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The Changing Japanese Society And The Law

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はしがき

日本社会は，さまざまな面で変革を遂げてきている。とりわけ第二次世界大戦敗戦後の，経済の発展および国際化の進展は，日本社会に大きな影響を及ぼしている。このような中で，法制度も改革され発展を遂げている。

周知のごとく，日本政府は国際化を推進し，日本は今や国際社会の一員として，重要な地位を占めているといえる。しかしながら，法制度の面では，国内適用という特殊性から，これまで，日本社会と法に関する情報が，外国に向けて公表されるということはあまり多くなく，外国向けの英文資料も決して十分とはいえない。

毎年，多くの外国人旅行者が来日し，その数は年々増加している。また，近年，国際結婚が増加し，日本で生活する外国人も増えている。一方，歴史的にアメリカをはじめ多くの国々へ日本人が移民し，海外へ移住したことは，よく知られている。

日本の高度経済成長とともに，海外に進出する日本企業も多く，外国で生活する従業員やその家族もかなりの数にのぼる。このような状況で，日本国内外から，日本社会および日本人の生活と関わりのある法制度の情報が求められている。これに応えるため，本書では日本の法制度を英文で紹介する。

なお，法律専門家以外の要求にも応えるよう，新聞記事等を活用し，具体的な事例を取り上げて，説明を加え，理解を深めるよう工夫した。本書が国際社会における日本社会と日本法の理解に役立つことを希望する。

本書の刊行に際し，共同研究に参加いただいた方々のご協力とご教示に対し御礼を申し上げるとともに，私たちの研究成果の刊行につき広島経済大学に対し深く感謝申し上げたい。

ジョージ・R・ハラダ
小　川　富　之

PREFACE

The Japanese society has changed in many ways. The effects of the economic development and advancement in internationalization on the society have been especially remarkable since the end of the Second World War. The legal system has also tried to keep up with the changes of society by periodic reforms.

The Japanese government has worked hard in promoting an international society. It is now an important player in the international forum. However, because of the particular characteristics of the law and its application domestically, the merits of the system have only been introduced in a very limited manner. Compared to other legal systems of foreign nations, English material on the Japanese legal system is not as readily available.

Each year, many tourists come to Japan. The numbers are increasing annually. Furthermore, in recent years, there are more foreigners living in Japan due to an increase in international marriages. On the other hand, historically, there have been many Japanese nationals emigrating to the United States and many other countries to live permanently. Moreover, with the economic advancement of Japan, more Japanese companies have begun to develop branches and subsidiaries abroad increasing the numbers of Japanese employees and their families going to these foreign countries. As a result, more people, domestically as well as internationally, are demanding information on the legal system concerning the Japanese society and its

people. And, to answer to the call of these demands, we thought it would be appropriate to provide material in English introducing the contemporary Japanese society and its legal system. To make it more readable for interested non-legal specialists, we have included relevant newspaper articles to provide for more concrete examples and explanations for a better understanding of the topic.

We would like to thank all those who participated in our joint research; as well as, the Hiroshima University of Economics for its generous support in making the publication of this booklet possible. We truly hope that this small collection of information will assist in some way in the understanding of the Japanese society and its legal system within the international community.

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1. Introduction
——Background and Recent Trends

1.1 Internationalization

Internationalization has affected Japan in many ways. For example, in recent years Japanese nationals have been leaving (*shukkoku*) the country in record numbers for travel, work, study, etc., ... In 1995, the number was approximately 15 million, in more recent years the number has exceeded 17 million. On the other hand, more foreigners are entering (*nyukoku*) Japan for various reasons. Recent statistics show approximately 5 million foreigners have entered the country for some reason or another. In 1998, alien registration was at 1,512,116, approximately 1.2% of the whole population. From the establishment of the Alien Registration Law in 1947 to the 1980s, 90% of the foreigners were registered as Koreans, however, more recent statistics show that the numbers of Koreans have gone down below 50% suggesting that more people from other countries are deciding to reside in Japan. If one includes the 30 to 50 thousand illegal aliens in the country, the total number of foreigners residing in Japan is well over 2 million.

According to the Ministry of Foreign Affairs, in 1996, there

were approximately 760,000 Japanese nationals residing abroad. If one included those people of Japanese descent, the total numbers of Japanese living abroad would be over 2 million.

Family living in Japan has also been significantly affected by the influences of internationalization. The situation with international marriages presents an appropriate example. In 1955, when the statistics for international marriages were first surveyed in Japan, there were 1,167 couples of international marriages. The majority of these marriages were with Koreans at 66%, while 28% were with Americans and 6% with people of other countries. In 1997, however, the total number of international marriages was at 28,251. Marriages with Koreans were at 25%, and American at 5.5%, showing a decrease in marriages with people from these countries and an increase in marriages with people from other countries suggesting that marriage partners for international marriages are diversifying. Recent statistics show that almost 4% of all marriages are international marriages. Statistics show that the numbers for husbands and wives being Japanese nationals has also changed. In 1965, statistics showed that the wives of 3,438 couples were Japanese nationals as opposed to 2,108 husbands being Japanese nationals showing that there were more Japanese women than men deciding to get married with foreigners. However, the numbers changed dramatically to show the opposite results in 1975, and by 1990 there were 20,026 couples with Japanese husbands as opposed to 5,600 couples with Japanese wives. This trend has continued ever since the change in 1975.

These trends naturally conclude that there is an increase of

children with foreign mothers and fathers. It is interesting to note, however, that while there is an increase in alien registration of children, within these numbers there is an increase of children without nationality (*mukokuseki-ji*). In 1996, the numbers for alien registration of children without nationality were at 2,109. Within this category, the numbers for children less than five years of age have increased 10 times in the last five years. Furthermore, accurate calculations are difficult since there are many more children (possibly 10 times the numbers actually registered) that have not been registered at the time of their birth for some reason or another.

1.2 Recent Trends in relation to the Japanese Family

Recently, the Japanese family has experienced a major transformation. At present, the Japanese family and society in general are experiencing problems that deal with the aged and children. It has been said that a cause of these problems is connected to the elimination of the "Ie" system which existed before the war and the trend towards the development of the nuclear family. A short explanantion is necessary here to understand the situation.

During the Meiji era, the family in Japanese society was generally quite large. This was due to the Civil Code of 1887 that established the "Ie" system where in its foundation was the authority of the head of the household (*koshuken*) and the inheritance system where the eldest son received all of the household property (*katoku sozoku*). This "Ie" system established, in principle, a family registry (*koseki*) system with its

foundations in the political system placing the Tenno (Emperor) at the top of the family hierarchy. This "Ie" system was used strategically to maintain and strengthen the Meiji political system.

In the new Constitution of Japan, Article 24 states, "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis." This goes against the prewar "Ie" system and has enabled the family to transform from the feudalistic large family that it was, to the democratic modern nuclear family structure that it is today.

Before World War II, in most cases the husband and wife both worked on the farm or family business, however, after the war, the advancement of industrialization generalized a family model that consisted mainly of the husband working in the company and the wife tending to household and child raising matters. Thereafter, during the growth economy period, married women were provided more opportunity to work outside due to increased education of women as well as the fact that there was a deficient labor force caused by a decrease in child births. This trend has continued for various other reasons, one being to support the family income because of low growth in salary due to occasional economic recessions since the first oil shock in 1973.

The recognition of women working has also changed. There are many women now that give higher priority to work than to marriage. There are less women now devoting themselves strictly to doing housework and raising children or automatically

quitting their jobs after they have their first child. Many women are working even after they have their children. The Equal Opportunity Employment Law (*Danjo Kikai Kinto Ho*) established in May 1985 has assisted in continuing this trend.

The changing concept of the status of women and the increase in women entering society has affected the birthrate. The average number of children born for each family has dropped to below 1.5. The low birthrate has also made Japan one of the fastest aging countries in the world. One reason for this low birthrate is the higher average age in marrying which causes couples to have their first child at an older age making it difficult to have additional children thereafter.

After the passage of the Equal Opportunity Employment Law, the Maternal Protection Regulation in the Labor Standards Law was amended to extend the maternal leave from six weeks to eight. Also, in May 1991, the Child Raising Law (*Ikuji Kyugyo Ho*) made it possible for either parent to take a year off to raise a child that is less than a year old. If both husband and wife are to work and have children, it is hoped that further effort be made to establish conditions suitable to meet the changing situation.

Men have also been put in a difficult position when it comes to work and family. There is an increase of fathers not being able to live with their families because it is said that upwards of 20 thousand of them are required to transfer to various regions in the country to work and live alone (*tanshin funin*). Furthermore, it is said that the father's presence in the family and as a parent is becoming less influential.

It has been said that in comparison to families in the Anglo-European countries, the Japanese families have been relatively stable. However, there are signs that this is changing. As previously mentioned, the change in the concept of marriage and the status of women, and an increase in the number of couples living together without being legally married are showing signs that the lifestyles of recent people are changing. Statistics also show that 30% of all men are single, and 25% of all women are single, a significant increase to that of several years ago, showing a strong trend in choosing to remain single. Even if couples do decide to marry, 1999 statistics show that the average age of the wife is 26.8, and the average age of the husband is 28.7, showing that couples are getting married at an older age. Furthermore, the rate of divorce is rising. There are over 20 thousand couples a year that get divorced. Compared to the Anglo-European countries, the numbers may be lower, however, while in 1960 the divorce rate was 0.74, in 1985 it was 1.5, and in 1999 it was 1.98. In recent cases of divorce, there are two types of divorce that have increased so much that the terms expressing these types of divorce have become common. One is "Narita divorce" which refers to an extreme example of a breakup that would end immediately after the honeymoon at the Narita Airport. The other example is the "after retirement divorce" which refers to aged couples who have been married over 25 years and get divorced after the husband retires from his job. Both types of divorce have been increasing.

2. Characteristics of the Present Family Law System

EDITORIAL: What's in a name?

Acceeding to the feminist drive for legally assuring married women's right to retain their maiden names, the civil law committee of the legislative council of the Justice Ministry has compiled an interim report allowing couples the choice to hold separate family names.

. . . . . .

It is proposed in the interim report that a married couple can either bear the surname of the husband or the wife, or retain their respective surnames held before marriage. This places the alternatives on a completely equal footing. But a couple bearing separate surnames must, at the time of marriage, decide on one of the names for any prospective children in order to prevent such offspring from having differing surnames. Objections persist against a separate-name arrangement, insisting that for a married couple to bear one surname is a time-honored tradition, and that allowing separate names impairs family unity. Apparently the civil law committee has given in to women's rising call for independence, with the rationale that in a mature society married couples can at once remain free and be united.

The Supreme Court upheld a personal name as a right in a past decision which said that a personal name is the foundation on which a person is respected as an individual. The present law presents an outlook of equal opportunity for both sexes by saying that a married couple shall bear the surname of either the husband or the wife. This is because of the Japanese custom of

yoshi, or adopted son, where the husband joins the family of his wife to insure succession of its name and property. But yoshi is not a common practice, and 98 percent of married women bear the surnames of their spouses.

. . . . . .

A fundamental question remains as to whether the calls for separate names... will lead to happier marriages and families. The law may help, but in no way assures, happiness.

Taken from Mainichi Daily News
September 15, 1995, p. 2

2.1 Family Registration System

Under the "Ie" system established by the Meiji Civil Code, the last name represented the "Ie" or the family as a whole, while under the present law the last name represents merely the name of the individual.

The last name is attained at birth. In principle, the last name of the child's actual parent is given to the child. Therefore, when a couple has married and a child is born, the child takes on the last name of the parent. A child born after a divorce takes on the name of the parent who will have custody of the child (article 790, para. 1, Civil Code). If the mother and father of the child are not married, the child takes on the mother's name (article 790, para. 2, Civil Code). Furthermore, if at the time of birth the child was abandoned and the parents are not known, the head of the local government is given the discretion to name the child (article 57, para. 2, Family Registration Law). To be sure, the principle of having the last name

of actual parents is not absolute. In times of marriage and adoption, for example, children and parents may take on a new name.

2.1.1 First Name

The Family Registration Law (*Koseki Ho*) states that the act of giving a newly born child a name is done by submitting the birth certificate by the parents, or persons obligated to do so, to the local authorities. The characters that can be used for naming are restricted. A name can be changed if a rational reason is given and is approved by the Family Court (article 107-2, Family Registration Law).

2.1.2 Family Registration

The Family Registration System (*koseki seido*) is a system to record an individuals status by public notification and approval. The original Family Registration Law was made at the same time as the Meiji Civil Code, thereafter being amended in 1914. The present Family Registration System has abolished the "Ie" system and taken on the principle of "one family one registration record." Also, in principle, the system prohibits keeping records of three generations of a family.

When status changes become necessary, in principle, application for changes must be submitted by the party requiring the change. There are two types of changes that can be submitted. One is a notification change which includes such things as births, deaths, and court ordered divorces and dissolutions. The other type is referred to as *sosetsuteki todokede*. These include marriage, divorce or dissolution by consent, and adoption.

In the past, the Family Registration was subject to informa-

tion disclosure, however, since 1976, the law was amended to change this policy from the perspective of the protection of privacy.

The place of Family Registration is one's *honseki* (article 6, 13, Family Registration Law). The Family Registration is located and managed at the ward office of the *honseki*. The location of the *honseki* has nothing to do with one's residing address. One is free to choose where to locate his or her Family Registration. For example, in cases of marriage where a new Family Registration must be created, one can choose any ward office in any local government (article 30, Family Registration Law). In cases of abandon children, the head of the local authority is given the discretion to establish the child's *honseki* (article 57, para. 2, Family Registration Law).

2.2 The Procedure of Courts in Dealing with Family Law Matters

In Japan, when a dispute arises between husband and wife, parent and child, or between relatives, in many cases it is said that the disputes are resolved out of court through negotiation between the parties. However, when personal discussion or negotiation does not work, the parties take the matter to court. Family disputes require more than making clear the rights and obligations of the parties; concrete and rational answers are necessary. In order to do this, the Family Court was established after World War II, providing special procedures for family law disputes such as mediation (*chotei*) and hearings (*shinpan*). These procedures were not offered at the the normal

district court. According to article 18 of the Law for Determination of Family Affairs (hereafter, "Family Affairs Law"), family dispute matters (all cases of a personal nature and other general matters relating to the family) are initially required to go through mediation proceedings in Family Court. Mediation proceedings are organized by a mediation committee or a Family Court Judge (*kaji shinpankan*) assigned to each case. All cases are held in private. When both parties agree on a resolution, its effect is recognized as equivalent to that of a normal court judgment (Family Affairs Law, article 21).

Other than the mediaton proceedings, the Family Court also holds Family Court hearing (*kaji shinpan*). The cases that can be heard for these hearings are restricted by the Family Affairs Law (articles 9.1, 9.2, 24). Since these cases have a nonadversarial character, they are in principle held behind closed doors (Family Affairs Law, article 7; Law for Procedure in Non-Contentious Matters), and the cases are judged by a Family Court Judge in the presence of the councillor. The Judge is given discretion to make rational judgments in accordance to each particular case heard. He also has power to order an investigation of facts if necessary. If family dispute matters are not able to be resolved by the Family Court, the cases are presented to the district court in the form of civil litigation. Procedure is set forth by the Law for Personal Procedure which is a special law within the Code of Civil Procedure established for these particular cases.

3. Marriage

3.1 Engagement (*kon'yaku*) ·De Facto Relationships (*jijitsukon*)

Engagement is defined as a consent by both parties to get married in the future, however, there is no law pertaining to engagement in the Civil Code. In case law and academic opinion, engagement is considered to be not only an ethical promise, it has legal effect as a type of contract between the parties. It is said that no one can force a marriage to take place after a cancellation of an engagement, however, if it can be proved that there was no rational reason for cancellation of the engagement, then the party forcing the cancellation can be liable for damages experienced by breach of contract.

In some cases, there are ceremonial engagement gifts (*yuino*) exchanged between the parties to formally recognize engagement. In the past, some characterized this act as a "procedural guarentee." Presently, the *yuino* is thought to represent either a "monetary gift in case of cancellation (*kaijo jokenteki zoyo*)" or a "monetary gift representing the objective of engagement." The Court (Supreme Court Case, 9·4·1964, Minshu 18·7·1394) stated in 1964 that "[the *yuino*] is a type of monetary gift which represents both the recognition of engagement, and a bond of friendship between both parties and family if and when they get married. If the marriage is not finalized and engagement is cancelled by the party receiving the *yuino*, it must be returned for reason of excessive profit. However, a Tokyo High Court

(1047 HANREI JIHO 84) stated that if the party giving the *yuino* is the party wanting a cancellation of engagement, and if there is no rational reason for it, the party cannot demand a return of the monetary gift.

There are two concepts included in the word "marriage." One is a legal marriage recognized by formal notification (the expression of "marriage" is used as a legal term in article 739 of the Civil Code). And, the other is a de facto relationship that is not formally notified (article 225 of the Criminal Code uses the term "marriage" in cases involving a crime of abduction for the purpose of living together or "marriage." "Marriage," in this case meaning without notification, or in other words a de fact relationship).

Under the Civil Code of Japan before World War II, there were various instances where couples lived together in situations equivalent to a marriage, but could not file notification (for example, couples simply not being able to attain approval from the head of the family or a prospective successor to the family headship being prohibited in marrying out to another family). These situations were referred to as *naien* relationships. Both case law and academic opinion stood in favor to protect those in a *naien* relationships. *Naien* was considered as a promise of marriage. The Court (Daishinin, 1·26·Taisho 4th year, Minroku 21·49) ruled that a cancellation of a *naien* relationship without rational reason would constitute in an obligation to pay for damages experienced. Also, the Court in 1957 (Supreme Court 4·11·1957, Minshu 12·5·789) declared that a *naien* relationship as equivalent to a marital relationship and that an

illegal action would be recognized if an irrational cancellation was forced upon the partner. The Court suggested in this case that situations other than those recognized by the law, as in those cases of *naien* in progress would be recognized for their effects on the parties involved.

Presently, in many instances, not notifying the authorities of a marriage are due to reasons such as custom or personal preferences, reasons quite different from that of the Meiji era. The two types of cases that occur most frequently are: 1) a de facto relationship resulting due to not being able to complete a divorce in the previous marriage; 2) a de facto relationship resulting from parties not filing with the authorities for some reason or another. These types of relationships have increased in recent times and have been distinguished from the *naien* relationships. Both, however, are considered as de facto relationships. It is still an issue as to whether these new types of relationships also constitute a legal protection of the parties involved as in the former concept of *naien*.

