Provisional Justice System Investigation Committee in the early 1960s. That Committee concluded that introduction of such a system was unfeasible at the time, in part because the legal profession was too small to support a move to recruit judges exclusively from among experienced lawyers. See Investigation Committee Recommendations, *supra* note 51, at 13-48. The bar's anger over this issue reportedly was the reason for the JFBA's disavowal of the Investigation Committee Recommendations and its unwillingness to cooperate in a consultation council with the two other branches of the legal profession, established pursuant to those Recommendations, for many years thereafter (although it seems likely that another factor was the Committee's call for a substantial increase in the size of the legal profession, justified in part by reference to the *hōsō ichigen* issue). See KOBAYASHI, *supra* note 15, at 160.

199. See, e.g., KOBAYASHI, *supra* note 15, at 167-73, 206-12; Kuboi Kazumasa (久保井一匡), *Chokusetsushugi/kōtōshugi o kōtai saseru na* (直接主義・口頭主義を後退させるな) [Do Not Let The Principles of Directness and Orality Regress], RONKYŪ JURISUTO 02 (Summer 2012), at 99 (2012).

200. Even if the *hōsō ichigen* concept had been adopted, it is questionable whether enough lawyers would have been willing to join the judiciary. The justice system reforms included an effort to revitalize a program for mid-career appointments of lawyers to the judiciary, but very few lawyers have pursued appointment. See Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HŌSHAKAIGAKU 128, 135-36 (2007).

asserted deficiencies, such as unevenness in skills training at law schools, inadequacy of the shortened LTRI apprenticeship training, and inability to provide sufficient on-the-job training to the new entrants,²⁰¹ the centerpiece of its indictment of law school education has rested on a narrow definition of quality as, in essence, mastery of legal doctrine. In its 2008 Urgent Proposal, for example, the JFBA warned: "Of the many elements of the skills that make up lawyer quality, the decline in quality noted [here] relates to the skill of basic legal knowledge and legal understanding. To take the first step on the road to the legal profession, this constitutes the minimum that is absolutely essential."²⁰² The evidence offered was mostly anecdotal, selectively utilizing material such as the assessment by LTRI instructors, mentioned earlier, that "one segment" of law school graduates "has not attained sufficient understanding of the fundamentals of core fields of law." The JFBA allegations of lower quality conveniently ignored the highly positive overall tone of the assessment by LTRI instructors, including their reports that passers of the new exam were superior to passers of the old exam in communication skills and several other concrete respects. Nonetheless, the image of declining quality took hold. And, as discussed in Section VII below, the contentions of lower quality, coupled with the narrow definition of quality utilized, have had a serious impact on legal education.

C. Demand for Legal Services

Perhaps the most difficult question in connection with the future of Japanese legal education and the legal profession relates to demand for legal services. What makes this especially difficult is that it involves two very different sets of assumptions.

One view, held by those pushing to limit the number of passers, sees the Japanese legal profession as likely to continue to play largely the same roles in the future as it has in the past, primarily centered on litigation, with only gradual expansion into other roles. Those who hold this view also tend to view demand for lawyers

201. See, e.g., JFBA, *Hōsō jinkō seisaku ni kansuru kinkyū teigen*, Kanren shiryō (法曹人口政策に関する緊急提言、関連資料) [[Urgent Proposal regarding the Policy on the Size of the Legal Profession, Related Materials] [Related Materials], March 2011, available at http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_shiryō.pdf.

202. 2008 Urgent Proposal, *supra* note 186.

even for litigation-related matters as relatively limited. Accordingly, they foresee at most limited increases in demand.

The second view, which was held by the Reform Council (and by the Legal Training Reform Consultation Council, in its final report of 1995²⁰³), anticipates a major expansion in demand. That view sees great unmet needs for lawyers in Japanese society, even in their traditional role as representatives for litigation; it sees involvement in ADR and other forms of dispute resolution as a natural extension of the traditional roles; and it envisions lawyers as assuming many other roles, including taking in-house positions at corporations, working for governmental bodies and NGOs, and advising businesses and individuals on a wide range of matters.

The Reform Council recognized that the size of the legal profession should be based on the needs of Japanese society (as opposed to being set by the legal profession itself). Yet, insofar as the Council envisioned an expansion of the legal profession into new geographical areas, new legal fields, and new roles, it could not simply look to past experience within Japan in order to assess the needs. The market for legal services in Japan, after all, had developed based on a system in which the number of new lawyers had been capped at the same level for over 25 years, and had only gradually increased over the prior decade. For the expanded roles envisioned by the Reform Council to take root, changes in mindset would be needed on both sides: the consumers of legal services and the legal profession itself. And it would inevitably take some time for a new model of legal practice and new market equilibrium to take hold. It is presumably for reasons such as these that the Reform Council referred to the "zero-one regions" and introduced comparisons from foreign nations, as proxies for assessing future needs.

The use of the foreign comparisons, however, left the Reform Council open to the JFBA charge that Japan is unique and Japanese needs cannot be judged based on comparisons with other nations. And the reference to the zero-one regions gave the JFBA the opening to declare victory with regard to the issue of lawyer scarcity when the last of the "zero" judicial districts was eradicated and only a handful of districts remained with just one lawyer.²⁰⁴

203. See text at note 69 *supra*.

204. See, e.g., JFBA, Related Materials, *supra* note 201, at 15-16 (Shiryō 22, Bengoshi zero-wan chiiki no kaishō (資料22, 弁護士ゼロ・ワン地域の解消)

Symbolic measures and rhetorical flourishes aside, the basic question of how many lawyers society needs inevitably involves subjective judgments. Among those who favor limiting the number of lawyers, some view the small size of the legal profession and relatively weak demand as praiseworthy: reflections of Japan's deep commitment to harmony and consequent low need for lawyers. Many others, though, including many of the lawyers who have been involved in the debate over the size of the legal profession, feel differently. They wish there were more demand, and typically feel there should be more demand, but do not believe the demand will be forthcoming.

As this reflects, within the Japanese bar there is widespread, albeit by no means universal, agreement that there remain many unmet needs for legal services.²⁰⁵ Needs continue to exist even with respect to the traditional role of Japanese lawyers as representatives in litigation. There may not be any more "zero" court districts (although there surely are still many cities and towns with no lawyers), but studies of rural regions have found that lawyer scarcity remains a serious concern, with many legal needs going unmet.²⁰⁶ The extent of unmet need was brought home rather dramatically by the 2011 Great East Japan Earthquake and resulting disaster, including the meltdown at the Tokyo Electric Power Company (TEPCO) nuclear power plant. For claims for compensation for nuclear power-related damages, filed with a specialized ADR Center established to handle such claims, for the first several months under 20% of claimants were represented by counsel; and the low level of representation led to delays and difficulty in processing of claims.²⁰⁷

There is also fairly broad recognition of a continued and expanding need for lawyers serving other roles. Some of the major categories of perceived need include business advising, including

[Material 22, Eradication of the Zero-One Lawyer Regions]].

