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EDUCATION AND TRAINING OF LAWYERS IN JAPAN—A CRITICAL ANALYSIS

SETSUO MIYAZAWA*

THE CURRENT SYSTEM: LACK OF PROFESSIONAL LEGAL EDUCATION

The current system of educating and training legal professionals in Japan—practicing attorneys, prosecutors, and assistant judges—consists of two main components: the National Bar Examination and the Legal Training and Research Institute.

A. The National Bar Examination

The academic background required to sit for the National Bar Examination is merely to have finished general education in the first two years of any undergraduate program. No university legal education is required. A few students in their third year of undergraduate education actually pass the National Bar Examination, and they are hailed as heroes. However, it means that they have neither real life experience, nor much background in law.

There are approximately one hundred undergraduate law faculties in Japan, offering courses in both law and political science and admitting nearly fifty thousand students each year. Although they are the only academic institutions offering comprehensive legal education in Japan, university legal education is not designed to train lawyers. For instance, the University of Tokyo Faculty of Law admits approximately 600 students each year for approximately 55–60 full-time faculty members in law,¹ while Waseda University School of Law admits approximately 1300 students each year for approximately 70 full-time faculty members in law.² Such schools are not bound by any

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1. The University of Tokyo Faculty of Law teaches both law and politics. In addition to approximately 55–60 faculty members in law, it also has approximately 15–20 political scientists.

2. Waseda University School of Law does not teach political science. However, it has approximately 45 full time faculty members in foreign languages in itself.

common standards regarding professional legal education.³

Therefore, professional legal education designed to train future lawyers does not exist in Japan. A profession is usually given a monopoly on certain services because its members have acquired specialized knowledge and skills required to perform such functions. There is no such education or training for lawyers in Japan. Japanese lawyers have not established themselves as a profession in this sense.

This system is clearly different from that in the United States and Canada where professional legal education is provided at the graduate level. It is also different from the European systems, where law is an undergraduate program, because university legal education is basically required for lawyers in those countries. Many people say that Japan inherited the German system of legal education. They are wrong. You cannot become a lawyer in Germany without first completing university legal education.

The main part of the National Bar Examination is divided into three stages: a multiple choice examination covering three areas of substantive law (constitutional law, civil law, and criminal law); an essay examination covering six areas of substantive and procedural law (constitutional law, civil law, commercial law, civil procedure, criminal law, and criminal procedure); and an oral examination covering five substantive and procedural law (constitutional law, combined civil law and civil procedure, and combined criminal law and criminal procedure). The present system is based on the unrealistic assumption that a single examination that tests only a limited range of doctrinal knowledge can measure the aptitude of future legal professionals.

Those who passed the exam spend one and a half years as Judicial Trainees. They are considered civil servants and receive a government salary. Their first and last three months are spent at the Legal Training and Research Institute operated by the Supreme Court, and the twelve months in between are spent at local courts, prosecutors' offices, and attorneys' offices.

The physical capacity of the Institute has been used as the reason to limit the number of people who pass the exam. In 2000, only

3. For a historical analysis of the role of university legal education in Japan, see Setsuo Miyazawa with Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, *ASIAN-PACIFIC L. & POLICY J.*, 1-31 (2000) (Inaugural Issue), at <http://www.hawaii.edu/aplpj/1/02b.html>. Its slightly revised and shortened version has been published in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 162-208 (Yves Dezalay & Bryant G. Garth eds., 2002).

approximately 1000 passed the exam out of approximately 33,000 applicants, with a pass rate of only 3 percent.

More than 70 percent of successful applicants are students at universities in the jurisdiction of Tokyo High Court.⁴ This seems to explain the highly skewed distribution of attorneys in Japan, discussed below.

Where do applicants prepare for this extremely competitive exam? They go to cram school. Most of them are undergraduate law students, but they spend most of their time at cram school. They come to university classrooms only after finishing the exam, either after passing or failing. While they are university law students, their legal education actually takes place at cram school.

Cram schools are full-time yearlong programs with a national network of branch campuses. Some universities have asked cram schools to teach courses on their campuses and help students pass the exam.

Therefore, the extreme competitiveness of the exam does not mean that those who pass are broadly or deeply educated in law. Most students learn only patterned answers. Although undergraduate law faculties often offer fairly sophisticated courses on international business transactions, intellectual property, jurisprudence, the sociology of law, and other courses, those who wish to pass the exam cannot afford to take many such courses.

Furthermore, the sophistication of one's academic background outside law or real life experience is not relevant to the exam. Although several graduates of non-law faculties or mature applicants pass every year, that is coincidence, not design.