3.2 Formation of Marriage

In order for a marriage to be considered valid, there are several substantive qualification requirements that must be met: 1) both parties must consent to the marriage (article 742, no.1, Civil Code); 2) both must be of legal age——18 for males and 16 for females (article 731, Civil Code); 3) it cannot be an act of bigamy (article 732, Civil Code); 4) in the case of women, the period of marriage prohibition must have elapsed (article 733, Civil Code); 5) it cannot be an act of incest (article 734-736,

Civil Code); and, 6) if a minor, approval of parents is required (article 737, Civil Code). Also, as a formal requirement, in Japan, the parties must file notification of marriage with the local government authorities according to requirements set forth by the Family Registration Law for the marriage to become legal and effective (article 739, Civil Code).

If there is no consent of marriage or no filing of notification of it, the marriage will be considered invalid (article 742, Civil Code). Excluding cases involving parental approval for marriage between minors, all other cases which involve an infringement of substantive qualifications can be subject to annulment of a marriage. Marriage by fraud or duress are also subject to annulment (article 747, Civil Code). It must be realized that in cases of marriage, there is always a possibility of some overemphasis of the "good" and some hiding of the "bad," and strong pressure on making the final decision of whether or not to marry. However, when it can be proved that the decision to marry was a mistake and that it was caused by a fraud (i.e., misrepresentation of personal history and education, or not being truthful of a fact like previously having a child of another person, etc., . . .), or if that there existed so much duress that a decision to marry could not be concluded in a "natural" way, then the marriage could be subject to annulment. This, however, must be recognized within three months of the marriage for any claim to be valid. If these conditions are not met, annulment will not be granted even if appealed to a higher court.

3.3 Effects of Marriage

When a legal and valid marriage has been formed, the protection of mutual rights and obligations of husband and wife are recognized by the law. The following are the effects of a marriage within the Civil Code concerning non-property matters: 1) the agreement of the surname of husband and wife (article 750, Civil Code); 2) the obligation of living together, cooperating and aiding each other (article 752, Civil Code); 3) responsibility for minors after marriage (article 753, Civil Code); and, 4) the right to enter into contract between husband and wife (article 754, Civil Code). Also, although not mentioned in the Civil Code specifically, there is an obligation for husband and wife to be faithful to each other since unfaithfulness can be considered a cause for divorce (article 770). Therefore, the Court (Supreme Court Decision, 3·30·1979, 33 Minshu 303) has ruled that either husband or wife can sue the person that the spouse is having an affair with for damages leading to a breakdown of the marital relationship, however, in a more recent case, the Court (1563 HANREI JIHO 72) ruled that this cannot be done if the affair had taken place after the breakdown of the marital relationship.

In terms of property related matters, the matrimonial property system (*fufu zaisan seido*) is considered as a legal property system (*hotei zaisan seido*) in that property contracts entered into before marriage that differ from the legal property system are recognized by the husband and wife by their mutual agreement. The content of the matrimonial property contracts are, in principle, to be entered into freely, however, since these

contracts involve not only the couple, but most likely a third party, strict procedure is demanded by requiring property to be registered prior to marriage notification. There is no custom in establishing matrimonial property contracts in Japan, so there are very few cases of this kind.

Therefore, the majority of the couples follow the rules set forth under the legal property system. Under this system, property belonging to either the husband or wife prior to their marriage and property acquired during marriage is held and managed separately. Uncertain property is presumed to be property of both husband and wife (artcle 762, Civil Code). Expenses accrued from married life are shared taking into account each's property, income, and other circumstances (article 760, Civil Code). Also, as an exception to the separate property ownership and management system (*fufu bessan betsukanri seido*), there is joint liability in contracts entered into concerning daily household matters.

4. Dissolution of Marriage

4.1 Types of Dissolution of Marriage

A dissolution of a marriage (*kon'in no kaisho*) results from either death or divorce. Those who have been judicially declared missing are also categorized as dead (article 31, Civil Code). After a dissolution of marriage by death, the effects of marriage between husband and wife are in principle discontinued, and the living spouse is able to remarry (an exception to this is article 733, Civil Code, which restricts the woman from

immediately remarrying after a divorce). After a dissolution of a marriage, the spouse that has changed his/her surname when he/she got married is able to change it back to his/her original surname through the procedure of *fukushi-todoke* (there is no time period restriction in this case).

In principle, the matrimonial relationship continues until the living spouse declares his/her intentions to terminate the relationship (article 728, no. 2, Civil Code; article 96, Family Registration Law). In a divorce, a dissolution of a marriage occurs while both parties are living. The history of divorce has developed from an era that began with a prohibition of divorce through the management of marriage by the Church, to a legal system recognizing fault (*yusekishugi*), where divorce is recognized when either spouse claims that the other has committed an infringement of a marital obligation such as adultery or desertion. It has further developed to a system referred to as *hatanshugi* where a marital breakdown with prolonged separation that is irreconcilable is a ground for divorce without placing fault on either party.

In Japan, until the Meiji Civil Code was made, divorce was in principle a right recognized only of the husband by a procedure referred to as *san-kudari-han* (which was simply a three and a half line document demanding divorce). The Meiji Civil Code, although having many discriminatory qualities in terms of causes of divorce in the previously mentioned legal system of fault, adopted the system of divorce by consent, recognized divorce by court decree, and most importantly recognized divorce claims presented by the wife. After the World War II,

divorce by consent was continued and *hatanshugi* was adopted into the system of divorce by court decree.

If husband and wife can agree on a divorce, they can divorce by consent (article 763, Civil Code). If an agreement cannot be made by consent, they must apply for mediation procedure through the Family Court (Family Affairs Law, articles 17, 18) where divorce by mediation is rendered only when the mediation committee establishes an agreement in writing between the two parties. If mediation fails, in a few cases the parties decide to go through a hearing for divorce, however, in most cases the parties take their divorce claims to the district court (article 770, Civil Code).

4.2 Effects of Divorce

A divorce dissolves marriage and the future legal relationship of the couple. The spouse that changed his/her surname at the time of marriage resumes his/her original name after a divorce by consent (article 767, Civil Code). However, the surname used during the marriage may be continued even after the divorce, if the divorced spouse files this desire within three months of the date of the divorce in accordance to procedures set forth by the Family Registration Law (Resuming prior surname, articles 767, 771, Civil Code). A divorce also ends relationships between relatives created by the marriage (article 728, Civil Code). If there is a child who is a minor at the time of a divorce, one of the spouses will be assigned parental authority becoming the legal parent (article 819, para. 1 & 2, Civil Code). If necessary, the Family Court will appoint a

guardian other than the mother or father, or a third party to be a cusodian for the child (article 766, Civil Code). The parent of the child, whether appointed or not, has the responsibility and obligation to raise the child in accordance to his/her economic status. Also, although there is no law stating to the effect, visitation rights are to be recognized, if necessary, for the divorced spouse who does not have custody of the child.

4.2.1 Property Division

A divorced spouse may demand a division of property (article 768, 771, Civil Code). If no agreement can be reached on the method and/or amount of property to be distributed, either spouse may apply to the Family Court to have the dispute resolved (article 768). In the case of a divorce by court decree, the district court will decide on both the divorce and division of property (The Law for Personal Procedure, article 15). Division of property normally involves the liquidation of the property held by the husband and wife, alimony after the divorce, and consolation payments; however, the Court ruled that consolation payments may either be included in the resolution involving the division of property or separately demanded (Supreme Court Decision, 1946·7·23, 25 Minshu 805).

4.2.2 Payment of Child Support

Child support after a divorce is an expected responsibility of the parent whether or not he/she has parental authority. However, the basis for this expectation is under dispute. The concrete amount and method of child support are to be resolved through agreement of mother and father. If an agreement cannot be reached, then it must be resolved by mediation. The

Family Court will also hold hearings on the demands of the costs necessary for custody and child care to help assist in resolving the dispute. Also, in the case of a divorce by court decree, if necessary, the court may include a decision on child support (The Law for Personal Procedure, article 15, para 1–3).

In principle, the obligation of child support for minors after a divorce should be no different to that of the support and maintenance given to the child during the marriage. Theoretically, the living standard for both parent and child must be the same, however, in reality the actual amount and payment methods for child support are far from the theoretical ideal.

There are several serious problems concerning child support. First, since many of the divorces in Japan are divorce by consent, in many cases, the method of payment for child support is not thoroughly discussed and decided on. Even in cases where the method of payment has been decided on, there are many cases where the amount of child support is insufficient, or no actual payment at all. Parental authority in the majority of divorce cases is given to the mother, however, it has been said that the living situation for mother and child is not always easy after the divorce. According to a survey, only 20 percent of the fathers provide for child support, and only about half of the child support disputes are settled through mediation. Also, it is said that about 15 percent of the fathers pay all of the child support for a one parent/child home. Under the present law, child support after a divorce is enforced by *riko kankoku* (investigation and admonition concerning the performance of obligation), *riko meirei* (order to perform obligations by court order of

determination), and *kitaku* (deposit of money in behalf of the obligee), however, these methods have not been very effective. To improve the effectiveness of the present system, The Japan Bar Federation has recommended that child support payment be an obligation, and that decisions concerning child support be included into the procedure for divorce by consent.

5. Other Family Issues

5.1 Parent and Children

One's own child is defined as being a child that is legally recognized as having physiological blood relations with the parent. Since a real parent/child relationship is a natural blood relationship, legally, there is no way of ending the parent/child relationship. In a real parent/child relationship, if the mother and father are in a marriage relationship the child is considered to be legitimate, while a non-marriage relationship would make the child illegitimate. The former relationship legally presumes that the child conceived by a wife during marriage is the child of the husband (article 772, Civil Code). In the latter relationship, the father/child relationship is not recognized unless the father legally acknowledges paternity of the child (article 779, Civil Code). In the case of the maternal relationship, the Court has ruled that if there is proof of childbirth, then the relationship is presumed without acknowledgment (Supreme Court Decision, 16 Minshu 1247). A child can acquire legitimacy by reason of marriage of his/her father and mother, and the father's acknowledgement of paternity of the child (article 789,

Civil Code).

A legitimate child assumes the surname of his/her mother and father (article 790, Civil Code). The child, who is considered legitimate is entered into the parent's family register (article 18, para. 1, Family Registration Law), and he/she is under the cooperative parental authority of both mother and father (article 818, Civil Code). An illegitimate child, in principle, assumes the name of his/her mother (article 790, para. 2, Civil Code), and is entered into the mother's family register (article 18, para. 2, Family Registration Law). The child is recognized to be under the parental authority of his/her mother (article 818, Civil Code). After the father has recognized the child's paternal relations, the child may with the approval of the Family Court assume the surname of his/her father (article 791, Civil Code). Also, parental authority can be given to the father after agreement between the mother and father or by Family Court judgment (article 819, para. 4 & 5, Civil Code).

5.2 Artificial Insemination and Parent/Child Relationship

Artificial insemination is defined as the process in which a child is conceived by artificially uniting the ovum and semen without natural human sexual intercourse. There are two methods. One method is by artificially inseminating a woman's body with the man's semen. The other method is by artificially fertilizing the ovum and sperm *in vitro* and then implanting the fertilized ovum (embryo) into the woman's body for the birth of the child. Artificial insemination can be categorized further by

the process which involves artificial insemination by either a husband's semen (AIH) or a donor's semen (AID). In the case of the former, no problem arises between parent/child (father/child) relationships, however, in the case of the latter, academic opinion suggests that problems arise in relation to the interpretation of article 772 of the Civil Code. Problems concerning parent/child relationships also occur in the case of *in vitro* fertilization when semen from other than the husband or an ovum from other than the wife is used. Generally, a father/child relationship is not denied when a child is conceived by aritificial insemination from a donor other than the husband, if the husband has given prior consent. However, parent/child relationships may be denied in cases where the husband has not given consent to artificial insemination.

Medical technology has advanced to an extent that a donor's semen or ovum can be preserved by freezing and used later. However, problems involving inheritence arise in these cases. Furthermore, in recent years there are cases involving surrogate mothers. In Japan, the Society for Obstetrics and Gynecology does not approve of *in vitro* fertilization with surrogate mothers and parties other than the spouse. In 1998, however, a dispute concerning this issue was sparked by an anouncement of a child being conceived by *in vitro* fertilization using an ovum donated by a sister. Since there is no legal binding force in the academic society's restrictive position, it is presumed that more and more of the same examples will occur in the future. The Ministry of Health and Welfare has established a committee to discuss and examine the issue in order to correspond to future

developments. There is obviously a limitation in the present legal system in corresponding to issues involving reproduction. Furthermore, moral, ethical and religious issues need to be considered. Immediate legislative action is necessary to resolve the present confusion.

5.2 Adoption

THE REGION: Social mores fuel Japan adoption trade: expert

Growing numbers of unmarried Japanese mothers are sending their children overseas for adoption to avoid shame, according to Professor Tomiyuki Ogawa, a visiting professor at the University of WA Law School.

Professor Ogawa said the practice was not regulated and was open to abuse. . .

"The Japanese family desires to live in the same manner as the family next door. This ensures stability within society and a happy life," he said.

"Although the numbers are very small, families which are not part of this stable social condition experience a very difficult situation in which children's rights are jeopardised. For example, it would be very difficult to raise a child born to an unmarried man and woman, especially if the parents were minors (under 20).

"Society tends to be more severe with them and makes it nearly impossible to raise the child." Professor Ogawa said many young Japanese had a greater awareness about sex but sex education often came too late. There had been an increase in pregnancies among minors and unmarried adult women. At the same time, there was a growing overseas demand for Japanese children, especially in the US where diverse family structures were accepted.

> The advantage of overseas adoption was that once the child obtained the citizenship of its adoptive parents, its name was eliminated from the potentially embarrassing Japanese Family Register. The most popular practice involved the Japanese parent or adoption agency taking the child to the US on a temporary visa. The child was given to a US couple who would apply for adoption. Because Japanese law recognised the domestic law of other countries, adoption could be completed in the US. . . . .
>
> Taken from The West Australian
> August 15, 1996, p. 22

Adoption refers to a system that creates a legal parent/child relationship that is equivalent to a real parent/child relationship without the parent and child having a natural blood relation. The adoption system has a long history where its purpose has changed from a system that was created for "the purpose of continuing the family name," to a system for the purpose of "normalizing" a childless marriage, to the present system that was established "to put children into an improved environment." Japan has developed in a similar way. Under the Meiji Civil Code, as previously mentioned, the "Ie" system was adopted and an adoption system with the character of maintaining the family name was created, later changing to a system with the purpose to assist in normalizing a childless marriage. When the Civil Code was amended after World War II, the "Ie" system was abolished, and a system to allow the adoption of minors by court approval was established, and in 1987 the Civil Code was further amended to establish the "special adoption system" for the purpose of putting children into an im-

proved environment.

In the present Japanese adoption system there are two sub-systems. The first is referred to as the "normal adoption system" which is a system that establishes an adoption by the consent of the parties involved and the filing of notification of adoption to the proper authorities. This adoption system in most cases is used for the purpose of continuing the family name and/or for purposes of succession. For this reason, the person adopted continues his/her blood relations to his/her original parents and relatives.

The second system is referred to as the "special adoption system." This system was established for the protection of the interests of the child, and adoption is established by a court hearing. In the process of an adoption, if the situation requires so, the child's "new" parents can apply to the Family Court to have the child's legal relationships with his/her original parents and relatives to be discontinued (Family Affairs Law, article 817.2, Otsu-type no. 8.2).

In the U. S. and Europe, most adoptions are generally the Japanese "special adoption" type, however, in Japan, adoptions are generally the "normal adoption" type. This "special adoption system" was established through an incident that involved a Dr. Kikuta who owned a hospital specializing in obstetrics and gynecology located in northeastern Japan. A young woman who entered the hospital wanting an abortion was convinced by Dr. Kikuta, who emphasized the value of life, to give birth to the child. The newly born baby was registered under the name of a childless couple as their real child. Dr. Kikuta's license to

practice medicine was revoked for falsifying the birth certificate to assist in finding a child for the couple. This incident was publicized widely and caused many groups to think about the situation. Citizens groups in support of Dr. Kikuta's position urged legislation for a special system recognizing difficult situations similar to that of Dr. Kikuta's. The result was the establishment of the present "special adoption system." With the establishment of this system, however, many Japanese children have been sent abroad in the form of international adoption as mentioned in the article at the beginning of this section.

5.3 Succession

EDITORIAL: Rights of Illegitimate Kids

The Supreme Court is expected to decide soon on the constitutionality of a civil law article that provides for a disadvantageous treatment in legal inheritance by illegitimate children. We urge the top court to come up with a clear-cut answer fully weighing the equality of individual citizens in its ruling...

Article 900 of the Civil Law Act says that the portion of an illegitimate child shall be one-half that of its legitimate counterpart. Two special complaints have been lodged with the Supreme Court after the courts of the first and second instances turned down the plaintiffs who contested the lesser portions under that article.

However, in two other inheritance trials held about the same time, the Tokyo High Court handed down opposite decisions ruling the "one-half provision" as unconstitutional. Thus there exist contradictory judgments on the issue in the absence of a Supreme

Court precedent. The top court, which is often criticized as being timid, should not avoid a constitutional decision this time.

The one-half provision obviously contradicts Article 14 of the Constitution that says, "All of the people are equal under the law and there shall be no discrimination." In the past, a majority of legal scholars upheld Article 900 as constitutional, maintaining that the provision was aimed at protecting family ties based on legal marriage, and thus should be respected despite discriminatory treatment for illegitimate children.

In recent years, however, women's social advancement has brought about different attitudes toward marriage, with more men and women no longer bound by the conventional adherence to legal marriage.

At the same time awareness is rising of the need to ensure children's rights.

These changing trends have led scholars to question the validity of the discriminatory provision, and an increasing number of them now regard it as unconstitutional.

Legal marriage must be respected. On the other hand, should children be flatly discriminated against according to whether they are born out of legal wedlock?

. . . . . .

Respect for legal marriage and the dignity of the child should not sacrifice each other. At the same time, these two ideals do not contradict each other. The Supreme Court, then is called upon to hand down a ruling upholding both ideals. The one-half provision has received criticism from abroad, as the International Human Rights Covenant committee in 1993 took up the issue and recommended rectification. The opportunity is ripe for a change.