205. See, e.g., JFBA, *Shimin kaigi*, Minutes, Session 19, at 25-26 (comments of Secretary-General Marushima Shunsuke (丸島俊介事務総長)), available at http://nichibenren.or.jp/library/ja/judicial_reform/data/shiminkaigi19.pdf.

206. See, e.g., Takayuki Ii, *Young Migrants from Big Cities: Measures for Dealing with the Shortage of Legal Services in Japan*, 27 Z. JAPAN. R./J. JAPAN. L. 59 (2009).

207. See Suzuki Isomi & Ono Yasuhito (鈴木五十三 & 尾野恭史), *Genshiryoku songai baishō funsō kaiketsu sentā no mōshitae gaikyō to shinri no kadai* (原子力損害賠償紛争解決センターの申立て概況と審理の課題) [The General Situation of Claims at the Nuclear Power-Related Damage Claim Resolution Center and Issues for Hearings], NIBEN FRONTIER, Oct. 2012, at 24-25.

in-house legal staff; full-time or part-time legal staff for governmental and administrative bodies; NGOs; and preventive lawyering and advising for individuals.²⁰⁸ Moreover, there is rather widespread recognition of the need for lawyers in various specialized fields, including labor, consumer, welfare/eldercare, and health law.²⁰⁹

Even if needs do exist, however, a second critical question is whether those affected will utilize legal professionals. Two initial aspects of that issue are whether the potential consumers of legal services will even recognize their concerns as being legal in nature, and, if so, whether they will appreciate that lawyers can help resolve the concerns. Those who are optimistic about rising demand for legal services anticipate increased recognition of need as new patterns of access and utilization develop; skeptics are dubious. A further important aspect is the ability and willingness of consumers to pay for the legal services, or, in the alternative, access to other funding sources. A recent conversation with a leading lawyer representing claimants in the nuclear-related ADR proceedings offers a vivid example of the difficulties Japanese lawyers may face in changing consumers' attitudes toward payment for legal services. He reported having reached an initial agreement with claimants that they would pay the team of lawyers representing them 5% of awards received from TEPCO. When the ADR Center subsequently issued a standard calling on TEPCO to pay lawyers representing claimants an amount equivalent to 3% of recognized awards, though, the claimants balked at paying the lawyers the additional 2%. One would hope that, as the Japanese public becomes more aware of the value of the services lawyers offer, this type of resistance will fade. Still, it is presumably for reasons such as this that lawyers push for expansion in civil legal aid and place considerable hope in provisions included in many recent automobile insurance and other insurance policies authorizing payment of lawyers' fees.²¹⁰

In connection with the debate over new roles for lawyers,

208. See, e.g., Forum on Legal Training, Summary of Main Issues, *supra* note 25, at 1-3.

209. See, e.g., *id.* at 3-4.

210. See, e.g., *Minji shihō gurando dezain shinpojiumu (jō)* (民事司法グランドデザイン・シンポジウム (上)) [Civil Justice Grand Design Symposium (Part 1)], 982 NBL 24, 28 (2012).

changes in the mindsets of both lawyers and consumers are essential preconditions for significant expansion in hiring patterns. The accepted interpretation of the Lawyers Act is that members of corporate legal departments and legal specialists in other organizations need not be licensed legal professionals; and that interpretation is so deeply rooted a change seems highly unlikely. Thus, in filling those positions, the corporations and other organizations understandably will want to know what it is that law school, LTRI training, and the lawyer license add.²¹¹ Potential hiring by governmental bodies and administrative agencies faces another complicating dynamic: In the past, those bodies have tended to view lawyers as enemies, and vice versa. Overcoming that adversarial mindset represents another barrier.

Proponents of both points of view can point to data from the five years since the first law school graduates entered the market to support their positions. The JFBA has assembled, and publicized in numerous formats, data to show the market for legal services is over-saturated and cannot absorb the large numbers of lawyers entering practice every year.²¹² A more specific contention is that, despite the assiduous efforts of the JFBA in placement, finding jobs for new lawyers has become more and more difficult.²¹³ Now that nearly all the former zero-one districts have at least two lawyers, the bar has implied that what were once areas of lawyer scarcity no longer need more lawyers. In recent years, an increasing percentage of those completing LTRI apprenticeship training do not register with a bar association right away; it is assumed that most of them still have not located jobs.²¹⁴ A considerable number of new lawyers

211. Presumably, the corporations and organizations also will consider what the candidates might have gained if they had spent the same period of time on the job.

212. See, e.g., JFBA, Related Materials, *supra* note 201. For an examination of various aspects of this issue, see *Tokushū 1* (特集1) [Special Topic 1], *Shinjin bengoshi no shūgyō jōkyō* (新人弁護士の就業状況) [Employment Circumstances of New Lawyers], JIYŪ TO SEIGI, Vol. 63, May Issue, at 8-36 (2012).

213. See Tsujikawa Masato, Takahashi Tarō & Fujimoto Yasunari (辻川正人, 高橋太郎 & 藤本和也), *Shinki tōroku bengoshi no shūshoku jōkyō to Nichibenren no kore made no torikumi* (新規登録弁護士の就職状況と日弁連のこれまでの取組) [Employment Circumstances of Newly Registered Lawyers and the Efforts of JFBA Until Now], JIYŪ TO SEIGI, Vol. 63, May Issue, at 14 (2012).

214. *Id.* at 14-17. Among passers of the new bar exam who completed LTRI training in 2010, 11% did not immediately register for a bar association; in 2011, 20.1% did not register immediately. By two months later, the non-registered were down to 5% and 7.2%, respectively. By six months later, only 2.6% of the 2010 cohort remained unregistered; comparable figures were not available for the 2011

commence practice as sole practitioners right from the start; in the view of the JFBA, this is mainly because they have not been able to find jobs with existing firms.²¹⁵ Moreover, for new lawyers who do find jobs with existing firms, pay levels have been falling.²¹⁶

In terms of other indicia of demand, the JFBA also points to data showing that, after peaking in 2003, the total number of civil and administrative cases filed in Japanese courts has fallen substantially.²¹⁷ Nor, proponents of the restrictive view would assert, can one expect increases in other types of legal jobs to absorb all the new entrants into the legal profession. While hiring of lawyers by corporations, governmental bodies and other organizations may have risen, the number of lawyers employed in those settings remains modest, and there is little reason to expect major increases anytime soon.²¹⁸

Those who view the Japanese legal services market as in transition to a new equilibrium, with greater demand, would utilize much of the same data but interpret it differently. Even before turning to the data, though, advocates for this view might note how unfortunate it was that the Lehman shock and global downturn in legal hiring hit just as substantial numbers of graduates from the new law schools were beginning to enter the market, observe that Japan is not alone in experiencing a downturn in hiring of lawyers, and express hope the downturn proves to be relatively short-lived.

cohort. In addition to those who could not find jobs, the unregistered group includes persons who secured jobs that did not require (or, in some cases, did not permit) bar membership.