B. The Legal Training and Research Institute

The faculty members of the Legal Training and Research Institute are judges, prosecutors, and practicing attorneys who are temporarily assigned to the Institute. Unlike university professors, they do not enjoy academic freedom. The curriculum focuses on doctrines developed by judges, techniques of fact-finding, and skills of document drafting, including judicial decisions. The course work at the Institute is too short to provide meaningful remedial education in broader areas of law.

The twelve months apprenticeship at local courts, prosecutors' offices, and attorneys' offices is not governed by a curriculum. Unlike

4. Japan is divided into eight High Court jurisdictions.

clinical programs at American and Canadian law schools, trainees may not represent actual clients even under the supervision of a licensed lawyer. They simply watch what judges, prosecutors, or attorneys do.

After returning to the Institute for three months, they take the final examination and are hired as assistant judges or prosecutors, or choose to become attorneys.

Increasingly, faculty members of the Legal Training and Research Institute complain of the quality of Trainees, saying that they are often unable to handle legal questions that go beyond answers provided in manuals used in cram schools. Many judges, prosecutors, and attorneys share this complaint.

The result of this system is an extremely small bar. We have approximately 17,700 attorneys for a country of 127 million people as of 2000. The distribution of attorneys is highly skewed. Tokyo has more than 40 percent of the total number of attorneys, while it has only ten percent of the total population.

THE JUSTICE SYSTEM REFORM COUNCIL: POSITIVE STEPS

The Japanese government established the Justice System Reform Council for a two-year term in July 1999 to make the judicial system more accessible and effective.⁵ Achieving this goal requires a much larger number of more sophisticated lawyers who are able to handle increasingly more complicated issues. Hence, the Council quickly identified the reform of education and training of lawyers as one of its earliest priorities.

While the Council is not expected to present its final report to the Prime Minister until June 12, 2001, basic elements of its proposal to reform the education and training of lawyers has been already revealed. They are fundamentally positive.

(1) The Council proposes that 3000 new lawyers be licensed by 2010, contingent on the development of a new system of graduate professional law schools. The Council says that this number should not be construed as a ceiling.

(2) The Council proposes moving from the reliance on a single examination to a system that educates and trains new lawyers through an integrated process that includes university legal education, a

5. For a general discussion of the background of this decision of the government and the situation of the Judicial System Reform Council as of late 2000, see Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PACIFIC L. & POLICY J., at 89-121 (2001).

National Bar Exam, and a legal apprenticeship. At the core of this new system, the Council wants to establish graduate law schools as professional schools specialized in educating future lawyers.

According to the Council, these graduate professional law schools should be "fair," "open," and "diverse," and they should be distributed throughout the country. The Council hopes that the first group of law schools will admit their first students in 2004.

(3) As in most other developed countries, university legal education in Japan would be required as a common academic background for lawyers. Professional legal education would finally be born, and the legal profession would be established as a true profession.

Because new law schools would be established at the graduate level, they would be able to admit students who have studied various subjects other than law or have acquired real life experiences valuable to their legal education. The educational background of many lawyers in Japan would become comparable to that of American and Canadian lawyers. Because a legal apprenticeship would be required after passing the National Bar Exam, the new system would look more like the Canadian system that combines graduate professional legal education in universities with an apprenticeship (articling) provided by the bar, although the Supreme Court would still manage the apprenticeship in Japan.

Because new schools are to be distributed throughout the country, more lawyers would be produced locally, and the skewed distribution of lawyers might be ameliorated.

THE PROPOSED SYSTEM: FUNDAMENTAL PROBLEMS

However, the proposed system has problems. Most obvious is the cost of education. Partly because an extremely low student-faculty ratio (such as ten to one) is targeted, students would have to pay high tuition fees compared to those of undergraduate law faculties. This problem would be particularly true at private universities. While a student loan program like the federally guaranteed loans in the United States has been proposed, the government has shown no commitment to such an idea.

Furthermore, the Council has in some respects yielded to pressure from interest groups, like undergraduate law faculties, businesses, the Supreme Court, and the Justice Ministry. Some of the Council's compromises might seriously damage its proposal.

(1) While the Council wants the standard program of graduate

law school to require three years of study, it also proposed that those who have already acquired “basic academic knowledge in law required in graduate law schools” be allowed to complete the program in two years. The Council noted that such individuals are not limited to graduates of undergraduate law faculties. Then, where do such individuals acquire such legal knowledge? Aren’t graduate law schools the only places where professional legal education is provided?

A university might try to give this benefit to the graduates of its undergraduate law program, so that its graduate law school would have only a two-year program that would mostly admit graduates of its undergraduate law program. The requirements of “fairness,” “openness,” and “diversity” would thus be violated.