Taken from Mainichi Daily News
June 14, 1995, p. 2

The system of succession in Japan recognizes the freedom of

wills of testament. If there is no will of testament, then a system to divide the belongings left behind is established and taken care of by legal inheritance rules.

Wills (*yuigon*) must be made to form in the manner stated in article 960 of the Civil Code. There are "ordinary forms" and "special forms." Within ordinary forms, wills must be made by holographic (article 968, Civil Code), notarial (article 969, Civil Code), or secret (article 970, Civil Code) means. The special forms of wills include those wills that cannot be made using the ordinary forms for special reasons such as emergencies or in situations of isolation. For example, there are provisions for wills that can be made when one is in imminent danger of death through disease or on board a distressed ship (article 976, 979, Civil Code); or when one is in a place where communication has been shut off by administrative measures on account of a contagious disease or on board a ship (article 977, 978, Civil Code).

Legal inheritance comes into question from the death of someone (article 882, Civil Code) at the address of the successor-to-be. When inheritence comes into question, the first in line in lineal descendants to inherit the belongings of the deceased is the child of the deceased. The second in line would be lineal ascendants (mother/father), and third in line would be the brothers and sisters. When the higher priority inheritor exists the others in line are disqualified (article 887, 889, Civil Code). The spouse of the deceased is considered in the same priority rank as the first in line inheritor of lineal descendants (article 890, Civil Code). If the child or any of the brothers and sisters of the deceased has died or has been eliminated from

consideration and has lost the right to inherit (article 891, Civil Code) before inheritance, then the child of that person has the right to inherit in his/her place (article 887.2, 889.2).

6. Conclusion
——Recent Considerations for Change

In 1996, the Ministry of Justice finalized a Civil Law revision plan, the first major change in nearly 50 years. The Diet has yet to start discussions for legislation. In terms of marriage qualification requirements, the Legislative Council for Legal Affairs (*Hosei Shingikai*) after deliberation sent the issue to the sub-committee where it decided to recommend legislation that would equalize the minimum age requirement for a legal marriage for both males and females at 18 years of age, and to shorten the remarriage waiting period restriction (*saikon kinshi kikan*) on women from 6 months to 100 days.

The minimum age requirement for a marraige was established for the reason that if one gets married at an early age he/she will have less opportunity for life's experiences such as work and education that will be valuable in the future in helping to resolve difficult problems experienced as well as to acquire ability to be self-supporting. Also, it was interpreted in the past that the primary reason for the present law setting the age of males at 18 and females at 16 was based on the idea that the maturity rate was different between males and females; however, many assert now that this law was created more for the reason that women were expected to become housewives

after marriage and that higher education and work experience were not necessary. The present recommendations hope to amend the present law to meet international equality standards and to secure equal rights for both men and women as stated in article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women.

The remarriage waiting period restriction of 6 months has been judged to be constitutitonal by the Supreme Court (Supreme Court Decision, May 12, 1995). However, this period which is used to verify the legitimacy of childbirths of the previous marriage after a divorce is said to be too long, and that 100 days is enough time to verify whether or not the child was from the previous marriage. Therefore, many critics are of the opinion that if there is no other reason for leaving the remarriage waiting period at 6 months, it should be shortened.

Although the recommendations from the committee did not mention anything on the prohibition of incest, more thought needs to be put into the issue. In Japan, for reasons of genetic considerations marriage is prohibited between natural blood relatives (immediate family——ascendants, descendants, siblings) and collateral relatives by blood up to the third degree of relationship. Also, for reasons of ethical considerations marriage is prohibited between direct relatives by remarriage and legal blood relatives. From the perspective of freedom of marriage and international trends, the scope of prohibition of incest should be made as narrow as possible. The prohibition of marriage between natural blood relatives for genetic reasons is very quite persuasive, however, in some instances the prohibition

against legal blood relatives presents inconsistent results. For example, the adopted child and the collateral relative of the adoptive parents, and spouses of the adoptive parents and lineal relatives of the adoptive parents and the adopted child may marry. However, after the adoptive relationships have been cancelled, the marriage between the former adopted child, his/her spouses, his/her lineal descendants or their spouses on the one hand, and the former parent by adoption or his/her lineal ascendants on the other, may not marry. The significance of the family in present society and ethical considerations related to the family are in need of further consideration.

The Legislative Council on Legal Affairs also discussed and recommended amendment on the issue concerning the marriage partners' choice of whether each should retain his/her original family name or both use the same name. If the couple decides to choose separate names, the surname for the a child conceived after marriage must be decided at the time marriage is notified to the authorities.

Inheritance was also considered in the Council's recommendations. When either the mother or father dies, the spouse and the child of the deceased are first in line for inheritance. Under the present law there is no difference in order of inheritance whether it be one's own or adopted child, legitimate or illegitimate child——all are considered first in line for inheritance. The problem arises in distribution of inheritance. Illegitimate children are presently entitled to only half the inheritance that legitimate children would receive (article 900, Civil Code). This distinction has been said to be in violation of the International Human Rights B Covenant. Futhermore, in

1994, the Convention on the Rights of Children forbid the discrimination of illegitimate children. The Council's recommendations remove the distinction between legitimate and illegitimate children in regard to inheritances from parents.

There has been a number of opinions asserting the unconstitutionality of article 900, no.4, however, it has always been the minority opinion. On June 23, 1993, the Tokyo High Court declared that setting a distinction in the amount of inheritance between legitimate and illegitimate children was unconstitutional (1465 HANREI JIHO 55). With this decision, many more people became aware of the situation and not only lawyers, but the general public became concerned with the issue of distinction. Thereafter, another court case again decided by the Tokyo High Court the following year declared unconstitutional the distinction system (1512 HANREI JIHO 3). The most recent decision by the Supreme Court on this issue was in 1995, two years after the Tokyo High Court judgments. It will be interesting to see how the Supreme Court will decide on this matter since there are presently two cases being appealed to it as the previous article mentioned.

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Chapter 2
The Changing Aspects of the Japanese Employment System

Natsuko Ogawa

EDITORIAL: Companies must avoid the staff downsizing bandwagon

... We find it disturbing that the word "restructuring" has become effectively synonymous with "personnel reduction," disregarding the correct meaning which is to reorganize or rebuild business by investing capital or manpower in areas that hold promise.

Personnel cuts are being implemented in practically every sector of industry. Yet, many corporations claim they are still overstaffed.

No company enjoys pruning its workforce. Even now, there is every evidence that companies do want to keep as many employees as they can. But profits have fallen and competitors have emerged around the world. For companies that have had to resort to personnel downsizing, the decision must have been agonizing——at least we would like to believe so.

But that being said, we are still troubled by certain recent developments. . . . . .

A survey on restructuring, done last autumn by the Japan Institute of Labor, showed that while the percentage of employees being fired is smaller than the percentage taking early retirement

or being farmed out, the number of fired workers has nevertheless risen dramatically in recent months.

Workers are in a hopeless bind when their salaries are cut without any assurance of continued employment. If union leaders are agreeing to only marginal raises or no raise at all this year because they understand there is no other choice, then there is all the more reason for management to make every effort to guarantee stable employment.

Cutting personnel is nothing like cutting costs or goods. Obviously, it is a terrible thing for the party being dismissed, and certainly no fun for the party giving the notice, either. More than anyone else, top executives must be truly sensitive to the pain and humiliation this is bound to inflict.

We now have court rulings to remind us that casual or arbitrary termination is not to be condoned.

For any dismissal to be justified, the laws require certain conditions be met. For instance, the company must have a legitimate need to cut personnel; the company has made every effort to avert personnel downsizing; the choice of the person to be dismissed is appropriate; and management and labor have discussed the issue thoroughly before reaching the decision.....

We do not know when the long recession will bottom out. Now may be the hardest and most uncertain time. But we beg companies to refrain from competing with one another on personnel downsizing.

Taken from Asahi Evening News
March 23, 1999, p. 8

1. Introduction

The Editorial in the Asahi Evening News of 23 March 1999

addresses the topical issue of job losses resulting from the massive restructuring of Japanese businesses as a response to Japan's prolonged period of recession. The Editor observes that "restructuring" has become synonymous with "personnel reduction" and calls on businesses to avoid perpetuating this disturbing trend.

The Editor appears to be resistant to a change from the Japanese model of personnel management, which is characterised by life-time employment of employees within a supportive corporate "family". Under that model, employers take responsibility to keep their workers employed, despite adverse economic pressures, and workers remain loyal to the employers, sacrificing in the shorter term the relatively high salaries which they might earn in Western countries for a gradual rise over the long term. The model has been popularised as one of the main reasons for Japan's development into an economic power from the ravages of World War II.

The theme of the Editorial is reflective of changes which are occurring particularly in large businesses. Even those businesses which still favour the Japanese model have been making modifications, such as to place greater emphasis on performance and outcomes rather than seniority and ability in making decisions on salaries and promotions.

However, despite the popular stereotype for the Japanese worker being an employee of a large business such as Toyota, Mitsui or Mitsubishi, in 1991, almost 9 out of 10 Japanese workers were employed in small to medium sized businesses with less than 300 employees. To many of these workers, the

Japanese model of personnel management has been of little relevance.

It follows that, rather than emphasising the changes to the Japanese model of personnel management which are now affecting a limited, though important, section of the labour market, such changes should be regarded merely as a striking examples of the effect of more far-reaching trends in the Japanese economy and society, which have been described as the "Big Bang" of labour in Japan.

These trends are examined further in Section 2, followed by an analysis in Section 3 of the most recent overhaul of the Labour Laws (*Rodo Ho*), the majority of which took effect in April 1999. These revisions to the Labour Laws included revisions to the Labour Standards Law (*Rodo Kijun Ho*), the Employment Stability Law (*Shokugyo Antei Ho*) and the Equal Opportunity Law (*Dan-jo Koyo Kikai Kinto Ho*).

The paper concludes in Section D that the revisions to the Labour Laws appear to be primarily concerned with addressing economic trends, marking a shift in legislative approach from using the Labour Laws to protect workers' rights to using them as a means to achieve economic efficiency. While this may benefit workers with special skills and qualifications and with the ability to assert and exercise their individual bargaining power, there remain concerns in relation to other workers without these attributes.

2. Major Trends

2.1 Unemployment

The unemployment rate in Japan jumped 20% in 1998 and continued to worsen, reaching a record high of 4.9% in June 1999. The average for 1999 was 4.7%, the highest recorded since 1953. Job losses resulted partly from the massive restructuring mentioned in the Editorial, highlighted in recent times by the retrenchment of 20,000 Nissan employees in November 1999. They also resulted from widespread corporate bankruptcies. In the first 11 months of 1998, 17,865 companies filed for bankruptcy protection (compared to 16,464 for the whole of 1997) with 177,032 workers losing their jobs as a consequence.

2.2 Japan's aging society

The main casualties of job-cutting by businesses have been said to be the aged workforce who have been forced to retire early. The Yomiuri Shimbun of February 2, 2000 reported very high levels of unemployment amongst aged workers. In December 1999, when the unemployment rate rose again after a period of decline, the unemployment rate amongst men aged 60 to 65 was 9.8%.

This runs contrary to the longer term concern that Japan's aging population will place burdens on the welfare system. As of September 15, 1998, the percentage of the population aged 65 years or more was 16.2% and the Japanese National Institute

of Population and Social Security Research projects that this percentage will rise to 17.2% this year and 25.2% in 2015. One solution which is currently under debate is to increase the retirement age from 60 to 65. The Yomiuri Shimbun of February 10, 2000 reported that this would be the subject of strong negotiations by the unions in this year's spring offensive.

2.3 Job mobility

As a further consequence of job losses and as a result of the deregulation of key industries such as the finance and telecommunications, job mobility has increased. For example, in the finance industry, deregulation has allowed Japanese banks to engage in securities business previously prohibited to them. It has also made Japan a more attractive environment in which to conduct business for foreign companies. Both these factors have contributed to an increase in demand for workers with relevant experience. The failure of Japanese financial institutions, such as Yamaichi Securities Co. and Sanyo Securities Co., have created a source for such labour.

2.4 Participation of women in the workplace

Amid growing recognition that the effective participation of women in the workforce is required in order to give further support to Japan's aging society, the percentage of women in Japan's total workforce has been gradually increasing. In 1993, it was 38.6%; in 1998, it reached 40%.

While the push for equal opportunity for women continues, the Asahi Shimbun of 7 August 1997 reported that women still

carry greater burdens than men outside work in child-rearing, caring for invalid relatives and maintaining households.

2.5 A different kind of Japanese worker

Union participation of Japanese workers has been declining for several years. The Ministry of Labour reported a drop in the ratio of workers who were members of unions to the total labour force to a post-war low of 22.6% in 1997, which further declined to 22.4% in 1998 and 22.2% in 1999. The number of workers who were union members fell for the fifth consecutive year in 1999, to 11.825 million.

These statistics are consistent with the overall shifts in the composition of the Japanese workforce to one which is more white collar than blue collar and in which more workers engage in service, information and knowledge-orientated tasks rather than manual ones. In such a workforce, in which individuality and creativity are valued, collective bargaining power is becoming less relevant.

2.6 Disputes

Disputes between employers and individual employees in Japan are increasing. Apart from unfair dismissal claims arising from job losses, it has been suggested that workers are less accepting of adverse employment conditions in an environment where job stability cannot be assured.

2.7 Working hours

The working hours of Japanese workers, the highest in the

industrialised world, have been a subject of concern for a number of years. It is regarded as having adverse effects on family relationships and the workers' health and well-being. The Japan Times reported in March 1998 that *karoshi* (or deaths from overwork) were increasing, as were deaths caused by stress from extreme work conditions.

The Ministry of Labour has made efforts over the last two decades to promote a reduction in working hours, including through revisions to the Labour Standards Law, but actually achieving a reduction has been a slow process.

2.8 Part-time work

The Mainichi Daily News reported on March 2, 1998 that the number of workers (defined as those working less than 35 hours per week) in Japan was rising. This trend has continued, with the Ministry of Labour reporting in December 1999 that the number of part-timers in November 1999 increased by 3% compared to the same time in the previous year. A high proportion of part-timers are women.

3. The Recent Revisions to the Labour Law

3.1 Change to maximum term of employment contracts

Under the revisions to the Labour Standards Law effective in April 1999, the maximum term which can be specified for an employment contract was increased from 1 year to 3 years for contracts entered into for the first time with a person:

*possessing a high degree of specialist knowledge, which is necessary in relation to new products, new technologies or new services;

*with a high degree of specialist knowledge necessary for project type business; or

*aged more than 60 years.

Previously, in prescribing a maximum contract term of 1 year, the assumption was that employees, with weak bargaining positions, may not be able to exercise their right to terminate their contracts and could be tied unwillingly to their employers. In practice, employment relationships were stabilised in other ways, such as by application of the Japanese model of personnel management.

However, as mentioned above, experts are now in great demand from employers, in the finance and telecommunications industries especially, and employers wish to secure the services of these experts for longer than 12 months. The 3 year maximum is intended to allow employers to do this, while still safeguarding the interests of the employee.

A further purpose of the revision is to allow employers to engage aged workers in a similar way to experts, tapping into their years of experience. This foreshadows further revisions which will be required to ensure effective participation by aged workers in the labour market, such as increasing the statutory retirement age as mentioned in paragraph 2.2.

3.2 Greater freedom for employment agencies

Under the Employment Stability Law, there are limitations on

the extent to which introduction services – i. e. introducing prospective employers and employees–can be performed for a fee. In fact, before the revisions to the Employment Stability Law effective in April 1999, these services were generally prohibited, except in 29 approved fields in which the employees require special skills, such in fine arts, music or entertainment, fashion design, law, medicine, pharmacy and interpretation (foreign language).

The effect of the revisions was to change the underlying principle of the Law from one of prohibition to one of freedom. Under the revised Employment Stability Law, all fields are approved, with some exceptions including most distribution and services businesses, preservation of public peace, agriculture, fishing and forestry industries, transportation and communications and skilled manufacture.

This relaxation is in line with similar liberalisation in the regulation of the despatch of employees by employment agencies under the revisions to the Worker Despatch Law (*Rodo Haken Ho*) passed on June 30, 1999.

These revisions appear timely given the recent rise in unemployment and the job mobility. For example, executive introductions are one area in which employment agencies are already starting to extend their services, due to the changes to the application of the Japanese model of personnel management in large businesses and the demand from foreign affiliated companies expanding their businesses in Japan.

3.3 Appointment and dismissal of workers

Under the revisions to the Labor Standards Law effective in April 1999, the following conditions must be clearly and expressly set out in the contract documentation for appointment of the employee:

- *the term of the employment contract;
- *the place of employment and the work the employee will have to do;
- *work in excess of scheduled working hours, rest times, holidays, vacations etc;
- *the wage (including its calculation, method of payment, deadline, and payment period); and
- *the scheduled working hours and retirement or resignation (except that where these conditions are set out in work regulations (*Shugyo Kisoku*), in which case it is sufficient to merely refer to those regulations in the appointment documentation).

Previously, the only condition which was required to be shown in the appointment documentation was that relating to the employee's wage.

Upon termination of employment, revisions to the Labour Standards Law, with effect from April 1999, provide that if the employee requests, the employer must give the employee a certificate setting out the employee's period of service, types of work done and reasons for dismissal. Before these revisions, similar certificates had to be given but no reasons for dismissal were required to be stated.

Both the revisions to the procedure concerning the appoint-

ment and dismissal of employees respond to the increase in labour disputes and attempts to smooth and expedite their resolution. By setting out the employment conditions clearly in the appointment documentation, it is hoped that this will lessen the prospect of a later dispute as to whether these terms were known to either employer or employee. Similarly, by setting out the reasons for dismissal in a certificate, in the event of a dispute, the issue immediately turns to one of whether the reasons are rational rather than proving the existence and content of the reasons.

It should be noted that in this connection that new regulations effective in October 1998 have empowered the bureau chiefs of urban and rural prefectural labour standards offices (*Todo Fuken Rodo Kijun Kyoku-cho*) to give advice and guidance at the request of an employee or employer involved in a dispute.

On receipt of such a request, a bureau chief is required to collate the relevant facts and issues and attempt to quickly resolve the dispute by providing advice and guidance. Where necessary, a bureau chief may consult and consider the opinions of experts on labour issues or the relevant industry. Previously, discussions on conditions of employment were entirely within the jurisdiction of the Labour Standards Supervisory Bureau (*Rodo Kijun Kantoku Sho*).