215. See *id.* at 17-18. For the new bar exam passers who completed LTRI training in 2011, 2.4% fell in this category. Approximately the same percentage had done so in 2009 and 2010, as well.

216. See Fujihara Yasuo (藤原靖夫), *Shin63ki bengoshi no shūgyō jōkyō ni tsuite* (新63期弁護士の就業状況について) [Regarding the Employment Circumstances of Lawyers from the New 63 Term Cohort], *Jiyū to Seigi*, Vol. 63, May Issue, at 8, 9 (2012).

217. The reference in the text is to cases at all levels of courts, including summary courts. There has been an increase in the number of civil cases filed in district courts since 2005; but the JFBA explains that the increase is mainly attributable to a wave of consumer loan cases, demanding repayment of excessive interest charges, stemming from a series of Supreme Court cases clarifying the rights of borrowers, and warns that the peak in those cases has now passed. See e.g., JFBA, Related Materials, *supra* note 201, at 11 (Shiryō 16, Kabaraikin henkan seikyū soshō no dōkō (資料16, 過払金返還請求訴訟の動向) [Trends in Lawsuits Demanding Return of Overpayments]).

218. Tsujikawa et al., *supra* note 213, at 18-19.

As to the data, proponents of the new equilibrium view might observe that every year since 2008 the JFBA has been saying the market is over-saturated and has been predicting the coming year would be the one in which large numbers of new lawyers went unemployed, yet the market has continued to absorb nearly all the new entrants every year.²¹⁹ True, many of the new entrants have not been able to obtain the jobs they desired, many have taken longer to find jobs than they expected, and a fair number are under-employed; but, despite the rhetoric, unemployed LTRI graduates remain rare. And, the optimists might say, while many members of the new cohorts of lawyers have faced struggles, their efforts have helped develop new niches and expand the market for legal services, and, at the same time, have improved access to legal services. A prominent example, the proponents of this view might suggest, is the extent to which new cohorts of lawyers have undertaken practice in what heretofore were areas of lawyer scarcity. In those regions, many residents had fallen prey to usurious interest rates charged by consumer loan companies, and lawsuits related to those cases have helped sustain lawyers during the startup period. But as those lawyers settle and develop ties, it seems likely they will help achieve greater recognition for the value of legal advice and pave the way for further expansion of the market for legal services.

Those who foresee expanded roles for lawyers might also point with hope to the data on hiring of lawyers by corporations and governmental bodies. While the number of licensed lawyers holding in-house positions within Japanese companies remains relatively modest, with just 667 total as of December 2011, the rate of increase has been dramatic, with the number up more than ten times since 2001, when only 64 licensed lawyers worked in-house.²²⁰ Notably, much of that increase has come about through hiring of lawyers directly upon their completion of LTRI training, with about 60 new lawyers hired each year by Japanese companies since 2008.²²¹ The number of licensed lawyers employed by national or local governmental bodies is even smaller, with fewer than 200 full-time lawyers in such positions as of early 2012 (most in fixed term appointments). Here again, though, there has been more than a ten-

219. *See id.* at 15.

220. *See id.* at 18.

221. *See id.*

fold rise over the past decade. (In contrast to the situation for in-house lawyers at companies, most of these positions have gone to lawyers with considerable experience.)²²² And, gradually, other organizations are beginning to show interest in hiring lawyers.

The significance of the rise in employment of lawyers by corporations and governmental bodies may go beyond the numbers themselves. The pattern signals a shift away from the traditional law firm-based litigation-centered practice to new types of positions that involve much more preventive lawyering, strategic planning, and even policymaking and legislative drafting. This is precisely the sort of expansion in roles the Reform Council envisioned; and as these hiring trends develop, they may pave the way for a reconception of the role of the Japanese legal profession.

As Richard Abel has observed, legal professions throughout the world typically have proven more adept at holding down the supply of legal services than in increasing demand for legal services.²²³ To the JFBA's credit, at the same time it has been mounting a fierce counter-offensive to keep the supply of lawyers down, it has provided new entrants with assistance in finding jobs.²²⁴ Those involved in these placement efforts are sincere and dedicated, and their efforts have borne fruit. It is in part thanks to their outreach efforts that more corporations and governmental bodies are hiring lawyers. That said, it may well be that the new entrants will be even more creative than their predecessors in exploring new territory and pioneering new roles for the legal profession. The new entrants are not so habituated to traditional practice patterns and assumptions; a considerable number have prior experience in business or other organizations; and quite a few are, at least figuratively, hungry.

VII. Implications for Law School Education

The legal profession requires a broad range of qualities and skills. As the profession enters new fields and takes on new roles,

222. *See id.* at 18-19.

223. *See, e.g.,* Abel, *supra* note 62, at 5-8; Richard L. Abel, *England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors*, in *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* 23, 38-48 (Richard L. Abel & Philip S.C. Lewis eds., 1988); Richard L. Abel, *United States: The Contradictions of Professionalism*, in *id.* at 186, 189-200, 212-18.

224. *See, e.g.,* Tsujikawa et al., *supra* note 213.

the scope of essential abilities will become even wider. The Reform Council recognized this, with its calls for a diverse student body, broad education bridging theory and practice, and many other features of the law schools it envisioned.

Those of us who teach in the so-called foundational fields, such as sociology of law, jurisprudence, legal history and comparative law, might feel that even from the outset most of the new law schools paid too little attention to the Reform Council's admonitions of the need for the legal profession to possess "rich humanity and sensitivity" and "insight into society and human relationships." As discussed earlier, however, in many other respects the new law schools realized significant achievements. These include a rather diverse student body, clinics and other education in practice-related skills, attention to ethics, and, at many law schools, programs in international law and various specialized fields. Yet these and other achievements either already have eroded or are under threat; and in some respects the threat extends even to undergraduate legal education and beyond.

The main source of the threat lies in the bar examination, either alone or in combination with other factors. With respect to admissions in general, the low passing rate on the bar exam, coupled with widespread reports over the difficulty even LTRI graduates face in finding jobs, would appear to be the key reasons for the dramatic decline in the number of people applying to law school. The decline in applications has been even more dramatic for the two groups that were supposed to diversify legal education and the legal profession, the *mishūsha* and *shakaijin*. For those groups, the bar exam represents an especially daunting barrier. With a pass rate for *mishūsha* that is well under 20% and dropping, it is no surprise fewer and fewer nonlaw graduates choose to attend law school. Yet with nonlaw graduates now constituting less than 20% of the student body at most Japanese law schools, the initial promise of greater diversity is quickly being lost.