Regarding admission to graduate professional law schools, the Council said that it would be worth considering a standardized aptitude test like the LSAT (Law School Admission Test) in the United States and Canada, as well as a standard law examination to screen those who wish to finish the program in two years. The latter would cause a serious problem. Such a standardized law exam would become another National Bar Exam and produce similar problems. I believe that each law school should independently administer a placement test to determine which students will be allowed to finish the program in two years, rather than relying on a standardized exam.

(2) The Council is expected to recommend a separate route for becoming a lawyer that bypasses law school but would not undermine the rationale for graduate professional law schools. Two groups may be eligible for such a bypass: those who are financially, socially, or geographically unable to go to law school, and those who have accumulated practical experience in government or business. The need for a bypass was first raised for the former, but the latter has pressed the more recent argument for the need for a bypass.

However, what will happen if some people do not have to attend or complete law school before taking the National Bar Exam? They will go to cram schools. Wouldn’t it be better to provide a law school education to such people instead of having them attend cram schools? Evening programs, part time programs, and distance programs might be an option worth considering in such cases.

Furthermore, what will happen in rural areas where there are no cram schools? People living in such areas would not be able to become lawyers. Again, distance courses, for instance, might be a good alternative.

Moreover, work experience in government or business is not the

same as being a lawyer. If certain government or company employees have the aptitude for lawyering, they should apply to law school and try to use their work experience as an asset in their application. They can continue to work if they attend evening courses or part-time courses. There is no need to exempt them from law schools.

Finally, proponents of a bypass want to design an exam for those who want to avoid law school. This proposal would create two National Bar Examinations. Such a proposal reflects the idea that we can test people's potential as legal professionals, which is exactly the position the Reform Council rejected in its discussion of the need for the education and training of lawyers through a new process.

(3) The present standards for establishing professional schools include a student-faculty ratio of ten to one. This is half the ABA standard and unnecessarily stringent, and might simply become a barrier to the establishment of law schools. A more reasonable standard should be established, so that a good number of law schools can be established throughout the country.

(4) The Council appears to believe that standards for recognizing a law school can be separated from those for allowing graduates of the same school to sit for the National Bar Examination. There is also a chance that the Justice Ministry will retain the authority to grant the right to sit for the exam. If the Justice Ministry retains that power, such a system could be easily used to reduce the number of people who pass the exam and, ultimately, prevent the development of graduate professional law schools. Rather than separating the two standards, they should overlap in such a way that resembles the relationship between provisional accreditation and full accreditation by the ABA.

(5) The Council has not clearly stated that the new National Bar Examination should be administered as a licensing exam. The Council should clearly say that the exam would pass every applicant who received a certain point. Otherwise, new limits on the number of legal professionals may be introduced, and the importance of establishing graduate professional law schools will be lost.

EPILOGUE: THE NEED FOR CLOSER MONITORING OF THE LEGISLATIVE PROCESS

The government will establish an office for the preparation of legislation soon after the presentation of the Council's final opinion on June 12. Those who want more extensive and fundamental reform have to continue to closely monitor the development of a new system

of educating legal professionals and must take action to prevent further compromise.

POSTSCRIPT: THE DEVELOPMENT SINCE JUNE 2001

The Justice System Reform Council submitted its final report to Prime Minister Jun'ichiro Kouizumi on June 12, 2001.⁶ The reform of education and training of lawyers was presented as the first priority of the entire reform. The Council largely maintained both the positive aspects and fundamental problems mentioned above. New graduate professional law schools should be established in April 2004, a New National Bar Examination that reflects content of law school education should be introduced in 2006 (for those who would have completed law schools in two years), apprenticeships should be maintained, albeit for a shortened period, and at least 3000 people should pass the New National Bar Examination by 2010. However, the present Bar Examination should continue until 2010, and a preliminary examination for those who cannot afford or need not go to law schools should be introduced afterward and those who pass it should be allowed to take the New National Bar Examination without going to law schools.

On November 29, 2002, the Diet, the Japanese parliament, passed the laws to establish law schools in April 2004. Standards to charter law schools as well as standards to recognize accreditation organizations are likely to be set by the Education Ministry in January 2003. Applications for chartering will be made in June and chartering will be granted in November. At least 40 universities are expected to apply, with sizes of entering classes ranging between 30 and 300. Some universities have presented conservative plans that emphasize shortened courses obviously designed to attract their own undergraduate law students, while other universities, including Waseda University, has proposed more idealistic plans that emphasize three-year standard programs clearly intended to attract students from a wide range of academic and social backgrounds.

The most dangerous scenario is that the bypass through the preliminary examination will be made larger than the route through law schools and that the Justice Ministry will manage to make the New National Bar Examination a highly competitive one. It remains to be seen whether and how universities will succeed in preventing such scenarios through their efforts in the next few years.

6. This postscript was added in December of 2002. For an official English translation of the Council's report, see <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.