3.4 Equal opportunity

The revisions to the Equal Opportunity Law effective in April 1999 sought to strengthen the legal basis for protection of women from all kinds of discrimination in the workplace. Previ-

ously, the Law provided that employers had a duty to make efforts to prevent discrimination but, as there were no penalties for breaches, the Law was criticised as lacking substance.

Under the revised Equal Opportunity Law, there is now an absolute duty on the part of the employer to treat male and female workers equally in all employment situations including recruitment, appointment, promotions, education and training, retirement and dismissals. Employers also have a duty of care to prevent sexual harassment.

A further feature of the revised Equal Opportunity Law is the provisions for affirmative action. First, the Government will provide assistance in affirmative action to promote employment for female workers. Secondly, favourable treatment (such as provision of special training) for female workers in recruitment and appointment is permitted in circumstances where female participation in a particular occupation is less than 40%.

While these changes have been welcomed, their practical effect would be negligible without sufficient penalties for breach of the Law. The revised Equal Opportunity Law provides that in the event of a breach, a notice will be sent to the offending employer by the Ministry of Labour and advice or guidance may be given. If that advice or guidance is not heeded, a kind of social sanction known as *kigyo-mei no kohyo* (public announcement of the business' name) will be imposed.

It has been argued that the effect of the sanction is that the image of the business will be tarnished and may lead to more serious consequences such as consumer boycotts. While this may be the case, the effect of the sanction is likely to vary de-

pending on the nature of the business and may well not be a sufficient deterrent in some cases.

Hand in hand with the bolstering of anti-discrimination provisions has come a controversial revision of the Law to repeal protections from overtime and night and weekend work, which were applicable to the majority of women under the previous Labour Standards Law, excepting those in specified occupations such as doctors, lawyers and publications editors.

The repeal of these protections was opposed on the basis that it ignored the reality that women still carry the greater burden in relation to domestic duties, child rearing and caring for invalid and elderly relatives. It was argued that equality should not be achieved by placing women under the same exacting conditions as men but rather by offering the same protections to men.

While this approach was not accepted, the concerns were to a limited extent addressed by providing that for 3 years after the repeal of the protections for women, women could request maximum overtime hours of 150 hours per year from their employer if they have children younger than pre-school age or if they are caring for elderly relatives.

In this connection, the Child Rearing/Family Care Law (*Ikuji/Kango Ho*) provides that where a male or female worker engaged in child rearing or caring for family members under the meaning of the Law requests relief from overtime duties, the employer must grant relief. The period requested can be any period greater than 1 month but less than 6 months and there is no limit to the number of requests which can be made.

Women who are pregnant or have babies under the age of 1 may also request relief from overtime.

3.5 Changes to the Discretionary Work Scheme (*Shin Sairyo Rodo Sei*)

The Discretionary Work Scheme has been expanded, in revisions to the Labour Standards Law which took effect in April 2000. While most Japanese workers are paid salaries based on the hours which they work, workers covered by the Discretionary Work Scheme are paid by reference to the results which they achieve regardless of the hours which they work. Accordingly, if a worker covered by the Scheme actually works more than the hours they are scheduled to work, there is no entitlement to overtime payments.

Before the revisions, only limited categories of workers, such as those developing new technologies or products, designers and journalists, were covered. However, it is now possible to implement the Scheme for most white collar workers engaged in planning, drafting, investigations and analysis. Implementation of the Scheme in new workplaces requires the unanimous decision of the worker-management committee (*Roshi Iinkai*), which must then be reported to the Government.

The Editorial of the Mainichi Daily News of September 9, 1998 noted that these changes were based on the grounds of intensifying global competition and changes to Japan's economy and society. The trends of greater individuality and diversity amongst workers and the growth in white-collar and service employees (discussed in paragraph 2.5) were recognised as con-

tributing to this. The changes are also consistent with the changing approach of employers to rewarding employees for results rather than their abilities.

However, the Editor expressed concerns that the expanded application of the Scheme was open to abuse. Even though the workers' consent is needed to adopt the Scheme, the Editor pointed to the "conformist climate of corporate Japan" as a reason why workers would not exercise their right to reject the implementation of the Scheme. The Editor also suggested that businesses could use the Scheme to avoid making overtime payments.

3.6 Working hours

3.6.1 The Average Working Time System (*Henkei Rodo Jikan Sei*)

As indicated above, the Government has for a long time made efforts to reduce the number of working hours of the Japanese. The Labour Standards Law currently specifies the working hours as being 40 hours per week. There is an exception for certain industries where working hours of 46 hour per week may apply, including commercial businesses with less than 10 employees, the film and drama industry and the insurance/health industry. However, even in these industries, the working hours are expected to be gradually decreased.

The Average Working Time System allows businesses which may have difficulties in reducing working hours to efficiently achieve a 40 hour week. This is done by changing the working hours from time to time depending on the flow of work in the

business so that over a particular month and a particular year, an average 40 hour week is achieved.

The revisions effective in April 1999 have made this existing Average Working Time System easier to use by:

*permitting implementation of the system as it allows averaging over a one month period through concluded collective agreements;

*extending the subject period in the system as it allows averaging over a one year period from that in excess of 3 months and within a year to that in excess of one month and within a year; and

*extending the system as it allows averaging over a one year period to workers who joined an employer or retired in the middle of the year, who were previously excluded.

Within the context of on-going attempts to encourage a reduction in working hours of the Japanese, these revisions will not reduce overall working hours but will merely make the 40 hour week a more easily achievable target for businesses. Accordingly, it would appear to be a revision which is of greater benefit to the employer than the workers.

3.6.2 Overtime

Revisions to the Labour Standards Law effective in April 1999 sought to further reduce overtime hours by providing that the article 36 agreements (*Sanjuroku Kyotei*) which currently exist in relation to standard overtime hours, be replaced by a standard specified by the Minister.

Previously, a maximum of 360 overtime hours a year was specified as a target for businesses to aim to achieve and, in the

case of the article 36 agreements which specified a maximum greater than this, the Labour Standards Supervisory Bureau gave advice and guidance. By making the principle a standard specified by the Minister, this advice and guidance has been given a legal basis.

In addition, the unions and representatives of the employees, being the other parties to the article 36 agreements, must endeavour to make the agreements conform with the standard.

In connection with the issue of reducing overtime, it should be borne in mind that no matter what Laws are made to encourage reductions in overtime hours, there are complicated reasons of a social rather than a legal nature which still exist to frustrate such efforts. Many workers budget overtime payments into their household budgets to meet large expenses such as housing loan repayments and children's education expenses. Further, there remains a practice amongst Japanese companies in which employees do overtime without receiving any payment. This so called "service overtime" constitutes around 10% of the worker's actual working hours. In any event, many workers find it difficult to leave work before their bosses as working long hours is still considered a sign of dedication to the business.

3.6.3 Rest time

It has previously been considered desirable that all employees should take their rest time simultaneously. Before the revisions effective in 1999, this was the general position except in the distribution business on the approval of the chief of the Labour Standards Supervisory Bureau.

Under the revisions effective in April 1999, it is possible for employees to take their rest times at different times simply where there is a provision in a collective agreement to this effect and it is not necessary to deliver this agreement to the Labour Standards Supervisory Bureau. However, any inconsistent work regulations must be amended and that amendment must be notified to the Labour Standards Supervisory Bureau.

These revisions have been justified on the basis that Japan's growing white collar workforce prefers to be able to take rest times according to their work schedules rather than strictly from 12 pm to 1 pm. It is also consistent with the greater emphasis on results rather than the actual hours spent at work.

4. The Effect of the Revisions

Traditionally, in all industrialised nations, the role of labour law has been to protect the rights of the worker, as the party with weaker bargaining power in the labour market. However, it would appear that many of the revisions to the Labour Laws in Japan discussed above respond to economic trends, including labour market trends, and make the assumption that Japanese society has changed or will change along with those trends.

The fundamental assumption of the revisions is that the Japanese worker, whether male and female, is no longer the weaker party but is able and willing to bargain with the employer on a one to one basis in relation to appointment and work conditions. It follows that a loosening of previous "protections" which restricted opportunities to exercise such

bargaining power should benefit both employer and employee.

While this is at first sight logical, and may be true for an increasing number of workers in Japan, there are social and cultural reasons why it may be an inaccurate assumption for Japanese workers generally. For example, the issue of reducing overtime hours discussed in paragraph 3.6.2 demonstrates how, despite there being standards in place which ought to empower workers to refuse to do overtime in excess of the maximum, contrary business practices and workplace culture place even stronger pressures on workers.

It follows that the fears of some commentators regarding the recent revisions to the labor laws may be well founded. Rather than striking a balance between an efficient and a socially responsible labour market, the revisions may give employers, in their struggle to survive, the ability to be even more demanding of their employees.

What remains to be seen is whether in the longer term, Japanese workers will themselves demand a change in the way they work, to achieve a greater balance between work and private life.

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Chapter 3
Changes in Japanese Contract Law

Veronica Taylor

News article: Shiho: Keizai ga to-dai 3 bu-Tokken wa dare no tame ka (The Legal System: Economics Asks Questions-Part Three: Privileges for Whose Benefit?)

Some people represent themselves [in Japanese legal proceedings] because they have lost confidence in their lawyers. Architect Yasui Yoshio is someone who won a decision in his favour in the Tokyo High Court last Autumn in the amount of 10,000,000 yen.

The problem related to payment for the cost of preparing plans for a residential building in Yokohama. Mr Yasui accepted the brief from the client and began drafting the plans, only to have the transaction unilaterally terminated by the owner-client. The client argued that there was no contract in writing and therefore no obligation to pay.

In the court of first instance, Mr Yasui hired a lawyer and won a decision in his favour for 5,000,000 yen. However, in the process, he was urged by his lawyers to accept conciliation. "[He kept saying to me] We've already had four or five hearings and your feelings as a plaintiff have had time to cool. If we make a demand now, they will pay up immediately . ." His lawyer's true intentions in the case became more apparent in the course of their dealings.

> . . . Mr Yasui appealed to the High Court without the benefit of a lawyer. [Instead] he relied on a judicial scrivener for help and put together the necessary documents for filing by himself. As a result, the amount he recovered doubled. Although an architectural services case with no contract in writing presented difficulties, he succeeded in getting an order to pay his bill. Mr Yasui now says "Lawyers who simply keep recommending conciliation are no use at all".
>
> Taken from Nikkei Shimbun
> January 29, 2000, p. 1

1. Introduction

This chapter aims to help you identify some of the ways in which Japanese contracts are conceptualised, performed and interpreted, and to stimulate you to think about how this might compare with the situation in your own legal system and culture.

The newspaper article extracted forms part of a series of articles in the Nikkei Shimbun–Japan's leading business newspaper–that critiques monopolistic practices and inefficiencies in the Japanese legal system at present. The case at the core of the article poses a simple, but typical contract problem–non-payment of a contract price for services. The question being contested is: 'Was there a contract at all?'

2. What We Think We Know About Contracts in Japan

The defendant in Mr Yasui's case seeks to rely on the absence of any documentation as a defence to claim for damages in contract. At first blush, this seems to fit well with notions of contract in Japan being informal and less 'binding' than contracts elsewhere. This idea as it has been received in the west seems to originate with Professor Kawashima's analysis of 'contract consciousness' (1967). The message that many lawyers and businesspeople absorbed from Kawashima was that, in contracting with the Japanese, law is largely irrelevant. Instead, the business relationship is paramount, the Japanese favour unwritten, or very brief agreements; do not regard themselves bound by the letter of such agreements but rely on the notion of *jijo henko* (changed circumstances) to seek renegotiation; and, in the case of a dispute, will seldom, if ever, allow the matter to proceed to court.

What does Mr Yasui's case suggest about the accuracy and applicability of these ideas in Japan today? Let us start with some doctrinal questions and then look at Mr Yasui's contract dispute in its commercial context.

Someone reading the Kawashima thesis could be forgiven for thinking that Japan has no formal law of contract. In fact, like the European civil law systems from which much of its modern doctrinal law was drawn, Japan has a wealth of legislation governing contracts, court decisions that apply the legislative

concepts and scholarly treatises that interpret and critique the results.

The basis sources of contract law are the Civil Code; the Commercial Code (for specific kinds commercial contracts); and a range of special laws that cover specific kinds of transactions, for example the Door-to-Door Sales Law. A law on standard-form consumer contracts is being drafted and Japan is also expected to ratify the Convention on the International Sale of Goods (Vienna Convention) sometime soon. Beyond the Codes and the "special laws" that deal specifically with contract are the wider regulatory laws such as the 1947 Antimonopoly Law, which governs unfair trade practices and anticompetitive behaviour in contracting. The regulatory framework is complex and interesting. For more detailed descriptions of the anatomy of the laws governing contract you should look at Ramsayer and Nakazato (1998) or Oda (1999). An authoritative Japanese source is Uchida (1994a).

3. Applying the Law to Our Contract Problem

Mr Yasui's threshold problem as a plaintiff is to prove that a contract existed. What do the rules governing contract formalities say about a situation in which there is no contract in writing?

In Japan, as in other civil law systems, party autonomy is a core concept within contract law. Thus the Civil Code does not prescribe the form that contracts must take to be valid, nor

does it require the common law element of 'consideration' to be present to cement the contract's validity. Within the Civil Code, contract is formed merely through the agreement of the parties. Even where writing is prescribed by special legislation, the failure to comply does not invalidate the contract.

The Civil Code provisions reflect this party autonomy. The Code contains very few compulsory provisions. An example would be the Article 1 duty to transact in good faith or the Article 90 invalidation of juristic acts (such as making contracts) 'contrary to public policy and good morals.' These compulsory provisions are implied into all contracts. The balance of the Code, however, comprises 'non-compulsory' provisions, may be expressly varied by the parties. Where the parties do not make a clear choice, the non-mandatory provisions can be used by the courts as interpretive provisions or to supplement the intent where it does not exist. In this sense the Japanese Civil Code sections on contract provide rules for private transactions where the parties have not been explicit about their choices.

The real significance of the Civil Code rules on contract is that they make writing completely optional in all but a very few situations. This is the principle that the Tokyo District Court upheld in the *Marubeni Iida v Ajinomoto case*, where *Ajinomoto* sought to rescind a purchase agreement for soy beans worth $5 million because the market price had plummeted. *Ajinomoto* argued that its oral agreement with the seller should be set aside because there was no contract in writing. The court disagreed. It held that there was insufficient evidence that contracts in writing were part of commercial custom in these cir-

cumstances and found no reason to overturn the consensual contract principle (8 Kakyu Minshu 1366 at 1415-1416 (Tokyo Dist. Ct., 31 July, 1957).

The interesting issue now is not whether domestic contracts in Japan are unwritten, but what to do with those that are. Japan, like other industrialised legal systems, is increasingly a country of standard-form, tightly drafted contract documentation. In a culture (and civil law legal system) that traditionally has not reified contract documentation, should courts interpret a written agreement as an embodiment of the parties' intent? Japanese case-law and commentary suggest that, in many cases, reliance on the literal agreement would work an injustice; that the parties "true" intent should be deduced from their actions and surrounding circumstances (eg Kashiwagi in Iwaki et al, 1995a).

So the absence of writing in Mr Yasui's case is not, of itself, fatal. As plaintiff, however, he does have the burden of proof to show that he undertook the work and drew the plans pursuant to an agreement with his client. We are not told in the newspaper report how he established that there was a contract, but presumably he gave evidence of faxes, telephone calls and meetings as a basis for taking instructions to do the plans. The inference in the article is that he succeeds in his claim for damages based on either the contract price or a reasonable price for the work performed.

It may also be the case the plaintiff was able to rely on the doctrine of good faith (article 1, Civil Code). Broadly speaking this doctrine performs some of the functions of equity in an

Anglo-American or Anglo-Australian common law setting (eg Harland, 1999). Professor Uchida has been exploring this idea at a theoretical level. He argues that codified contract law is losing its persuasive value as a standard for dispute resolution in Japan because it has severed contracts from their social context and failed to abstract their 'internal norms.' (Uchida, 1994) Uchida suggests that these 'internal norms' do, and should, inform the court and influence the disposition cases and development of positive law. However, such norms need to be filtered judicially, and it is possible to construct an interpretive theory of how this happens. In Japan, Uchida argues, the impact of transactional norms is visible in the judicial treatment of good faith. By looking at approximately 500 cases, particularly the surge in court decisions since the 1960s that have widened the scope of contractual obligations, Uchida identifies a number of strands within Japanese 'good faith':

1) the right to compensation when contractual negations are wrongfully destroyed;
2) the obligation or provide information and disclosure; the duty to re-negotiate, including change of circumstances situations;
3) the obligation to protect the other party in a contractual relationship from loss (or expansion of loss);
4) the necessity of an appropriate reason for mid-transaction termination of a continuing contract;
5) court adjustment of liquidated amounts claimed.

Of course, calibrating court decisions is not an exact science-many of the decisions are not easily subsumed within this

model. Nevertheless, Uchida's analysis is important and influential. For non-Japanese observers, it opens up a new framework within which to consider the cultural form of these 'internal norms' and the extent to which a Japanese context influences the ways in which these are understood by the parties, transmitted to judges and retransmitted to society as positive law.

4. Non-Contractual Remedies

In the absence of a contract, a common law analysis of the problem would suggest the possibility of promissory estoppel ie the defendant is estopped from denying that work was undertaken, based on assurances or implicit promises from the defendant, with the defendant knowing of the plaintiff's reliance and knowing that the plaintiff would suffer detriment if the work was carried out (eg Harland, 1999).

Japanese law offers an alternative solution to this kind of problem, by focussing on the negotiation process. In a prolonged negotiation, where one party becomes increasingly (and reasonably) convinced that concluding a contract is a mere formality and that the transaction will go ahead, that party is likely to make commitments or undertake work that will create loss for him if the other party pulls out suddenly. In this situation the party terminating the negotiation may be liable for losses suffered as a result of his 'fault in negotiating' ie tort damages for inducing loss on the part of the other transaction partner. This is an application of the good faith concept discussed above.

5. The Business and Social Context

Contracts for professional services are typical of transactions that are clearly not 'one-shot deals.' Usually the arrangement is based on some kind of interpersonal relationship between client and professional, which extends over time in a 'continuing contract.'

Mr Yasui's relationship with his client would have been of this kind. The problem that he faced in litigation (and the reason that the newspaper article refers to these kinds of cases as 'difficult') is that the Civil Code provides no clear guidance on what rules to apply to 'continuing contracts.'