Within the law schools, the bar exam is driving many aspects of the curriculum. To prevent law schools from gearing the curriculum entirely to the bar exam subjects, the accreditation standards set minimum requirements for credits in several non-bar exam fields,²²⁵ as well as maximum credit hours for courses in the

225. Using the National Institution for Academic Degrees and University Evaluation (NIAD-UE) standards as an example, students must complete at least

bar exam fields.²²⁶ Even though that maximum represents approximately two-thirds of the total credit hours required for graduation, some law schools have sought to skirt the requirements, by, for example, disguising exam-oriented courses under other labels or characterizing mandatory additional study sessions conducted on weekends or during school breaks as "voluntary." For that reason, one of the responsibilities of the accreditation bodies is to ensure that the course content actually corresponds to the course names and descriptions.

The low pass rates on the bar exam naturally affect not only the decision whether to apply to law school in the first place, but course choice and behavior patterns of students once they have entered. Students inevitably feel great pressure to devote their time to subjects that will appear on the bar exam and to avoid other courses,²²⁷ not to mention extracurricular activities that might interfere with bar exam study. And while students are required to earn certain numbers of credits in specified categories other than the bar exam subjects, the level of student commitment in those courses

four credits in foundational fields or neighboring disciplines; at least eight credits in practice-related fields, including two credits in determining the elements of causes of action and basic fact-finding for civil procedure and two credits in fact-finding for criminal procedure; at least two credits in professional responsibility; and at least twelve credits in advanced or cutting-edge fields of law. See NIAD-UE, *supra* note 110, at 5-9 (Chapter 2, Standard 2).

226. Of the 93 credit hours required for graduation, the NIAD-UE standards mandate at least 54 credit hours in the seven core bar exam fields and authorize the law schools to require up to eight more credit hours in those fields. *Id.*

227. See, e.g., Miyagawa et al., *supra* note 160, at 113. I am all too familiar with this phenomenon through personal experience. Ever since I joined the University of Tokyo faculty on a full-time basis in the year 2000, I have offered a course in International Contract Negotiation, in which teams of students from the University of Tokyo utilize Internet-based videoconference facilities, e-mail and other technologies to negotiate major contract with teams of students at the University of Washington School of Law, where I taught previously. (For a description and account of the early years of that course, see Daniel H. Foote, *International Contracting Meets Information Technology: Tales from a Transpacific Seminar*, Z. JAPAN. R./J. JAPAN. L., Vol. 10, No. 19, pp. 69-100 (2005).) For the first five years, before the law schools started, I offered it as an undergraduate seminar. All those years, it was vastly oversubscribed, with sixty to over one hundred students applying for the fifteen slots available. In the eight years since it became a law school offering, I have never had to limit enrollment. To the contrary, I have struggled to attract even a dozen students in total, and the first year I had to proceed with just six. Former students from both eras routinely tell me that, of all their classes, this class was by far the most valuable preparation for practice. Nonetheless, most law school students are chary of devoting the time the class requires, for a subject that is only tangentially related to the contents of the bar exam.

is often lower than in the exam-related subjects. The impact extends to the exam-related subjects, as well. Even at top law schools, students have voiced complaints when faculty members in those subjects spend precious class time discussing topics not likely to appear on the exam.

The impact from the bar exam is not limited to whether or not one passes. Passers receive a notice informing them of their rank order on the exam; and the judiciary, procuracy, and many law firms reportedly take the rankings into consideration in their hiring decisions. According to the student grapevine, for graduates of certain elite law schools (fortunately including the one at which I teach), law firms place considerable weight on the candidates' law school grades; but for students from nonelite law schools, many law firms base hiring decisions heavily on the candidates' rank on the bar exam, by, for example, welcoming those who ranked among the top 500 passers but avoiding those below 1,500. If these reports – variants of which naturally can be found on blogs²²⁸ – are true, how students have performed in their two or three years at law school, and what they have studied there, are of little importance; what really matters is how they do on the single occasion of the bar exam. Moreover, regardless of how widespread this practice may be, the very fact students believe these reports makes them a potent influence on student behavior.

Bar exam passage rates of course are of great importance to the law schools, as well as to the students. If the *U.S. News and World Reports* law school rankings are the principal criterion by which prospective applicants rate U.S. law schools, in Japan typical applicants are most concerned with the bar passage rates. Moreover, even private law schools in Japan are heavily dependent on public funding, administered by MEXT, and the bar exam passage rate for graduates is one of the key criteria by which MEXT evaluates whether to continue to provide such funding.²²⁹ The resultant

228. See, e.g., Kuroneko no tsubuyaki (黒猫のつぶやき) [Mutterings of a Black Cat], *Shinshihōshiken no "gōkakushasū fuyasebyō" ni tsuite* (新司法試験の『合格者数増やせ病』について) [Regarding the "Increase the Number of Passers Disease" on the New Bar Exam], July 8, 2012, <http://blog.goo.ne.jp/9605-sak/e/e587910846f84a1f9e1aa8689e472095>.

229. See, e.g., *Yureru hōkadaigakuin* (揺れる法科大学院) [Trembling Law Schools], *Asahi Shinbun*, Sept. 14, 2012, at 34; MEXT, *Hōkadaigakuin no soshiki minaoshi o sokushin suru tame no kōteki shien no saranaru minaoshi ni tsuite* (法科大学院の組織見直しを促進するための公的支援の更なる見直しについて)

pressure affects many aspects of law school administration, including decisions on whom to admit, teaching methods, and structure of the curriculum. It comes as no surprise to hear that some law schools that had established specialized programs in fields with little connection to the bar exam, such as welfare law and international law,²³⁰ have shifted resources away or have allowed positions in those fields to lapse when faculty members have retired. At many law schools with highly developed clinical programs, student enrollments in those programs have declined.²³¹ One even hears rumors that administrators at some schools have discouraged students from taking intensive clinics or other specialized offerings, evidently out of fear over impact on bar passage rates.

The impact of the bar exam extends to the undergraduate level. When the law schools were first established, many universities shifted advanced doctrinal offerings from the undergraduate law faculties to the law schools. Even at that time, though, a few universities reportedly increased the weight accorded to bar exam subjects at the undergraduate level. Recent reports suggest other universities are moving in a similar direction or reinstituting advanced doctrinal courses at the law faculty level, in parallel to the law schools. One reason for these trends lies in the law school admissions process. For law school applicants to qualify for the two-year *kishūsha* course, they must pass an exam to demonstrate they have mastered the core subjects taught in the first year of law school (which largely correspond to the bar exam subjects). Most law schools administer their own exams for this purpose, as part of the admissions process. By selecting students who already have demonstrated considerable mastery of those fields, the law schools can enhance the likelihood their students will pass the bar exam following graduation. This in turn means that undergraduates in

[Regarding the further review of public funding to promote review of law school organization], Sept. 7, 2012, available at http://www.mext.go.jp/b_menu/houdou/24/09/1325669.htm.

230. Although Private International Law and Public International Law are two of the eight elective subjects on the bar exam, the percentages of candidates who take those subjects (8.3% and 1.5% of all exam takers, respectively, in 2012) lag far behind those for the most popular fields, Labor Law (31.2%) and Insolvency (23.6%). See MOJ, Heisei 24nen shihōshiken juken jōkyō (平成24年司法試験受験状況) [Circumstances of Examination Taking, 2012 Bar Examination], available at <http://www.moj.go.jp/content/000098851.pdf> (statistics for 2012).

231. See Miyagawa et al., *supra* note 160, at 113.

law who are aiming at the legal profession feel even greater pressure to master doctrine in the bar exam subjects, in order to achieve admission to law school.

The preliminary exam provides another important incentive for undergraduate law faculties to beef up their advanced doctrinal offerings. The preliminary exam was conducted for the first time in 2011. As with the old bar exam, the preliminary exam consists of three stages: multiple choice, essay, and oral exams. In 2011, 6,477 candidates sat for the exam. Of the exam takers, 1,434 were still enrolled either in undergraduate programs (1,236) or law schools (198). In total, only 116 passed, for an overall passage rate of just 1.8%.²³² Among the current students who took the exam, the passage rate was somewhat higher: 3.2% for undergrads and 3% for law school students. Overall, over a third of the passers, 39, were still enrolled in undergraduate programs, with six more in law schools.²³³

In 2012, the number taking the preliminary exam rose by about 10%, to 7,183.²³⁴ The overall pass rate rose somewhat, from 1.8% to 3%; and the total number of passers nearly doubled, to 219. The number of current undergraduates taking the exam rose by an even greater proportion, 34%, to 1,657; and their success rate also increased, from 3.2% to 4.2%. For law school students, the changes were far more dramatic. The number of current law school students taking the exam nearly tripled, to 555. And the success rate for law school students also rose greatly, from 3% to 11%. Of the passers, nearly sixty percent were still enrolled either in undergraduate programs (69) or law school (61).

The statistics on the preliminary exam alone pose a concern for Japan's law schools. The rate of success achieved on the bar exam, by those who qualified through the preliminary exam, greatly

232. See Hōmushō daijinkanbō jinjika (法務省大臣官房人事課) [Personnel Division, Minister's Secretariat, MOJ], Heisei 23nen shihōshiken yobishiken kōjutsu shiken no kekka (平成23年司法試験予備試験口述試験の結果) [Results on the Oral Examination of the 2011 Bar Examination Preliminary Examination], available at <http://www.moj.go.jp/content/000080849.pdf>.

233. See MOJ, Heisei 23nen shihōshiken yobishiken (平成23年司法試験予備試験) [2011 Bar Examination Preliminary Examination], Sankō jōhō (参考情報) [Reference information], available at <http://www.moj.go.jp/content/000080863.pdf>.

234. For statistics on the 2012 preliminary exam, see Heisei 24nen shihōshiken yobishiken (平成24年司法試験予備試験) [2012 Bar Examination Preliminary Examination], Sankō jōhō (参考情報) [Reference information], available at <http://www.moj.go.jp/content/000103364.pdf>.

increases the concern. Of the 116 who qualified by passing the 2011 preliminary exam, 85 took the bar exam in 2012. Of those, 58 passed, for a passage rate of 68%, considerably higher than even the highest rated law school that year (Hitotsubashi, at 57%). And of the 37 who were still in college or law school when they took the 2012 bar exam, 34 passed, for what, by Japanese standards, represents the extraordinary success rate of nearly 92%.²³⁵ Furthermore, just as under the old bar exam system, those who passed the preliminary exam and then the full bar exam while still in college or law school reportedly have been getting the star treatment, with top law firms competing to recruit them. Thus the treatment accorded this group conveys the message that the old mindset is still intact: passing a highly competitive exam at a young age is what really counts, not experience nor law school education.

For undergraduate law faculties, at least those at a handful of elite universities, the preliminary examination route to the legal profession represents a new opportunity. Reinstating advanced doctrinal courses to the undergraduate curriculum may be seen as helping to attract students who want to pursue that route and aiding them in their studies, and at the same time ensuring they have access to a sufficiently broad array of courses to prepare adequately for their future careers.

For law schools, of course, the preliminary examination represents a grave threat. Before the preliminary exam started, law schools could hope and pray it would prove to be a very narrow path, with such difficult questions and strict grading only a handful of candidates would pass each year and the chances of success would be minimal. The results from the first two years of the preliminary exam suggest those prayers will have been in vain. Accordingly, for law schools to be able to stand up to the threat presented by the bypass, it is vitally important for them to demonstrate that they provide added value, and that law school graduates possess qualities and abilities not likely to be found among those who have qualified through the preliminary exam. In this respect, one would hope that the skills and qualities the MEXT

235. For the statistics in this paragraph regarding the 2012 bar exam, see Shiryō 45, Heisei 24nen shihōshiken juken jōkyō (yobishiken gōkakusha) (資料45, 平成24年司法試験受験状況(予備試験合格者)) [Material 45, Test-Taking Circumstances for the 2012 Bar Examination (Preliminary Examination Passers)], in *Regarding the Bar Exam*, *supra* note 41, at 137.

committee reports have highlighted would be important to law firms and their clients – heightened commitment to learning and superior skills in communication, research, drafting, and identifying and adjusting interests, among them. One might also hope law firms would value the heightened understanding of the social mission of the legal profession and legal ethics law school graduates have been found to possess. The Reform Council's long list of desirable skills and qualities offers many other ideas for the types of values law schools might add, including abilities in persuasion and negotiation, knowledge of up-to-date legal fields and foreign law, an international vision and a firm grasp of language.

As lawyers assume a broader range of roles in companies, governmental bodies, and other organizations, still more abilities become important. These include understanding of corporate culture, strategic planning, policymaking and legislative drafting. Furthermore, as lawyers begin to enter new fields, such as intellectual property, health law, and welfare, specialized knowledge and understanding of those fields will take on greater importance. By developing their own identities and areas of emphasis, law schools could provide valuable training for a wide range of fields and roles.