When Kawashima was writing about Japanese law in the 1960s, he drew on sociological work in the United States which delineated the gap between what we usually think of as contract law (or doctrine) and how commercial contracts operate in reality (eg Macaulay, 1963; Macneil, 1978). What became known as 'relational contract' theory sparked lively debates about how relational transactions should be weighed and accommodated within doctrinal law (eg Hadfield, 1990).

Since then, there has been considerable Japanese scholarship on the interplay between commercial transition norms, contract problems that are litigated, and the contract jurisprudence being fashioned by the courts. Kawagoe Kenji is a leading commercial contract practitioner, who compiled a digest of franchise and distributorship cases (1986). He analysed trends in court

decisions on termination because the Civil Code itself provides few guidelines about these kinds of cases. From the court decisions, Kawagoe attempts to distil some benchmarks, in particular the 'going rate' for notice periods and remedial measures.

An interesting conclusion in his research is the suggestion that the approaches taken by the courts in most cases are identifiably 'Japanese.' He points to, for example:

1) a qualified right to terminate contracts in which there is no stipulated contract period;
2) a tendency to look behind the parties' expressed 'right' to terminate (where this exists), on the basis that this may be a mere *reibun* [stereotypical provision], which does not capture the parties' true intent and is therefore not binding;
3) the requirement to show a 'serious reason' for termination, usually non-performance of contract obligations: the breakdown of the parties' trust relationship; unreliable delivery; non-payment; breach of a non-competition clause; intense anxiety about the other party's creditworthiness (*shinyo fuan*); a change in product line, making it difficult to continue the contract; a 'breach of faith' or 'betrayal' through the actions or statements of the other party (*haishinteki koi*) and disruption of the distribution channel or a severe change in circumstances which are beyond the control of either party (cf Taylor, 1993);
4) sufficient notice by the party seeking termination, and in its absence, liability for compensatory damages if the purported termination is litigated. Reasonable notice varies with the particular circumstances, but something like one year in the case of a supplier, and six months in the case of a purchaser seeking termination should be regarded as minimum notice periods;
5) Even where there has been an opportunity to negotiate, the court may accept a request for compensation from the other party. In some cases this will be based on a liquidated damages clause contained in the parties' written agreement; in some cases the court will determine an amount or reliance damages, but in most cases compensation awards, however, are based on projected profits. Where a supplier seeks termination, this is usually profits for a year, and where a purchaser seeks termination, profits for at least six months.

This case-law exegesis accords with Professor Haley's observation that judicial decision-making is important within the Japanese legal system, not for the net number of decided cases, but as a reliable predictor in the bargaining process (Haley, 1991:116).

6. Contract Harmony?

The other essentially 'Japanese' feature of contract read into Kawashima is the idea that contracts in Japan are intrinsically harmonious. He cited, for example, dispute resolution clauses in contracts which required the parties to 'confer-in-good-faith'

(*sei'i o motte kyogi suru*) and achieve a harmonious settlement (*enman na kaiketsu*). When I interviewed Japanese lawyers about this, they unanimously responded that they seldom included such clauses in contracts because they were redundant– legal prudence, economic commonsense, commercial custom and positive law usually ensured that Japanese (and non–Japanese parties) would try to negotiate anyway, regardless of what a contract clause said.

Haley argued that the cultural 'preference' for informal dispute resolution was never wholly convincing; that it stems rather from a lack of formal sanctions in the Japanese legal system. Without a reliable means of enforcement 'the words in a contract are just words, no matter how carefully drawn' (1991:181). Haley's analysis is supported by the economic view that developing an interdependent relationship is a rational way to maximise mutual benefits and discourage one another from seeking substitute partners. This economic rationale is buttressed by the ideological use of 'harmony' and 'consensus.'

Although the preferred form of contract in Japan may be relational and continuing, this does not mean immutable, or intrinsically 'fair'. In difficult circumstances, as Mr Yasui's experience illustrates, Japanese parties will terminate relational, as well as discrete, 'one–shot' transactions (Taylor, 1993).

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Chapter 4
The Financial Crisis and the Changes in Banking Law

Takuhide Mitsui
Natsuko Ogawa

EDITORIAL: The great bank debate begins

The Diet is debating a package of crucial financial bills that are designed to restructure the nation's rickety banking system. . . .

the government and the ruling Liberal Democratic Party are pinning hopes on the total plan which they see, correctly, as essential to the speedy liquidation of the enormous——and seemingly still increasing——number of bad loans held by private banks. Economic recovery depends on how this festering financial problem is resolved.

. . . . . .

The centerpiece bill is designed to create government-run "bridge banks" that will take over lending operations from failed banks in order to protect sound borrowers until healthy banks come forward to absorb the failed banks. . . .

there is persistent concern, however, that public funds might be used to save failed banks without pursuing the bankers that are responsible for the mismanagement of the institutions.

. . . . . .

Bank executives seem to have little sense of responsibility for the mountains of bad debt held by their banks. This, coupled with a lack of the sense of crisis, obviously has caused serious

delays in bad debt liquidation. No less responsible are the financial authorities who, taking cozy government-business ties for granted, have neglected to take needed actions.

The FSA, which began checking the books of 19 top banks last month, has a vital role to play in sorting out bad loans. These checks are focused on so-called gray loans, which may go sour depending on how things develop. But drawing the line between good and bad loans is not always easy. Still, it is absolutely necessary to draw a clear line.

Given the enormity of the bad-debt problem, there are obvious limits to private initiatives in consolidating banks that are no longer viable. The government, therefore, has a vital role to play, and that includes the use of public funds. Animated are the motivated Diet debates should produce laws that ensure transparency in restructuring the banking system by leaving no room for administrative discretion. Only fair and clear rules can bring about financial revival and restructuring.

Taken from The Japan Times
August 13 1998, p. 18

1. Overview

The Editorial of the Japan Times of 13 August 1998 gives a snap shot of a critical time in the development of Japan's banking system. As indicated by the Editorial, some eight years after the bursting of the "Bubble Economy", financial institutions in Japan still held a huge amount of bad debts and this "festering financial problem" was yet to be resolved. The bad debt problem was the main cause of a stunning series of bankruptcies in financial institutions, described in Section 2 below.

The Japanese public and international governments began to seriously question the soundness of the financial system, finally forcing the Japanese Government to act decisively. In November 1996, Prime Minister Ryutaro Hashimoto unveiled the Government's solution to the Japanese financial crisis–the "Japanese Big Bang" policy. The policy aimed to revitalise the Japanese financial market to be commensurate with international markets in New York and London by 2001 by creating a "free, fair and global" financial system. That is, the financial system had to employ market principles, be transparent and trustworthy, and international and advanced.

The main concern of the Japanese Big Bang policy was maintaining Japan's economic vitality in the face of Japan's aging population and the outflow of funds from the Japanese financial market to growing international markets in Europe and the United States.

The Japanese Big Bang also recognised, however, that in the shorter term, the financial condition of banks, particularly with regard to bad debts, had to be restored.

In response to the Japanese Big Bang policy, through 1997 and 1998, the Diet enacted a raft of legislative amendments (including those the subject of the Editorial). These amendments have brought about significant changes to the environment in which financial institutions now operate. While the recovery of the Japanese economy is ever slow, the changes appear to have at least stabilised the financial system for the time being.

The key legislative changes are examined in three parts in Sections 3 to 5 of this paper. Section C outlines the changes to the regulatory framework, focussing particularly on the new regulatory bodies–the Financial Supervisory Agency (*Kinyu Kantoku Cho*) ("FSA") and the Financial Reconstruction Commission (*Kinyu Saisei Iinkai*) ("FRC"). Section 4 describes the government's measures to stabilise the financial system. Section 5 sets out deregulatory measures which have been implemented to develop the financial system in accordance with the principles of the Japanese Big Bang.

2. The Japanese Financial Crisis

The start of the Japanese financial crisis following the bursting of the Bubble Economy can be traced back to the bankruptcy of Toho Sogo Ginko (saving bank) in 1991. The Toho Sogo Ginko merged with a regional bank with the assistance of a loan from the Deposit Insurance Corporation of Japan (*Yokin Hoken Kiko*) (the "DIC") at a low interest rate. At the time, no one paid very much attention to the bankruptcy and certainly did not anticipate that another would follow within a few years.

Subsequently some comparatively small Shinkin Banks and credit cooperatives went bankrupt and were rescued through similar schemes to Toho Sogo Ginko. However, in the case of the bankruptcies of two credit cooperatives in 1995, their financial status was too serious for such rescue schemes to be effective. Accordingly, the Bank of Japan and almost all the

Japanese banks subscribed for shares in a new bank, Tokyo Kyodo Ginko, which became the successor to the business of the bankrupt business. The subscription amount of the Bank of Japan was 20 billion yen, the aggregate subscription amount for the private banks was around 20 billion yen and for the DIC and the other banks, it totalled 90 billion yen.

Further bankruptcies of credit cooperatives followed and the Tokyo Kyodo Ginko was reorganised into the Bank for Resolution and Servicing (*Seiri Kaishu Ginko*) for the purpose of relieving the bankrupted credit cooperatives. In turn, the contributions of the DIC increased and in the case of the bankruptcy of Kizu Shinyo Kumiai in 1995, the DIC granted the huge amount of 1 trillion yen to the Bank for Resolution and Servicing.

In the same year, the situation became more serious in other parts of the finance sector. First, 6 out of the 7 housing finance companies, established by banks or other financial institutions for the purpose of making housing loans, went bankrupt. The Ministry of Finance devised a resolution scheme and the Housing Financial Receivables Maintenance Corporation (*Jutaku Kinyu Saiken Kanri Kiko*) was established to acquire the assets of the bankrupt housing finance companies. The capital of the Corporation was 200 billion yen, with equal contributions from the Bank of Japan and a fund established by private banks. The Government spent 680 billion yen to resolve this issue, attracting strong public criticism.

Secondly, a regional bank, Hyogo Ginko, went bankrupt. The Midori Ginko was established and succeeded Hyogo

Ginko's business. DIC granted 473 billion yen to the Midori Ginko and BOJ executed a subordinated loan in the amount of 110 billion yen. The Midori Ginko itself was subsequently merged with the Hanshin Ginko, a regional bank whose marketing area was the same as Midori Ginko.

Since these events, bankruptcies have spread to other financial institutions such as securities companies and life insurers. Despite increasing public anxiety concerning the true financial position of these institutions, especially in relation to undisclosed bad debts, the Government was reluctant to respond aggressively and quickly, choosing instead to merely assure the public that no long term credit banks, city banks or trust banks would go bankrupt or would be allowed to go bankrupt.

The financial crisis continually escalated through further events which occurred in November 1997. First, on November 3, Sanyo Shoken, a securities company filed a petition for bankruptcy under the Corporate Reorganisation Law (*Kaisha Kosei Ho*). This company was listed and ranked in the next group below the big 4 securities companies. It was the first time a listed security company had become bankrupt since World War II.

Secondly, on November 17, Hokkaido Takushoku Ginko ("Takugin") announced that it would transfer its business to Hokuyo, a regional bank and to Chuo Shintaku Ginko, a trust bank, and would be liquidated after the transfer. Takugin was a city bank and was accordingly amongst the institutions that the Government had said would not be allowed to go bankrupt.

Takugin had in fact announced in April 1997 that it was

going to merge with Hokkaido Ginko, a regional bank. This, however, did not happen because, it was said, that Hokkaido Ginko was anxious about the large and undisclosed bad debts of Takugin. Following the suspension of the merger, the financial problems of Takugin rapidly became worse.

Finally, on November 22, Yamaichi Shoken, a listed securities company and one of the big 4 securities companies, announced it was going into liquidation. The main cause was undisclosed debts of 260 billion yen but the direct cause was a rating agency lowering Yamaichi's credit rating to a speculative grade.

The public began to question which financial institution would be the next to go bankrupt and the stock prices of many financial institutions, especially banks, fell amidst rumours that they were in strife. The weighted average stock price of 8 Japanese banks in the Nikkei Stock Average portfolio fell from 2,600 yen in mid-February 1998 to 2,200 yen in March 1998 before plunging further in June 1998.

The financial system was unravelling and the Government could no longer stand back.

3. Changes to Banking Regulation

The regulatory structure in Japan in the financial sector had long been criticised for its lack of transparency. The Ministry of Finance had formerly held exclusive (yet ill defined) powers to regulate the activities of banks in Japan, including both policy making and regulatory functions, and there had been pressure from the Japanese public and foreign companies to

segregate the Ministry's powers. This has now been achieved by the allocation of the Ministry's regulatory powers to the newly formed FSA and FRC, described in greater detail below. The Ministry of Finance's functions have accordingly been reduced to those of planning and drafting laws and regulations for the financial sector.

Another important change to the regulatory structure was the amendment of the Bank of Japan Law (*Nihon Ginko Ho*), effective from April 1998, to secure the Bank of Japan's independence from the Ministry. The Bank of Japan is responsible for monetary policy, but had been under the strong influence of the Ministry of Finance. Following the amendment, the decision making process of the Bank of Japan has become more transparent, enhancing its credibility and market respect. For example, details of deliberations at the Bank of Japan's Policy Board Meetings are now disclosed publicly on a regular basis through a bi-monthly release of Board minutes and a bi-annual report to the Diet.

3.1 FSA

The FSA was established as the chief supervisory authority over banks in Japan under the Financial Supervisory Agency Establishment Law (*Kinyu Kantoku Cho Setchi Ho*), passed in the ordinary session of the Diet in June 1997. Although the FSA cooperates with the Ministry of Finance in its operations, the FSA is an independent entity with exclusive powers to supervise and monitor the financial sector.

The FSA commenced operations on June 22, 1998 and has

been carrying out its supervisory function by scrutinising company reports and conducting on-site bank inspections. The FSA commenced inspecting Japan's 19 major banks in late July 1998 and has since inspected Japan's regional banks and some foreign banks operating in Japan. A Financial Inspection Manual was published by the FSA in April 1999 to improve the performance by its Inspection Department of its investigative and supervisory functions and ensure that they are performed fairly.

The results of investigations of financial institutions are readily accessible to the public, including through FSA press releases which are available on its internet web site.

3.2 FRC

The FRC was established under the Financial Reconstruction Commission Establishment Law (*Kinyu Saisei Iiankai Setchi Ho*), passed in October 1998. The FRC is a temporary commission with the purpose of reconstructing Japan's financial system by 2001. Some of the Ministry of Finance's powers were transferred to the FRC including licensing of domestic and foreign banks, the suspension of banking business and the termination of banking licenses. In practice, since the FRC has limited resources compared to the FSA (having only 5 members as at August 1999), the FRC delegates its actual operations to the FSA or others, except in relation to licensing, termination of licenses and approvals concerning bank holding companies.

4. Stabilisation of the Financial System

The Government's efforts in the area of stabilising the financial situation of the banks including bad debts have included improving disclosure standards, the institution of early correction measures, the introduction of systems for Government assistance and investment in financial institutions and the enhancement of the functions of the Deposit Insurance Corporation.

4.1 Disclosure

One of the factors which was perceived to have contributed to banks' massive bad debt problems was the lax reporting and disclosure standards which allowed them to carry forward undisclosed bad debts for many years.

The public became sceptical of the amounts of bad debts disclosed by the banks since, in relation to the bankrupt banks, the actual amounts of their bad debts had always exceeded the amounts disclosed by the banks before their bankruptcies. The self assessment standards of the banks appeared ineffective in this light.

The Ministry of Finance and the FSA accordingly urged the banks to adopt stricter disclosure standards similar to those required by the U. S. Securities and Exchange Commission (through self assessment). In March 1999, the FSA published a figure for total bad debts of all banks of 35 trillion yen on July 17, 1998, which was far greater than the 25 trillion yen which had been calculated under the previous accounting standard.

4.2 Early Correction Measures

In April 1998, the Early Correction Measure (*souki zesei sochi*) came into effect, pursuant to amendments to the Banking Law enacted in June 1996. Under this measure, if a bank is not able to meet the standards of the required capital adequacy ratio, the FSA may take certain remedial action, including requiring the bank to formulate and implement a reform plan, requiring the bank to reduce its assets or take other specific action to improve its capital adequacy ratio or suspend all or part of its business.

4.3 DIC

The DIC was established in July 1971 pursuant to the Deposit Insurance Law with the purpose of protecting depositors. The DIC is funded by the Bank of Japan, the Government, private sector financial institutions and Labour Credit Associations.

The DIC guarantees principal amounts deposited with any financial institution, as defined in the Deposit Insurance Law, which pays insurance premiums to the DIC. The reimbursement of lost deposits was limited to 10 million yen for each deposit, however, following the enactment of the Financial Reconstruction Law (*Kinyu Saisei Ho*) effective from October 1998, all principal amounts are guaranteed at least until 31 March 2001. A current draft bill, which is currently under consideration by the Diet, contemplates that this so-called "freeze" period will be extended to March 31, 2002.

As discussed above, in circumstances where a financial institution was willing to take over the assets and liabilities of

another financial institution, which was insolvent or in danger of becoming insolvent, the DIC also made funds available to the rescuer to facilitate a merger. However, the public was becoming concerned at the escalating amounts of funding granted and the lack of any clear criteria employed for the making of the grants.

Under the Financial Reconstruction Law, this process is now under the supervision of the FRC so that the FRC's approval must be sought before a bankrupt financial institution and a non-bankrupt financial institution enter into transactions pursuant to which (1) the bankrupt and non-bankrupt financial institutions would be merged, (2) the business of a bankrupt financial institution would be transferred to the non-bankrupt financial institution, or (3) the non-bankrupt financial institution would acquire share capital of the bankrupt financial institution.

The FRC may approve such a transaction if:

*The transaction contributes to the protection of the depositors;

*The financial support of the DIC is essential for the transaction; and

*If the transaction were not realised, it is possible that there would be a material obstacle to the supply of funds and the convenience of clients in the area or market in which the bankrupt financial institution conducts its business.

If the FRC approves the transaction, the non-bankrupt financial institution may apply to the DIC to donate funds, make a loan or deposit, guarantee the debt obligations under a borrowing to be made by the non-bankrupt financial institution or purchase the assets of the bankrupt or non-bankrupt financial institutions, up to the amount that the DIC would have to pay to depositors if such transactions were not realised. Until March 31, 2000, DIC may contribute more than this amount with the approval of FRC and the Ministry of Finance.