Here again, however, the bar exam poses a significant barrier, and the impact of the bar exam has been heightened by the fallout over the MEXT committee's finding that some law school graduates lack "sufficient understanding of the fundamentals of core fields of law" and the JFBA's repeated harping on that point. In my view, there are numerous aspects of law schools and the overall legal training system that warrant criticism. These include elements that the organized bar is especially well-positioned to highlight, including the unevenness in legal skills training noted by the MEXT committee and the need for even greater attention to internationalization. The JFBA presumably realized that those types of criticisms have far less shock value than, for example, anecdotal accounts that an LTRI apprentice didn't even know the meaning of the presumption of innocence. Yet, by focusing its primary attack on the lack of legal knowledge, the JFBA appealed to precisely the same concern traditional legal academics have had for decades: too much to cover and too little time. Traditional academics in the core fields that appear on the bar exam dominate the policy setting process at most law schools, along with many of the relevant outside advisory committees. When presented with the complaints

over insufficient knowledge, they proved eminently willing to undertake sets of reforms that place even greater weight on mastery of doctrine in those core fields, with the consequent effect of reducing the time available for other matters.

The resulting reforms have included strengthening the requirements related to the law school entrance exam used to certify mastery of the core subjects for those seeking to enter the *kishūsha* course, and adding six extra credit hours, allocated to “mastering basic knowledge in the core legal subjects,” to the first year of the *mishūsha* course. To date, the most far-reaching of the reforms is the adoption of a proposal, contained in the 2009 report issued by the MEXT Special Committee on Law Schools, calling for the establishment of “common targets for achievement.” The “common targets” approach bears similarities to the “student learning outcomes” or “outcomes assessment” proposals in the United States.²³⁶ As with outcomes assessment, the common targets, as described by the MEXT committee report, seek to “clearly identify” the “abilities that law school graduates should possess in common.”²³⁷ Whereas the outcomes assessment debate has been raging for years in the United States, with no end in sight, the common targets proposal was put into effect in less than three years, in essentially top-down fashion, with MEXT guidance to the law school accreditation bodies and, in turn, their insistence that the individual law schools implement common targets.

An equally striking difference between outcomes assessment and the common targets for achievement lies in the content. The draft proposal on outcomes in the United States highlights a range of professional skills and values, as well as legal knowledge and understanding. In contrast, the common targets in Japan place almost total weight on mastery of doctrine in the seven core bar exam fields, containing a detailed list of doctrines, legal theories, and academic debates, set forth in bullet point after bullet point, in separate chapters spanning more than 200 pages.²³⁸ Despite a

236. See, e.g., American Bar Ass’n, Section of Leg. Educ. and Admissions to the Bar, Standards Rev. Comm., Student Learning Outcomes Subcomm., Draft for April 2011 Meeting, available at [http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Student%20Learning%20Outcomes%20\(redline%20to%20Standards\).pdf](http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Student%20Learning%20Outcomes%20(redline%20to%20Standards).pdf)

237. Special Committee 2009 Report, *supra* note 163, at 10.

238. For a more detailed discussion of the common targets and how they were

declaration in the introduction that the common targets are not intended to prescribe any uniform approach to those subjects, in many law schools they seem likely to have precisely that impact. One can assume those responsible for drafting the bar exam will regard any doctrine or theory contained in the common targets as fair game, so it should come as little surprise if law school students clamor for their professors to cover every item contained in all those bullet points. In sum, in seeking to defuse the criticism over lack of legal knowledge, the common targets and other reforms place the focus of law school education even more squarely on mastery of doctrine in the bar exam fields, leaving less time for the types of training in professional skills, values, and specialized fields that might truly set law school apart in the eyes of law firms and their clients, and less leeway for innovation and experimentation in fields and skills that might lead to broader roles for the legal profession.

Before turning to prospects for the future, I would like to briefly address one other matter, the plight of the *mishūsha*. When the law school system was being set up, many observers expressed skepticism over how nonlaw graduates possibly could be expected to master, in just one year, what the *kishūsha* had spent two and a half or three years learning. The standard response at the time, reflecting the stance of the Reform Council, is that all entrants naturally would need to achieve the basic minimum level needed for effective participation in the legal profession, but it was neither necessary nor desirable for all law school graduates to possess exactly the same sets of skills and abilities. To the contrary, a key objective for the new system was to develop a broad and diverse legal profession in which members from a wide range of backgrounds would possess different skill sets.

Those who administer the bar exam undoubtedly would insist that it tests only the minimum level needed for effective participation in the profession. And those who compiled the common targets for achievement undoubtedly would insist that those 200 pages of bullet points also represent the minimum all law school graduates must achieve. From the content of the exam and common targets, though, it is evident that the "minimum" level of doctrinal knowledge expected is high. Moreover, with what is in effect still a numerical cap on bar exam passers, those who have devoted more years to concentrated study of the bar exam subjects

naturally are at an advantage.

The struggles of the *mishūsha* are a serious concern for outside observers, many of whom continue to see *mishūsha* as an important source of diversity that will enrich Japan's legal profession. The struggles of the *mishūsha* are also a concern for legal academics, but it is not so clear whether the academics are equally sanguine about the *mishūsha* potential. Some academics certainly do regard the *mishūsha* as a source of diversity and vibrancy, which can enrich legal education as well as the legal profession. To other faculty members, though, the *mishūsha* must seem more like a burden, a group who slow down the progress of others and who must be "brought up to speed."

The relevant subcommittee at MEXT that is investigating the plight of the *mishūsha* appears to side with the latter view. That subcommittee is reported to be seriously considering authorizing the use of one-way lectures for teaching *mishūsha* in the first year, so they can more quickly master legal doctrine in the core (i.e., bar exam) courses. (As someone familiar with the deliberations explained, "What's the point in trying to get them to think if they don't know anything yet?") Since one-way lectures will not entail interactive class discussion, the subcommittee is also seriously considering relaxing the cap on the number of students per class for the first year of the *mishūsha* program. A third measure under serious consideration, for those who have entered through the *mishūsha* course, is relaxing the requirements that they earn certain numbers of credits in fields other than the bar exam subjects in the second and third year; relaxing those requirements would enable the *mishūsha* to devote even more time to mastering the bar exam subjects. (At the moment, these steps are only being considered with respect to *mishūsha*. If introduced at that level, though, it is likely to be only a matter of time before some law schools begin clamoring for permission to institute large, one-way lectures and reduce requirements for non-bar exam courses for *kishūsha*, as well.) The subcommittee even has suggested instituting a standardized nationwide exam after the first year of law school (focusing, one can be sure, on mastery of doctrine in the bar exam subjects), to assess whether *mishūsha* are qualified to move on to the second year.²³⁹

239. See, e.g., Expert Advisory Council on Legal Training, Session 5, Dec. 18, 2012, Shiryō 2-1, Hōgaku mishūsha kyōiku ni kansuru genjō to kadai, jūjitsu hōsaku ni tsuite (【資料 2 - 1】法学未修者教育に関する現状と課題, 充実方策について)

Whatever impact the other steps might have on applications, it seems certain that instituting an additional nationwide exam between the first and second years of the *mishūsha* course – especially when coupled with the availability of the preliminary exam as an alternative to the entire process, would reduce the flow of *mishūsha* applicants to a mere trickle. That is one way of dealing with the *mishūsha* “problem.” For me, as one who viewed opening law school to students from a broad range of backgrounds and disciplines as the principal reason for going to all the trouble of instituting a new tier of graduate schools,²⁴⁰ it is a profoundly depressing thought.

VIII. Prospects for the Future

In the near term, a key determinant for the future direction for Japan’s legal training system is likely to be the conclusions set forth by the Expert Advisory Council on the Legal Training System, in its report, expected sometime in the spring of 2013, to the Ministerial Conference on the Legal Training System. The shift in political control from the Democratic Party of Japan to the Liberal Democratic Party that resulted from the general election in December 2012 adds further uncertainty. Still, in Japan’s highly top-down system for regulating legal education, the conclusions of the Expert Advisory Council are likely to hold great significance.

What the Expert Advisory Council will recommend remains unclear. In May 2012, the Forum on Legal Training, the predecessor body containing most of the same members, issued a rather comprehensive “summary of the main issues,” spanning over 40 pages. That summary identified many issues; but from the

[Material 2-1, Regarding the current situation for and issues with education of *mishūsha*, and steps for strengthening] (explanatory material submitted by MEXT), available at <http://www.moj.go.jp/content/000105093.pdf>.

240. I have highlighted the value of diversity, not just for the legal profession but for legal education itself, in several publications and presentations in Japanese. See, e.g., Daniel H. Foote (ダニエル・H・フット), *Hōgaku kyōiku ni okeru tayōsei: sono igi to gan’i* (法学教育における多様性：その意義と含意) [Diversity in Legal Education: Its Significance and Implications], HŌRITSU JIHŌ ZŌKAN, SHIHŌ KAIKAKU 2002, at 41 (2002); Daniel H. Foote (ダニエル・H・フット), *Keiken, tayōsei, soshite hō* (経験、多様性、そして法) [Experience, Diversity, and the Law], in NOZAKI AYAKO (野崎綾子), SEIGI, KAZOKU, HŌ NO KŌZŌ TENKAN: RIBERARU FEMINIZUMU NO SAITEI (正義、家族、法の構造変換：リベラル・フェミニズムの再定位) [The Structural Transformation of Justice, the Family, and Law: A Repositioning of Liberal Feminism] (Keisō Shobō, 2003), at 227.

following quote it is evident that on the whole the Forum highly evaluated the new legal training system:

As a consequence of the introduction of a system in which legal training is treated as a process, the law schools have instituted classes emphasizing interactive discussion... and have led students to consider the true nature of things and the essential points on which judgments hinge; and the new system is exceedingly superior (非常に優れた) to the prior system, in which selection was based only on the single point of the bar examination.²⁴¹

Notwithstanding its praise for the law school system as a whole, the Forum voiced concern that there were still problems with the educational quality at some law schools and called for investigation of additional efforts at consolidation, including further reductions in the number of students admitted and the possibility more law schools would be merged or eliminated (with specific reference to the use of cutbacks in public financial support to deficient law schools as a means of promoting consolidation).²⁴² With respect to views on demand for legal services and the size of the legal profession, in addition to the Forum's summary of main issues, one can look to the minutes of the second meeting of the Expert Advisory Council, at which that topic was discussed.²⁴³ Based on these materials, there appears to be considerable support for the view that Japan continues to have many unmet needs for legal services and that the trends toward entry into new roles and new fields are likely to continue and expand. The precise implications of these views for the concrete number of bar passers are unclear; but the overall tone of the summary and discussions offers reason for hope that the Expert Advisory Council will reject calls for a substantial reduction in the current level of passers.

To synthesize relevant elements from developments to date and available information on the Expert Advisory Council's discussions: Assuming further consolidation in the number and size of law schools, the total annual number of entering students is likely to be no more than 3,000 or so, and strict grading and graduation requirements are likely to lead to considerable attrition from

241. Forum on Legal Training, Summary of Main Points, *supra* note 25, at 10.

242. See *id.* at 20-21.

243. The minutes are available at: http://www.moj.go.jp/housei/shihouseido/housei10_00006.html.

there.²⁴⁴ Given these figures, if the number of passers is maintained at least at the 2012 level of 2,100, and if the preliminary exam continues to be a relatively narrow path, within a few years the pass rate for law school graduates should reach or exceed the 70% level originally envisioned by the Reform Council. Even if that happens, it does not ensure law schools will emerge from the dominant focus on doctrinal mastery of the bar exam subjects. That mindset is deeply embedded in Japan. At a minimum, however, such a change should largely free Japanese law schools and their students from bar exam-centered tunnel vision; and over time that shift should allow law schools to develop their own identities.

With respect to the long-term future of law schools, one important aspect is the composition of the faculty. In its recommendations, the Reform Council stipulated that, in the future, faculty members responsible for the core fields of law should be qualified as legal professionals. This stipulation was rooted in the belief that, to achieve education that truly bridges theory and practice, it is vital for faculty members to possess an understanding of both. Thus, the Reform Council presumably expected that most faculty members of the future not only would attend law school, pass the bar exam, and complete LTRI training, but would spend at least some time in practice. If that paradigm takes root, it should increase sensitivity to practice-related matters and might affect thinking patterns relating to the weight placed on academic theory and doctrinal mastery. It also would likely reduce the level of compartmentalization between legal fields; faculty members who have spent several years in practice presumably would have worked on many matters that span wide-ranging fields of law.

With the recent establishment of a few programs to support those seeking to make the transition from practice to academia, by providing positions or fellowships so they can devote time to research and writing, it is possible such a paradigm may yet emerge. To date, however, such a pattern has not developed. If anything, the trend is toward a system similar to that of the past, with prospective academics in the core fields completing law school (and,

244. The Forum's summary of main issues referred, with evident approval, to statistics showing that the percentage of students completing law school within the standard number of years declined from 80.6% in the 2006 academic year to just 73.6% in the 2011 academic year. See Forum, Summary of Main Points, *supra* note 25, at 17.

in some cases, LTRI training), and then embarking on advanced research in the specific field of law they have chosen, either as research fellows or in M.A. or Ph.D. programs, without ever entering practice. In fact, the faculty certification process, mandated as part of the accreditation process, ensures the perpetuation of sharp divides between researcher-professors and practitioner-professors and the compartmentalization between legal fields, by requiring the screening of each individual faculty member for suitability to teach specifically designated courses.

Another important set of long-term trends relates to the legal profession. Law school graduates already constitute over 25% of all Japanese lawyers. At current levels, within ten years law school graduates will constitute over half the lawyers; and within a few years after that they will constitute the majority of all judges and prosecutors, too. Even if that happens, it is unlikely to put an end to the calls for limiting the size of the legal profession; self-interest is a powerful force. If law school graduates come to constitute the mainstream of the legal profession, though, law school presumably will be seen as the norm for legal training. Of course, law school graduates vary widely in their assessments of the experience.²⁴⁵ Yet if law school becomes the accepted norm for legal training, the bar's primary focus is likely to be on how to further improve law school education, with a constructive dialogue between law schools and the bar, as was the case in the first few years of the new legal training system, before the discussion became intertwined with the campaign to limit the size of the legal profession.