4.4 Government Investment

In February 1998, in order to stabilise the Japanese financial system, the Diet passed laws authorising the Japanese Government to inject capital into financial institutions which applied for Government funds and which satisfied certain criteria. The Government has in fact injected over 1.8 trillion yen into Japanese banks to stabilise their capital. These laws were repealed and substituted from October 23, 1998 by the Early Financial Soundness Law (*Soki Kenzenka Kinkyu Sochi Ho*) and the Financial Reconstruction Law.

Under the Early Financial Soundness Law, financial institutions are required to undertake self-assessment of their loans and assets in accordance with FRC guidelines and make necessary provisions or reserves accordingly. The FRC then classifies the financial institution depending on its capital adequacy ratios, and this classification is taken into account in deciding whether and on what conditions the financial institution will be entitled to an injection of public funds. Financial institutions may apply for this funding until March 31, 2001.

4.5 Appointment of an Administrator/Bridge Banks

As under the Early Soundness Law, the Financial Reconstruction Law, requires that financial institutions self-assess their loans and assets. On the basis of that assessment, until March 31, 2001, if the financial institution is unable to repay its debts having regard to its assets, the financial institution could possibly suspend the repayment of the deposits or if any other event provided for in the Law has occurred, the FRC may order that a financial reorganisation administrator be appointed to manage the financial institution.

Upon taking over the management of the financial institution, the administrator must transfer the business of the financial institution to another entity or otherwise dispose of its assets within one year (which may be extended for up to one year) of the date on which the order was made. If no other entity can be found to take over the financial institution's business, the DIC may establish a bridge bank to assume the business temporarily until such an entity can be found or the financial institution is dissolved by shareholder resolution.

To date, the Kokumin Bank, The Kofuku Bank and The Tokyo Sowa Bank have all been placed under the management of an administrator.

4.6 Special Public Management/Nationalisation

In addition to the measures described in section 4.5, the Financial Reconstruction Law provides that the FRC may, by public notice, place a financial institution under special public management or nationalise it if the FRC determines that (1) the

financial institution is insolvent or may suspend or has suspended repayment of deposits, (2) the failure of the financial institution could seriously affect domestic or foreign markets, or economic activities in certain regions and sectors and (3) special government control is the only means to avoid these effects.

The public notice results in the DIC acquiring all of the shares issued by and outstanding of the relevant financial institution. In this case, DIC:

*Must, in consideration of the acquisition of the shares, pay such amount, as determined by the share price calculation committee, to the shareholders of the relevant financial institution as at the date on which the public notice was made;

*May make a loan to, or indemnify business losses incurred by, the relevant financial institution;

*May provide the relevant financial institution with certain financial support under the Deposit Insurance Law necessary to conduct its business;

*Must conclude the special public management or privatise the relevant financial institution by a date not later than 31 March 2001 by transferring to another entity the business of, or disposing of the shares of, the relevant financial institution or by taking any other measure.

The first bank to be placed under special public management was the Long Term Credit Bank (Nippon Choki Shinyo Ginko) ("LTCB") on October 18, 1998. The LTCB, which had been labouring under massive bad debts was widely suspected to be insolvent, was the subject of much political debate at the time

of enactment of the Financial Reconstruction Law. The ruling Liberal Democratic Party's initial proposal was to inject public funds into the LTCB or the merged entity if the merger between LTCB and Sumitomo Trust & Banking Co (announced in June 1998) went ahead. However, the opposition argued against this proposal as lacking transparency and credibility, especially since the basis for the decision to grant funding was unclear, as was information surrounding the true financial position of the LTCB. Ultimately, a compromise was reached whereby the LTCB was placed under special public management. The LTCB has now been purchased by the US investment group, Ripplewood Holdings LLC.

The Nippon Credit Bank (Nippon Saiken Shinyo Ginko) was also placed under special public management in December 1999.

5. Deregulatory Measures

5.1 Expansion of Banking Business

In order to keep pace with the trend of diversification of financial products, the range of businesses in which banks may engage under the Banking Law has been expanded, by amendments effective as of December 1, 1998, to include new activities such as "financial etc derivative transactions" and "over the counter securities derivatives transactions".

Prior to the amendment, there was no provision that allowed banks to engage in derivatives transactions relating to interest rates, exchange rates or commodities prices or over the counter securities derivatives transactions. Further, some were strongly

of the opinion that such derivatives transactions fell under the category of gambling prohibited by the Criminal Code (*Kei Ho*).

In light of these circumstances and to remove any suspicion that derivatives trading conflicts with the Banking Law or the Criminal Code, the financial etc derivatives transactions and over the counter securities derivatives transactions have been added to the businesses in which banks may engage. In the case of over the counter securities transactions, FRC approval is also required before a bank may commence such business.

The definition of financial etc derivatives transactions under the Banking Law has been drafted to readily accommodate the expansion of the range of derivatives transactions. New kinds of derivatives transactions may be included in the definition by the flexible method of amending the Ministerial Ordinance (which is not required to be passed by the Diet).

As of September 30, 1999, financial etc derivatives transactions includes forward interest rate transactions, forward exchange rate transactions, over the counter financial futures transactions, commodities derivatives transactions and credit derivatives transactions.

Under amendments to the Securities and Exchange Law (*Shoken Torihiki Ho*), banks may also now engage in the business of sales of investment trusts, upon registering with the FRC. In the near future, banks will be able to sell insurance in their own right.

5.2 Alliances and Bank Holding Companies

As part of the Japanese Big Bang deregulatory measures, in

June 1997, the Law Relating to the Prohibition of Private Monopoly and Preservation of Fair Trade (*Dokusen Kinshi Ho*) was amended to permit holding companies, except where it would constitute an excessive concentration of economic power. Further legislation enabling financial holding companies came into effect in March 1998.

It was anticipated that holding companies would increase efficiency amongst financial groups, allowing them to benefit from synergies of alliances and mergers without the inconvenience of having to negotiate with companies outside the group.

In August 1999, Industrial Bank of Japan (Nippon Kogyo Ginko), Fuji Bank and Dai-Ichi Kangyo Bank announced that they would jointly be establishing a holding company. It is expected that the alliance will operate under the name "the Mizuho financial group".

The same sort of agreement between Tokai Bank and Asahi Bank was announced soon afterwards on October 7, 1999. Sumitomo Bank and Sakura Bank announced their plans to merge on October 14, 1999.

Despite these announcements, the benefits of these alliances and the way in which the new provisions in relation to financial holding companies operate are yet to be seen in practice, as none of the parties involved have yet reached the implementation stage. It has also been argued that tax reforms are also necessary to encourage more companies to consider restructuring their operations by using holding companies.

6. Conclusion

In January 2000, a meeting of the finance ministers and central bank governors from the Group of 7 industrialised nations was held in Tokyo-the first time such a meeting has been hosted by Japan. The statement issued at the conclusion of the meeting noted that Japan's economy had shown "encouraging signs of recovery, although a sustained recovery remains to be established". However, it went on to state that "measures to further strengthen the financial system and structural reforms will continue to be important". This indicates an expectation in the international community that reform to the financial system is by no means complete.

Indeed, the legislative reforms to date under the Japanese Big Bang are just the start of continual reforms which are necessary to enable Japan's financial system to be internationally competitive. As some of the reforms were only ever intended to be temporary measures, the Government is already considering whether to extend those measures or what measures need to be in place following their expiry.

The development of the Japanese financial sector should therefore continue to attract keen interest for years to come.

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Chapter 5
The Government and the Law

George R. Harada

1. Political Life and the Law

EDITORIAL: Low voter turnout

Fifty-five of every 100 voters stayed away from polling stations in the House of Councillors election, which marked the lowest turnout to date of 44.52 percent, for the first time dropping below the 50 percent level.

The ratio of the votes obtained by a candidate to all eligible voters serves as a useful yardstick. Hideo Den was elected with the smallest support ratio of 4.63 percent in the four-seat Tokyo district. In single-seat districts, Kohei Tamura of Kochi marked the minimum 14.11 percent. In other words, Den was chosen by only one out of every 21 voters, and Tamura by one out of every seven.

This reminds us of late Premier Kakuei Tanaka's favorite saying, "To control national politics, you only have to dominate a faction representing a majority of the Liberal-Democratic party, which accounts for one-quarter of the seats of the House of Representatives." Applied to an election, this means that the lower the turnout, the more possible it becomes to control national government with organized votes representing even far less than a quarter of the nation's voters.

In the latest election, whereas nonpartisan voters turned their

backs on polling stations, the chapters of the former Komeito went into full swing to mobilize the support of Sokka Gakkai members, their mammoth Buddhist parent organization. Their efforts played a decisive role in Shinshinto's respectable victory.

Politics is a power struggle, and it is logical that a contestant who best organizes grass-roots support wins. While we do not take exception to this axiom, an outcome specifically brought about by a poor turnout is not easy to swallow. Who can boast that the present result fully reflects the people's will? To be more precise, the latest election has been unusually swayed by a particular organization.

Is voting a right or a duty?.....

.....

Voters are urged to remember once again that under representative democracy, they cannot have their will translated into action without going through political parties. It is always true that those who disdain politics only get politics to be disdained. . . . .

Taken from Mainichi Daily News
July 27, 1995, p. 3

1.1 The Constitution and Political Participation

Japan is a representative democracy. The first paragraph of the Preamble of the Constitution of Japan states:

> We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that..... Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.....

In this manner, the people do not participate directly in the decisions of the national will, but as in many western nations

elect representatives to decide for them (excluding two exceptions which will be explained hereafter). Article 15 of the Constitution provides for the basic framework of this representative democracy:

> The people have the inalienable right to choose their public officials and to dismiss them.
>
> All public officials are servants of the whole community and not of any group thereof.
>
> Universal adult suffrage is guaranteed with regard to the election of public officials.
>
> In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Article 15, paragraph 1, guarantees the right of the people to indirectly participate in the decision and formation of the national will. The Constitution does, although in limited instances, provide a right to the people to directly choose or dismiss public officials. For example, Article 43 provides for the election of members of both Houses of the Diet; Article 93 provides for the election of heads of all local public entities, members of their assemblies, and other such local officials that are determined by law; and, Article 79 provides for the right of the people to recall Supreme Court Justices. Other public officials such as judges, and other civil servants serving in the executive branch are appointed and dismissed by the respective competent authorities in accordance with the procedures determined by the law.

The Constitution provides for two exceptions to the representative democracy principle. One is the right to referendum vote

on amendments to the Constitution. Article 96, paragraph 1, states that two thirds of all the members of each House must agree in amending the Constitution as well as an approval by the majority of all of the people voting at a special referendum or at the time of an election specified by the Diet. The other exception involves a right to referendum on the enactment of a special law applied only to one particular local public entity. Article 95 states that a special law that is applicable to only one local public entity cannot be enacted by the Diet without the approval of the majority of the voters of the local public entity concerned. Thus, although the Diet is the highest organ of the State power and the sole law-making organ of the State (Article 41), it cannot enact a law applicable only to one particular local public entity without the consent of its inhabitants.

Within the framework of the representative democracy in Japan, all Japanese nationals who have reached the age of 20 (Public Offices Election Law (*Koshoku Senkyo Ho*), article 9) are guaranteed a secret ballot, an equal right to vote irrespective of their race, creed, sex, social status, family origin, education, property, or income (Article 44, proviso).

Also, in respect to equality, article 36 of the Public Offices Election Law states that "One person shall have only one vote per election." In reality, however, disparity in the value of a vote between cities and rural areas has been a serious constitutional issue since the 1960s. For example, in a landmark case decided in April 1976, the Supreme Court declared that Schedule 1 of the Public Offices Election Law was in violation of Articles 14, 15, and 44 of the Constitution at the time of the 1972

House of Representatives (*shugiin*, Lower House) election. The maximum relative difference between electoral districts in the ratio of the voting population per representative was approximately 1 to 5. In this case, the Court asserted that the Constitution stated that matters concerning elections were to be determined by the law, and that "the concrete decisions concerning the mechanism of an electoral system are, in principle, determined by the discretion of the Diet." On the value of a vote, the Court asserted that "since the value of a vote is closely related to the mechanisms of the electoral system, depending on the electoral system established, differences in the influences of a vote will arise." Therefore, "the equality of the value of a vote cannot be determined by numbers alone." No concrete numerical standard was mentioned. Although the Court did declare the 1 to 5 disparity unconstitutional, it did not invalidate the election. This decision was based on the general principle of law implied in article 31 of the Administrative Case Litigation Law (*Gyosei Jiken Sosho Ho*) which authorized the Court to preserve defective administrative acts rather than annul them if it found that great harm to the public interest would result if the acts were invalidated (Supreme Court Decision, 30 Minshu 223 (1976)).

Malapportionment cases decided by the Court thereafter were also not clear as to the numerical standard to be used to determine the constitutionality of the disparity. For the House of Representatives elections, in 1988, the Court declared constitutional a disparity of 1 to 2.92. In 1993, however, the Court declared unconstitutional an disparity of 1 to 3.18. On the

other hand, the standard seemed to be somewhat different for the House of Councillors (*sangiin*, Upper House). In 1988, the Court declared constitutional a disparity of 1 to 5.85, but declared unconstitutional an disparity of 1 to 6.59 in 1996. From these decisions, scholars have assumed that for the House of Representatives the the maximum relative difference between electoral districts in the ratio of the voting population per representative cannot exceed three, and for House of Councillors cannot exceed six. However, scholars continue to question the basis for a persuasive ethical explanation for these numbers.

According to Article 15, paragraph 2, the representatives elected to office are to serve the "whole community" and not of any specific group, however, in reality since representatives for both Upper and Lower House need to be elected from a "specific" electoral region or district it becomes necessary for them to be parochially-oriented, listening to and answering questions of their local constituents. Furthermore, in the electoral system prior to 1994, since more than one candidate from the same party was able to run for the same office, each candidate would have the task of forming a strong personal campaign since party support could not be monopolized. To ensure the grass-roots support of each's campaign, candidates formed or inherited personal support groups referred to as "koenkai." These *koenkais* were formed for the candidate and not the party. They helped maintain personal and formal association with not only family and friends, but with local business associates, interest groups as well as with others that would be likely to support his/her campaign.

It has been said that the high costs in maintaining these *koenkais* have been one of the reasons for the many corruption scandals. Candidates would use dubious legal methods to raise the necessary funds to win an election. The result was an electorate voting for a candidate who was "parochially-oriented" with a "personality" that could be trusted by the local constituents, policy came second.

The major arguments for implementing a mixed system of single-member constituency seats and seats elected by proportional representation in 1994 were to root out corruption, to correct malapportionment of votes, and to move from a system of personality voting to one where competition over policy really mattered.

The voter apathy issue mentioned in the editorial at the beginning of this chapter is concerned with the low voter turnout because the system that was changed and implemented to accommodate the people's previous concerns is not being fully utilized for it to work. If the people do not express their opinions through voting, their disdain for the system will never be heard. The electoral system itself may not have been the only problem. To be sure, disappointment with party politics, money politics and the endless reports of bureaucratic corruption may have promoted the disinterest in politics overall. We will examine these issues in the following sections.

1.2 Party Politics

On June 18, 1993, the Miyazawa Government was dissolved by a no-confidence motion submitted in the House of

Representatives by a combined opposition of all non-Communist parties. Internal conflict between various factions within the Liberal Democratic Party (LDP) resulted in a serious split which resulted in two groups of LDP members to form new independent parties. The first party named itself the *Shinto Sakigake* (New Harbinger Party). It comprised of 10 former LDP members and was lead by Takemura Masayoshi. The second party called the *Shinseito* (Renewal Party) was formed consisting of 44 former LDP members and was lead by Hata Tsutomu and Ozawa Ichiro. Shortly thereafter, on July 18, 1993, a general election for the House of Representatives was held. The LDP found itself well short of a majority for the first time since its foundation in 1955. Some argue that an important factor behind the collapse of LDP rule may have been due to the complacency of the Miyazawa Government. There appears to have been an assumption that the LDP would still be able to pursuade defectors to enter a coalition government.

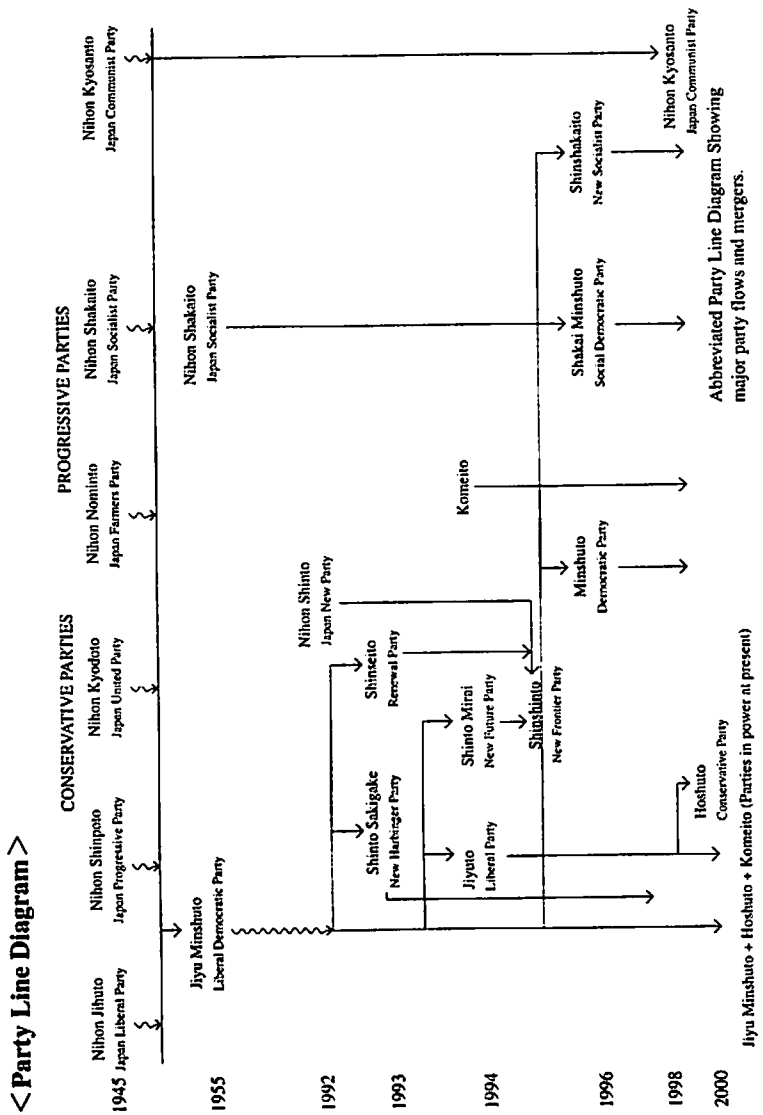
On August 9, 1993, however, the non-Communist parties opposing the LDP formed a new eight-party coalition government. This brought an end to the nearly 38 years of uninterrupted LDP rule (known to the Japanese as the "1955 political regime"). Hosokawa Morihiro became the new Prime Minister. He, along with the other members of his *Nihon Shinto* (Japan New Party) had been elected to the House of Representatives only the previous month. Although brief in duration (263 days), Hosokawa's coalition government not only broke up the "1955 political regime," but also provided an opportunity for subsequent coalition governments to consider reforming the overall

system.