Given the advent of the preliminary exam and the data from the first two years of that exam, though, the situation facing the law schools has become much more dire. Already in 2012, well over five percent of all currently enrolled law school students took the preliminary exam. In view of the statistics introduced earlier on the preliminary exam passers and their success rate on the bar exam, it seems inevitable that the number of law school students and

245. A recent survey found generally high levels of satisfaction regarding many aspects of law school education among graduates who passed the bar exam, but even some of that cohort were highly critical. See Miyazawa Setsuo (宮澤節夫), *Shin shihō shiken gōkakusha no hōkadaigakuin sentaku riyū to kyōiku keiken* (新司法試験合格者の法科大学院選択理由と教育経験) [Reasons for Choice of Law School and Educational Experiences of Passers of the New Bar Examination], 4 AOYAMA HÔMU KENKYŪ RONSHŪ (青山法務研究論集) 73 (2011). One can easily surmise considerably lower levels of satisfaction among the nonpassers.

undergraduates taking the preliminary exam will soar in 2013. The preliminary exam passers already are receiving star treatment. If they continue to outperform the law school graduates in terms of passage rates on the bar exam itself, the impression is likely to grow even stronger that those who have entered the legal profession through the preliminary exam constitute the true elite. If that occurs, it will place even greater pressure on the law schools. A further prediction, of which I am especially confident, is that the great majority of those who take the preliminary exam will make time to attend preparatory schools, so the "double school" phenomenon is bound to reappear with a vengeance, even for law school students under a supposed duty to devote themselves exclusively to their law school studies. Moreover, as discussed earlier, the efforts to achieve a more diverse student body are foundering, and the focus on doctrinal mastery is becoming ever stronger.

Thus, the future for the law schools appears bleak. If the Expert Advisory Council agrees with the Forum's view, quoted above, that "the new system is exceedingly superior to the prior system, in which selection was based only on the single point of the bar examination," one possible measure would be limiting eligibility for the preliminary exam. Eligibility might, for example, be limited based on the factors specified by the Reform Council, financial hardship or prior experience. Another approach might simply be to disqualify those currently enrolled either in undergraduate or graduate programs. Regardless of the practical feasibility of setting such limits, there seems to be very little political feasibility for doing so. Presumably, such approaches were considered and rejected when the preliminary exam system was first set up; now that it has gone into effect, making such a change would be even more difficult.²⁴⁶

If that is the case, another step might be to revisit the contents of the preliminary exam and bar exam. As a possible approach to reform of those two exams, the Forum's summary of main issues

246. If anything, political sentiment may point in the opposite direction; a 2009 Cabinet decision (albeit before the change in political administrations) stipulated that, "to ensure fairness in the competition between law school graduates and preliminary exam passers, the passing rates for both groups should be balanced and preliminary exam passers should not be treated unfavorably as compared to law school graduates." *Quoted in Forum on Legal Training, Summary of Main Issues, supra* note 25, at 36.

referred to suggestions that the fields covered and scope of those exams might be limited, so as to reduce the burden on candidates and encourage greater diversity in the legal profession. I disagree. The cap on the number of passers, coupled with the opening of the bypass, ensures that competition will continue to be intense. In my view, limiting the fields covered and scope of materials tested on the exams will not reduce the burden on candidates, nor will it increase the level of diversity in backgrounds and skills for Japan's legal profession. Rather, to survive the intense competition, they are likely to spend just as much time cramming for the exams, but devoting their efforts to mastering an even narrower set of materials.

My personal view is that the preliminary exam and bar exam should be reformed, but in the opposite direction – not reducing the scope, but expanding it. In the Japanese setting, it seems inescapable that the contents of the preliminary exam and bar exam will drive the study behavior of those seeking to enter the legal profession. In praising the new system of legal training, the MEXT Special Committee on Law Schools and the Forum on Legal Training highlighted a wide range of abilities and qualities that the new system has helped instill, including skills in communication, research, problem solving, and identifying and adjusting interests, as well as a heightened consciousness of ethical responsibilities. If the Expert Advisory Council and Ministerial Conference agree that abilities and qualities such as these are essential for the legal profession, the most effective way of ensuring candidates will develop such attributes is to include them on the exams.

Indeed, I would argue that it is even more important to include a broad range of abilities and qualities – including skills in research, drafting, and problem solving, as well as appreciation for ethics – on the *preliminary* exam. The entire aim of the preliminary exam is to ascertain whether candidates have attained the same level as those who have completed law school. The greatest achievements of the law schools are in nurturing those and other abilities that bridge theory and practice. By continuing to focus only on legal doctrine and analysis, the preliminary exam leaves out much of the essence of what it is students achieve through law school.

Truth be told, I have been advocating just such an approach ever since one of my first major interventions as a member of an advisory council on legal training, over ten years ago. At the time, I argued that the bar exam ideally should be a “qualification exam” in

the true sense of that term – an exam designed to assure that candidates had acquired the necessary qualities and skills for entering the legal profession. But I went on to argue that, since in the Japanese setting it was evident the content of the bar exam would drive much of legal education, the exam should be a comprehensive exam covering the broad spectrum of skills and knowledge students are expected to acquire. At least that way, I asserted, students (and, for that matter, law schools) would not be able to focus their efforts on cramming for a relatively limited number of subjects and mastering a limited number of test-taking skills. To that end, I argued that the bar exam should be thoroughly redesigned and expanded. As an example, I suggested a weeklong exam, with multiple choice or short answer, essay, performance type questions, and oral components, including questions focused on planning and problem-solving, questions spanning various fields of law, and questions incorporating ethical issues.²⁴⁷

At the time, my proposal was promptly rejected as impractical.²⁴⁸ I have little hope such a proposal would fare any better today, with respect to either the preliminary exam or the bar exam. Yet, especially in view of the advent of the preliminary exam and its implications for the future of Japanese legal education, I remain even more convinced that a step of that sort is needed to avoid a return to the tunnel vision the reforms were designed to overcome.

247. See Kentōkai, Jūten kamoku (重点科目) [Major Issues], Feb. 13, 2002, available at http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai4/4iken_3.html.

248. The primary objection was not to the length. Rather, the principal objection appeared to relate to the perceived inability of the bar examiners to draft appropriate exams covering those elements and to grade the answers. Of the various components, it would seem that the most difficult to incorporate would be performance type questions, but now that the Multistate Performance Test has a fifteen year track record in the United States, one would hope experience with that exam might offer useful guidance for developing a similar test in Japan.