Ever since the 1993 elections, however, party politics has become a somewhat confusing matter. The formation of a number of new parties, continuous party realignments and six prime ministers (Hosokawa (*Nihon Shinto*), Hata (*Shinseito*), Murayama (Japan Socialist Party), Hashimoto (LDP), Obuchi (LDP), and Mori (LDP)) during the following six-and-a-half years has ended up with the LDP in power again with the help of a coalition government (see Party Line Diagram). The government is still working toward a reform that will bring "new politics" into the forefront geared to people-centered policies.

Within the various party realignments, one in particular needs to be mentioned for its "unexpected" alliance. On June 29, 1994 a new government was announced replacing the non-LDP coalition. The result was an alliance between the LDP, the Japan Socialist Party (JSP) and *Shinto Sakigake*. Although the LDP was clearly the largest party in the new coalition, the JSP Chairman, Murayama Tomiichi, became Prime Minister and the the *Shinto Sakigake* leader, Takemura Masayoshi became the Minister of Finance.

The arrangement caused astonishment for a number of reasons. First of all, Japan found itself with a Socialist Prime Minister for the first time since 1948. Much more surprising was the very fact that the LDP and JSP, sworn political enemies for so many years and apparently far apart in their political ideologies, were now prepared to run a government together.



From the standpoint of the LDP, the rationale for the LDP/JSP/*Shinto Sakigake* coalition was not as "unexpected" as many would have thought. For the LDP, opposition was not where they wanted to be, and deprevation of office had been an extraordinary shock. The party's appeal during its 38 years of rule had rested to a considerable extent in convincing the electorate that it was more advantageous to support the ruling party that could deliver material benefits instead of supporting opposition parties which were only capable of delivering empty rhetoric. Thus, being out of office for a significant period would risk losing potential supporters at the polls.

For the LDP, the JSP may have seemed an unlikely coalition partner, but together with the *Shinto Sakigake* it had sufficient members for a comfortable majority in both houses. And, although important differences of policy and ideology between the LDP and JSP remained, it was less acute since the end of the Cold War. Upon reflection, this LDP strategy to align itself with the JSP was ultimately quite advantageous for the LDP in regaining control. The LDP strategists, who at the time believed that to persuade the JSP to join a coalition with it would ultimately constitute the "kiss of death for the JSP," were quite right in their conceptions. The tempation for the Prime Ministership, together with other more or less significant cabinet and party positions was too great for the JSP to turn down.

As a result, long-standing JSP policies were revised in the JSP Congress meeting in September 1994. Prime Minister Murayama announced that the JSP would no longer consider

the Self Defense Forces to be unconstitutional, and that the party would cease to oppose the Japan-US Mutual Security Treaty. Furthermore, the party would no longer campaign against the compulsory raising of the "rising sun" flag and the singing of the national anthem in schools. The consequences of this policy switch resulted in a split within the party in January 1995. (For more details, see Stockwin, Chapter 6)

Government control before Prime Minister Obuchi's hospitalization was led by a coalition formed by the LDP, *Jiyuto*, and *Komeito* (referred to as *Jijiko* coalition). This coalition had such a strong majority in both houses that the opposition parties such as the *Minshuto* (Democratic Party) and the Social Democratic Party (*Shakai Minshuto*, previously the JSP) had very little influence and means in vetoing laws and proposals presented by the *Jijiko* coalition. However, on April 1, 2000, Prime Minister Obuchi announced that it was no longer possible to continue the *Jijiko* coalition due to policy clashes with the *Jiyuto*. 24 members of the *Jiyuto* eventually decided to stay with the coalition by forming their own new party called the *Hoshuto* (Conservative Party). Furthermore, on the day following his announcement of the discontinuation of the coalition, Prime Minister Obuchi collapse from a stroke and was hospitalized. Immediately thereafter, a new Cabinet was formed with yet another new Prime Minister, Yoshiro Mori. Needless to say, further realignment of parties is likely to occur in the near future.

2. Money Politics and Bureaucratic Corruption

EDITORIAL: Money politics springing back to life

Is money politics an inescapable part of Japanese public life? Is this country condemned to confirm the suspicion that its politics is particularly prone to corruption? As Asia's most consequential democracy, the hope must be that the Japanese nation is modern enough to start weaning itself away from the corrupting practices that have defined party politics in this country almost since the time of the creation of Asia's first parliament over a century ago.

Confidence in the good sense, moral fiber and maturity of Japan's political and business establishment appear to be ill-founded. Once again, after all the sound and fury of the past two years, political parties seem to be busy trying to amass funds while corporations and some of their associations are digging deep into their pockets to contribute what are no doubt substantial sums, especially to the nation's two largest political parties, the Liberal Democratic Party and the Shinshinto (New Frontier Party).

This is a bitter betrayal of the hopes for genuine reform that have recently flowered. Suggestions that corporate Japan is slipping back into its bad old habits provoke renewed suspicions about the level of our political maturity. The most dispiriting aspect of the apparent revival of money politics is the fact that politicians, businessmen and civil servants seem to have learned nothing from the failings of the long rule of the LDP from 1955 to 1993. During that period, the so-called "iron triangle" developed with politicians to pressure the bureaucracy into bending official

rules on contracts and other government business.

.....

A dreary parade of scandals since 1945 has repeatedly brought to light the evidence of a high degree of corruption within Japan's ruling elite. For example, former LDP Deputy President Shin Kanemaru resigned in disgrace in 1993, and an LDP politician and several local government chiefs were arrested for their involvement in the nefarious zenekon scandal in the construction industry in the same year. Before that, the then Prime Minister Kakuei Tanaka was forced to resign from his post in 1974 over his money politics. His involvement in the Lockheed scandal led to his arrest in 1976.....

Taken from The Japan Times
January 21, 1995, p. 18

Corruption is a problem in any society, particularly in terms of the relationships between public officials and participants in the private sector. While some argue that certain kinds of "corruption" oil the wheels of administration in governing the country, it clearly does create problems of misallocation of resources. In some instances, corruption may result in an inequitable treatment of different people or organizations, and most likely result in a popular alienation from politics and government; such may have been one explanation for the voter apathy mentioned in the editorial at the beginning of this chapter.

As previously mentioned, the structure of the Japanese election system prior to 1994 was such that money politics was constantly an issue with the electorate. *Koenkais*, personal favors and factionalism in the LDP are usually the given causes for money politics. However, there is another important reason

that may have assisted in nurturing these causes; that is, the legalization of large political contributions by corporations. In 1960, a stockholder for *Yahata Seitetsu* (Yahata Steel Corporation, presently, *Shin Nihon Seitetsu* (New Japan Steel Corporation)) brought suit against two members of the Board of Directors for making a political contribution of three million fifty thousand yen to the LDP. The plaintiff's claim was that political contributions were outside the business purposes prescribed in the company charter, therefore illegal. The Tokyo District Court held that business corporations were to be distinguished between profit-making and non-profit-making activities, and that the latter was contrary to the objectives of profit-making corporations. Therefore, board members may make charitable contributions as an exception to a profit-making activity only when they can expect to receive the consent of the stockholders. Furthermore, political contributions to a political party, irrespective of the amount could not be recognized as an exception to this rule. Upon appeal, the Tokyo High Court reversed the lower court's decision ruling that corporate activity within the scope of its charter was not limited to those designed for profit-making alone, but also included activities that could be considered useful to the society as a whole. Political contributions were not in violation to the company charter since they could be considered useful to society. The court held, however, that board members could be held liable for failure to execute their duties under a charter when their activites exceeded reasonable limits. Upon appeal, the Supreme Court dismissed the case, ruling that

A company, like a natural person, has a social position as a constituent entity in the nation, local public associations, the local community, and the like, and as such must undertake certain social functions. The company can therefore properly engage in acts, which at first glance may appear to have no relation to its charter purposes, so long as the acts are demanded or expected of the company by common conception, and so long as the company is responding to such expectations. . . .

Contributions of funds for disaster relief, offerings of property to the local community, and financial co-operation in welfare work are typical examples of such activities.

To bear suitable expenses for its community is regarded as proper behavior of a company as performing its social role, and the interpretation that these acts are done within the scope of the company's capacity to assume rights does not infringe upon shareholders' interests, since such conduct of the company may well be anticipated by shareholders and other members of the company.

This principle applies similarly to companies' contributions to political parties. . . . . .

(Supreme Court Decision, Grand Bench, 24 Minshu 625 (1970), English translation can be found in, Beer & Itoh, pp. 406-421.)

In this manner, the Supreme Court confirmed the legality of political contributions by corporations. The appellant argued that political contributions by companies infringed upon the political participation rights of the people. The Court denied this argument by stating that political contributions to political parties did not directly affect the exercise of political participation including the right to vote. If occasionally, some political contributions were used to buy votes, this was a "social illness" and strict measures were provided to forbid such illegal acts.

Through the 38 year rule of government by the LDP, we know now that political contributions by corporations developed into a system to support, in many cases, particular faction leaders and/or individual politicians in exchange for "personal favors." *Koenkais* and other political organizations helped funnel the money to individual politicians for their election campaign and "other" dubious purposes. The reforms proposed in 1994 were implemented to alter the election system to eliminate this type of money politics. More on the reforms will be explained in the following sections.

2.1 Corruption arising from Amakudari

An issue that consistently arises when one refers to "corruption" in Japan is the element of "amakudari" (literally, "descent from heaven") which refers to a career movement of an elite bureaucrat from a ministry or agency to a private or public organization either before or after retirement. The discussion here will be limited to *amakudari* and the private sector. Professors Usui and Colignon note three perspectives on the nature of *amakudari*. The first perspective contends that *amakudari* developed out of a need to "insulate and regulate" the system during Japan's rapid industrialization period. According to this perspective, as Japan loosens its trade barriers and deregulates domestic markets, the need for the *amakudari* element will become less important. However, this perspective does not explain the continuing existence of *amakudari* in the system after the period of rapid industrialization.

A second perspective contends that *amakudari* became in-

stitutionalized as an integral part of the mechanism to maintain success in each ministry's specialty area. The assurance of "high paying and sometimes prestigious" post-retirement careers for elite bureaucrats has significantly assisted in the recruitment of the "best and the brightest" personnel. As global uncertainty increases, the ministries ability to maintain success relies on the *amakudari* element.

A third perspective contends that *amakudari* is an important mechanism that shows the degree of bureaucratic control and power over the private sector. Those businesses that are more receptive to *amakudari* placements are said to be businesses that listen and respond more readily to administrative guidance measures. In turn, these businesses are favored with easy access to capital, tax breaks, various government approvals. Thus, the actual numbers of *amakudari* placements in the private sector suggest the degree of government control over the economy. (For more details on *amakudari*, see Usui & Colignon.)

Each of the perspectives alone is insufficient in answering the many questions concerning corruption arising from *amakudari*. As many have noted, *amakudari* is a very complex relationship within a multiplex network society that cannot be ignored when studying the politics of Japan. The following concrete examples will exemplify the reasons for concern with this particular structural element.

2.1.1 Defense Agency Scandal

In 1997, four defense equipment manufacturers were discovered to have overcharged the government for defense equip-

ment. The Defense Agency attributed the discrepancies to "a series of simple miscalculations" by the former vice head of the Agency's Central Procurement Office. However, the subsequent arrest of the former head of the Central Procurement Office suggested that the vice-head was not acting alone. Furthermore, later the following year in 1998, the Tokyo District Public Prosecutor's Office placed four more suspects under arrest, including a former executive of NEC. At the time of arrest, investigators believed that NEC officials used their contacts in the Defense Agency to secure a reduction in the amount that their subsidiary, Toyo Communications Equipment, was supposed to refund to the government for overbilling. Many consider the practice of *amakudari* to be at the base of this incident. It was later disclosed that the head of the Agency's Central Procurement Office pressured Toyo Communications Equipment to hire former Defense Agency officials in exchange for a reduction in the amount that the company was to refund the government. The Self-Defense Forces (SDF) Law stipulates that in the first two years of retirement, Defense Agency officials and SDF personnel may not seek employment in businesses which they closely worked with in the final five years of their government service. A loophole, however, allows many former officials to be hired as "consultants."

In February 2000, the Asahi Evening News reported that even after the "overcharging scandal" the number of senior Defense Agency and SDF officials hired by the nation's 50 leading defense equipment manufacturers had not significantly decreased, and that the *amakudari* connection was well and

healthy. "In fiscal 1998, the Central Procurement Office made procurement contracts worth 1.24 trillion yen.... The six companies that accepted the highest number of ex-defense officials topped the list of companies winning procurement contracts.... Although about 800 companies have contracts with the Central Procurement Office, the six companies accounted for 54 percent of the total procurement contracts in fisal 1998 (see, Asahi Evening News, February 21, 2000)."

2.1.2 Okamitsu Scandal

Nobuhara Okamitsu, former Administrative Vice-minister of the Ministry of Health and Welfare was arrested in December 1996 in connection with apparent favoritism in awarding subsidies for construction of nursing homes for elderly people in return for cash and other bribes. This incident occurred during a period when the government was planning to build nursing homes to house 290,000 elderly people by the fiscal year 1999. It is estimated that by the year 2006, twenty percent (and in the year 2025, twenty-five percent) of the population will be over 65 years of age. To prepare for this "super-aging" society, and in order to actualize a plan to support nursing home construction, seventy-five percent of the cost of construction is underwritten by central and prefectural governments. Many municipalities also subsidize nursing homes. Such financial support is helping to build facilities for elderly people to prepare for the future.

This incident involved Hiroshi Koyama, chairman of the Aya Fukushi Group, a corporation that built and operated nursing homes. Chairman Koyama had built several such nursing

homes in Saitama prefecture and had received large sums in subsidies from both the Ministry and prefecture. He was suspected of bribing a number of ministry officials in order to receive subsidies from the government to pay off his debts. On June 24, 1998, the Tokyo District Court sentenced Nobuhara Okamitsu to two years in prison for receiving 65.7 million yen in cash and other bribes from Chairman Koyama. This was the first time an elite bureaucrat had received a prison term without suspension. Chairman Koyama received an 18 month prison sentence without suspension. The court also gave an 18 month sentence, suspended for four years, to Shigeharu Chatani, former deputy section chief of the Ministry of Health and Welfare who was detached to the Saitama prefecture welfare office which dealt with programs for the elderly and in charge of allocating subsidies.

Many believe that the reason behind their actions, as in the previous example, can be explained by the practice of *amakudari*, that elite bureaucrats and businessmen continue to collude because these bureaucrats continue to seek positions in organizations controlled by the industries they supervise.

A similar situation occurred with the Ministry of Finance. In a probe to investigate the "wining and dining" of Ministry of Finance officials, the Tokyo District Public Prosecutors Office found out that the Daiichi Kangyo Bank was given one month's notice that an inspection would be carried out in October 1994. However, the Ministry of Finance was supposed to inspect banks without prior notification, but many banks wined and dined ministry inspectors in order to obtain tip-offs about

branches that were to be inspected and the dates of the inspections. The Budget Bureau in the Ministry of Finance has the authority to make tax inspections, and to license, oversee and inspect financial institutions. And, since many of the past administrative vice-ministers have been former directors of the Budget Bureau, banks would be in a very good strategic position in terms of connection to the Ministry if they maintained "close" relations with or even hired officials who cooperated with them.

3. The Political and Administrative Reforms

3.1 Political Reforms

On January 29, 1994, the last day of an extended session, the two Houses of the Japanese Diet met together and approved a long awaited political reform legislation. The legislation changed the Japanese electoral system for the House of Representatives, established stronger restrictions on political fundraising, and introduced a government subsidizing system for political parties to assist in alleviating the high costs for elections. The major arguments for the reforms, as previously mentioned, was to eliminate corruption, to correct malapportionments of votes, and to move from a system of personality voting to one that would be policy-oriented.

3.1.1 Electoral Reform

The electoral system for the House of Representatives before 1994 was a multi-member constituency system in which each

elector had a single nontransferable vote (*chusenkyokusei*). Before the change in 1994, there were 129 constituencies and 511 seats. The structure of the election system forced candidates to form their own grass-roots campaign organizations resulting in high maintanence costs and a strategy aimed at attaining as many votes through networks of friends and other supporters. The party platform and policy preferences came second. This was necessary to compete against the other candidates since each elector had only one vote and there were in many cases several candidates from the same party running for the several offices of that particular district or constituency.

This system was replaced in 1994 by a system formed with 500 constituencies of which 300 seats were single-seat local constituencies and 200 seats were of proportional representation. The proportional representation seats were divided into 11 regional constituencies and used binding name lists submitted by each party. The candidates running for proportional representation seats have to be grouped in these party lists, therefore, the elector votes for a party and does not directly vote for a named candidate. In this new system, the elector has two votes, one for the local constituency and one for the regional proportional representation constituency. One problem with this new system that was pointed out from the start concerned a controversial provision that allowed candidates to run for both constituencies, and take a seat if elected in the one, even if defeated in the other.

To offset malapportionment of districts, the new system established a separate organization in charge of apportionment lo-

cated in the Office of the Prime Minister (*Sorifu*). It was hoped that malapportionment could be controlled under the new system, however, even after a major adjustment of seats for the first election in 1996, the disparity in vote value was already over two.

Also, the new system established certain poster restrictions during the election campaign period. In the House of Representatives elections, posters that included the name of the candidate or his/her *koenkai* could not be used from six months before the end of one's term to the end of the general election or immediately after a dissolution of the Diet to the end of the general election. In the House of Councillors elections, and elections for local assemblies and heads of local governments, posters could not be used six months before the end of one's term to the end of the general election. In local elections that involved cases other than the end of one's term, posters could not be used from the day after the election is declared to the conclusion of it. Also, the actual campaign period was shorten from 14 to 12 days for Diet members in the Lower House that decide to run for reelection (Public Offices Election Law, article 129).

Furthermore, stronger punishment (especially higher fines) for those violating the Public Offices Election Law were established. Wording in the Public Offices Election Law was amended to establish "complicity (*renzasei*)" for violations of the election law (articles 210, 211). Now, if the candidate's secretarial staff, parents, family, or brothers and sisters are arrested for bribery and convicted (including suspended sen-

tences), the candidate's election would not only be invalidated, his/her voting rights and rights to run for public office "for that particular constituency" would be terminated for the following five years (articles 251.2, 251.3). Some argue that limiting the punishment to "that particular constituency" is much too lenient since it leaves a loophole in the system enabling the violator to run for office in another constituency or separate position. For example, in 1996 the governor of Wakayama prefecture was convicted of violating the election laws through complicity and was barred from running for governor in the same constituency until 2001. However, during this period, the violator ran for mayor of Wakayama City and won.

3.1.2 Restrictions on Fundraising

The original reform bill that was proposed by the Hosokawa government to the Diet forbid all political funding from companies and other organizations to political parties. After an intense debate on the bill, the non-LDP coalition was forced to compromise with the LDP. The result was the passage of the Political Funding Restrictions Law (*Seiji Shikin Kisei Ho*). This law, unlike the original bill, did not forbid political funding from companies and other organizations, but merely limited contributions for political activities for a five year period. At the end of this five year period, the law was to forbid all political contributions of companies and other organizations (Political Funding Restrictions Law, supplementary provision, article 9). In addition to this, the overall law was to be reviewed and revised if necessary after examining the conditions of individual political contributions and the financial status of political parties (sup-

plementary provisions, article 10).

Previously, political funding of unlimited amounts had flowed into the hands of politicians through a variety of funding organizations established by them. To promote transparency and fairness, contributions from companies, unions, and other organizations could now only be given to a single designated political funding organization (*seiji shikin dantai*) representing a party (article 6.2) or a financial control body (*shikin kanri dantai*) in charge of financial matters for the individual politician (article 19). Individual politicians could now only receive contributions from these desiginated political organizations (article 21, 21.2). Furthermore, the total amount of political contributions were also limited according to the capital held (registered) by each company, the numbers of members of each union, and the annual expenses of organizations other than companies and unions excluding political organizations (article 21.3). In all of these cases, the ceiling was limited to 30 million yen which in many cases was much less than what these organizations were contributing in the previous years. Also, companies that registered a deficit for three consecutive years were barred from giving political contributions (article 22.4). And, any individual member participating in a fundraising party was limited to one million fifty thousand yen in political contributions (article 22.8).

Political parties, political funding organizations and other political organizations were now also required to disclose the amounts of financial contributions received in excess of 50 thousand yen (article 12). The names of people or organizations purchasing fundraising party tickets in excess of 20 thousand yen were also required to be disclosed (article 12).

Section Six of the Political Funding Restrictions Law is devoted to enforcing the above-mentioned provisions. For example, political organizations (or leaders of them) that were not registered as such which accept political contributions could be convicted and receive up to five years in prison and/or up to one million yen in fines (article 23). Also, those political organizations (or leaders of them) that violated the disclosure provision could be convicted and receive the same strict punishment (article 25).

And, in the same manner as the election law, complicity was established so that if a the candidate or any of his close associates (secretarial staff, family, etc., . .) were convicted under the provisions set forth in Section Six, the candidate's voting rights and rights to run for public office in that particular constituency would be terminated for five years thereafter (article 28).

3.1.3 Government Subsidizing Program for Elections

In addition to the Political Funding Restrictions Law, public funding for political parties was implemented in 1994 by passage of the Political Party Public Funding Law (*Seito Josei Ho*), to help shift the emphasis from candidates to parties. The total amount of public funding to be allocated for elections for one year was to be 250 yen times the population at the time the standard was established (Political Party Public Funding Law, article 7). The actual amount of money that an eligible political party was to be allocated was dependant on the number of Diet members and the percentage of votes received by the party

(article 8). To be eligible for public funding, a political party must have either more than five Diet members from the Lower or Upper House, or must have received at least two percent of the total valid votes in the most recent House of Representatives general election, or single-member or proportional representation constituency elections (article 2). Furthermore, the political party must also be registered as having "corporate status (*hojinkaku*)" to receive public funding (see, Political Party Corporate Status Conformation Law (*Seito Hojinkaku Fuyo Ho*)).

Each recipient party also must report its financial status to the Minister of Home Affairs (*Jichi Daijin*) and disclose the same information to public scrutiny (article 31). The Minister of Home Affairs has the authority to terminate a partial or the total amount of public funding if specific provisions of the law are violated (article 43).

The public funding system is to be reviewed for necessary revision for changes in condition, in the same manner as the Political Funding Restrictions Law, five years after its implementation.

3.1.4 Follow-up Reforms on the Electoral System

There have been several amendments to the original reform legislation. Some of the important changes are as follows: 1) the voting time has been extended two hours to encourage more people to vote. As a result, voting increased 16.3% in the election following this amendment; 2) absentee voting for those aboard ships at sea is now permitted by facscimile (law passed in August 1999); 3) absentee voting for those residing abroad is now permitted for Lower House proportional representation

constituency elections; 4) the penalty for those convicted of bribery while in public office has been amended to include an additional 5 years of loss of the right to run for public office making the total penalty a 10 year restriction (law passed in August 1999); 5) posters made and used for public relations are now to be restricted, and are regarded as the same type of posters that are to be restricted during election campaign periods (law passed in August 1999); 6) the 500 constituencies have been reduced to 480 of which 300 seats still remain single-seat local constituencies, however, the original 200 seats designated as proportional representation have been reduced to 180 (to take effect as of February 9, 2000); 7) the Political Funding Restrictions Law was amended to prohibit political funding from all companies, labor unions, and other groups such as religious, cultural, and employee organizations, but not including political organizations (the solicitation and coercion of political funding was also prohibited) (to take effect as of January 1, 2000). Other amendments to the system that are being proposed include: 1) prevention of candidates running for the proportional representation seats to change parties after election; 2) setting a minimum requirement of votes to be acquired for those candidates declared eligible to be elected for the proportional representation seats, but have lost in the single-seat constituencies after running simultaneously for both proportional and single-seat constituencies.

3.2 The Administrative Reforms

3.2.1 Restructuring of Government

In aiming for a new direction that would provide a more simpler, efficient and transparent system of government, the 145th Session of the Diet passed a series of reform laws following the recommendations of the "Final Report (December 3, 1997)" of the Administrative Reform Council (*Gyosei Kaikaku Kaigi*) chaired by Prime Minister Hashimoto. The laws passed were oriented to: 1) strengthening the leadership abilities of the Prime Minister and Cabinet; 2) simplifying and making more efficient the administrative organization and work related to it; and, 3) establishing "independent administrative corporations (*dokuritsu gyosei hojin*)" that could provide efficient service to the needs of the citizens.

First, in order to strengthen the Prime Minister's position, the Cabinet Law (*Naikaku Ho*) was amended to include the direct authority of the Prime Minister in presenting proposals pertaining to important cabinet policy matters such as foreign and security policy matters, administrative and financial mangement matters, management of the economy and budgetary matters, administrative organization and personnel matters (see, Central Government and Ministries Basic Reform Law (*Chuo Shochoto Kaikaku Kihon Ho*), article 6). This was to offset the authority and influence of the bureaucracy in the policy-making process. Also, an increase in the number of advisors to the Prime Minister from three to five was established to provide more direct support in advising on important matters within the Cabinet (Cabinet Law, article 19, 20). Furthermore, the Final

Report recommended that the Civil Service System be changed to allow more flexibility in appointing people of special knowledge and skills from outside the government (Report on the Basic Directions of the Reform on the Civil Service System (*Komuin Seido Kaikaku no Kihon Hoshin ni kansuru Toshin*), March 16, 1999). To strengthen the management of the various ministries, the position of parliamentary vice-minister (*seimu jikan*) was replaced with vice-minister of state (*fuku daijin*) and parliamentary minister of state (*fuku seimukan*). Both have the authority to supervise and make decisions concerning policy within his/her assigned jurisdictions (Law No. 116, (1999)).

Another major change to strengthen the Prime Minister's position, as well as to assist the Cabinet overall, included the establishment of the Office of the Cabinet (*Naikaku-fu*) of which the Prime Minister is the head. This Office assists in unifying the various sections of the Cabinet and is of higher status than the other ministries. It is also exempt from the rules of the National Administrative Organization Law (*Kokka Gyosei Soshiki Ho*). This Office also consists of Special Ministers of State (*tokumei tanto daijin*) who have coordination authority over assigned government organizations. Within this Office, there are also four advisory councils to advise the Prime Minister and Cabinet on matters concerning economics and finance, science and technology, protection against disasters, and issues related to work and co-existence of men and women.

Second, the reform amended the National Administrative Organization Law to simplify and make more efficient the func-

tions of the bureaucracy as a whole. Specifically, the reform eliminated the extensive discretionary power that each of the ministries had and made clear what mission and administrative functions each ministry was to have (see for example, National Administrative Organization Law, article 2.1). In balance, this would help to restore the authority of the ministers and politicians that were to be in charge.

Furthermore, the number of ministries were reduced from the original 22 ministries and agencies to 12 ministries and agencies and one office, to take effect in January 2001 (see, Central Government and Ministries Basic Reform Law, articles 15–31). At the same time, the traditional "hierachical" administrative system was eliminated to establish more flexibility and coordination between the ministries, and to provide for a system that would correspond more readily to necessary policy adjustments. Moreover, policy evaluation systems will be implemented within each ministry as well as an independent third party created by the Ministry of General Affairs (*Somusho*) to make the policy planning stage more effective in making better policy (see, National Administrative Organization Law, article 2.2).

Third, much of the administrative business controlled by the central ministries have been considered to be too costly to maintain. As a result, the reform has decided to streamline the ministries by "outsourcing" 90 or so of its adminstrative business functions (i.e., national hospital system, postal insurance system, national museums, testing and research organizations, etc., . . .) in a period of four years by establishing so-called "independent administrative corporations," modelled after the

English adminstrative agencies. The program will begin in 2001 and be reevaluated every three to five years. It is hoped that these independent administrative corporations will become cost-effective, improve service quality and become more transparent in its management (see, General Law for Independent Administrative Corporations (*Dokuritsu Gyosei Hojin Tsusoku Ho*)).

3.2.2 Decentralization and Local Autonomy

The Devolution Promotion Law (*Chiho Bunken Suishin Ho*) was passed on May 5, 1995 (Law no. 196). Its purpose was to make clear the role and responsibilities between state and local public entities (see, Devolution Promotion Law, articles 1, 2 and 3). The central government was to focus more intensively on business related to the international society and such activities that were to be considered important nationally, while local public entities were to be given more of a direct responsibility and comprehensive role in improving the welfare of its local citizenry.

A significant reform was the elimination of business delegated by the central government to the local public entities usually referred to as *kikan inin jimu*. It has been said that 80 percent of the work done by the local public entities (especially prefectural governments) was delegated by the central government. The devolution reform which took effect from April 1, 2000, separated approximately 60 percent of the total delegated business (such as city planning permits, approvals and permits of restaurants, hospitals and pharmacies, and etc.,..) and made it locally autonomous (*jichi jimu*). The other 40 percent that in-

volved business related matters such as recruitment of military personnel, national elections, management of roads, and others are now entrusted to the local public entities by law from the central government as "legally entrusted business (*hotei jutaku jimu*)." The ultiminate aim recommended by the Devolution Promotion Committee (*Chiho Bunken Suishin Iinkai*) was to provide local public entities with a freer hand within their own jurisdictions and to make the relationship between central and local public entities a more equal one.

Another significant reform was the establishment of a dispute resolution system that would handle disputes between the central and local public entities. A Dispute Resolution Committee established in the Office of the Prime Minister is to be responsible for hearing and reviewing disputes, and recommending resolutions (Local Autonomy Law (*Chiho Jichi Ho*), article 250.7). Unsatisfied local public entities can take their disputes to the high court only after exhausting the adminstrative remedy procedures provided (Local Autonomy Law, article 251.5).

An important issue within this reform that leaves many questions still unanswered concerns the source of revenue for local public entities. At present, approximately two-thirds of the total local tax revenue is allocated to the central government. However, local public entities actually bear two-thirds of the total workload since much of the work, as previously mentioned, is delegated by the central government. Deficient revenues are made up by subsidies provided by the central government. As a result, ministries and agencies have had a

strong hold on the local public entities because of their position as subsidizers. The final recommendations in October 1997 given to Prime Minister Hashimoto did not mention any plans in resolving this problem. The actual plan, decided on by the Cabinet Council in May 1998 to promote devolution, recommended a reevalution of the financial relationship between the central and local governments, an adjustment and rationalization of the central government subsidizing system, and, an examination into methods in securing a more complete local tax/fee revenue.

3.2.3 Disclosure of Information held by Government Organizations

The "Bill Pertaining to the Disclosure of Information Held by Administrative Organizations (hereinafter, "Information Disclosure Law (*Joho Kokai Ho*)")" was submitted to the Diet on March 27, 1998, but did not pass approval until January 17, 1999. It finally became law on May 14, 1999. As the pursuit of information disclosure began with the administrative reform movement, its realization makes a significant contribution to both the development of a more fair and accountable system of government by the people as well as being a strong driving force in promoting administrative reform itself.

The new system puts into action a right of the people to examine and evaluate information and activities of the government. Much change has been occurring on the local public entity level where information disclosure ordinances have been established to a certain extent. The first local ordinances went into effect in 1982, and as of October 1, 1996, all of the

prefectures had some type of information disclosure system in place. Many of the other cities and towns, however, decided to wait until the national law actually passed before establishing procedures for information disclosure. Thus far, on the local and prefectural levels, at least, financial scandals involving such things as fictitious parties and business trips that surfaced one after another demonstrated the power of the information disclosure.

Although its passage is a significant accomplishment in itself, critics of the Information Disclosure Law claim several shortcomings of the system. First, there is a question as to the organizations that are to be subject to this law. Special public administrative corporations (*tokushu hojin*) are not subject to information disclosure although they are very closely connected to the government receiving enormous amounts of funding and acting as receptacles for retiring bureaucrats by way of *amakudari*. Currently there are nearly 900 public corporations that are linked variously to central government offices. A working group for the government has drawn up plans for these public corporations to be subject to a mandatory disclosure system (requiring the disclosure of internal information, such as the financial status and executive salaries and backgrounds) designed to pick up where the Information Disclosure Law left off. Critics hope that an effective law will be enacted by the Diet.

Second, not all information is subject to disclosure (see, articles 5-8). Personal memos, and copies of documents used for personal use are not subject to disclosure. Also, "historical and

cultural material, and other documents for acadmic research are to be specially managed" and thus are considered nonaccountable to information disclosure. Critics assert that after a certain period of time has elapsed, all material should be accountable to information disclosure.

In any case, it is said that this law will significantly upset Japanese-style administrative practices and collusion between government and the private sector. Some have referred to the establishment of information disclosure as a "constitutional revolution." Such views are based on the assumption that access to administrative information enables the public to directly participate in the government decision-making process, complementing representative democracy.

Although many questions still remain in the reform process, the overall system has changed extensively to meet the needs of a changing society.

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Chapter 6
The Legal System and Reform

George R. Harada
Tomiyuki Ogawa

1. The Legal System and Its Actors

EDITORIAL: Top court makes a good decision on religion

In a lawsuit contesting the constitutionality of offering *tamagushi-ryo* (a fee for a sprig of a sacred tree offered to a Shinto god) to Yasukuni Shrine or to a prefectural Gokoku Shrine by the prefectural government of Ehime, the Supreme Court's Grand Bench ruled that payment of public money was unconstitutional.

While the defense for late former Governor Haruki Shiraishi argued that the payment was a social courtesy for the purpose of paying tribute to the war dead, the Supreme Court saw religious nature in the payment and said that violated the Constitution, which provides that "the state and its organs shall refrain from religious education or any other religious activity."

The decision handed down by the Supreme Court is epoch-making in that it draws a clear line regarding the separation of church and state under circumstances where the distinction between tolerable and intolerable activities in terms of the Constitution tends to be blurred, especially regarding official visits to Yasukuni Shrine by Cabinet ministers. This decision deserves praise.

. . . . . .

The sentence handed down by the Supreme Court is significant in three aspects:

One is that it provided a new guideline for the interpretation of the separation of church and state, which has swayed this way and that at the local- and high-court levels. . . . . .

The second noteworthy point is that the court can put a stop to attempts to incrementally undermine the principle of the separation of church and state through "official visits" to Yasukuni Shrine by the prime minister and other Cabinet ministers. While it did not make direct reference to the official visits to Yasukuni Shrine by Cabinet ministers, the majority opinion ruled that Yasukuni Shrine is an obvious religious organization and sternly warned against the government's "special involvement in a particular religion" even under the pretext of paying tribute. The prime minister and other Cabinet ministers should take seriously the spirit of the latest decision.

The third significant point is that the court, which has long been criticized as weak-kneed toward the government and the Diet, performed its function of holding another branch of government in check on an important problem.

Basic human rights guaranteed to the people by the Constitution can end up being illusionary unless the judiciary properly exercises its duty to judge constitutionality of official acts. It is hoped that the Supreme Court will continue to take a resolute attitude toward these problems. . . . . .

Taken from the Asahi Evening News
April 3, 1997, p. 8

1.1 The Legal Profession

Presently, there is one Supreme Court (*Saiko Saibansho*) at

the apex of the Japanese court system (located in Tokyo), eight High Courts (*Koto Saibansho*) (located in Sapporo, Sendai, Tokyo, Nagoya, Osaka, Takamatsu, Hiroshima, and Fukuoka cities), District Courts (*Chiho Saibansho*) for each of the prefectures (50 in all, however, 4 in Hokkaido), and 448 Summary Courts (*Kan'in Saibansho*) nationally. In addition to these courts, there are the Family Courts (*Katei Saibansho*) that are located in each of the prefectures in the same manner as the District Courts (50 in all, however, 4 in Hokkaido) to take care of disputes concerning the family and juvenile delinquency cases.

Corresponding with this court system, there is an Office of the Public Prosecutor for each of the courts named above (namely, the *Saiko Kensatsu-cho* attached to the Supreme Court located in Tokyo; eight *Koto Kensatsu-cho's* attached to the High Courts; 50 *Chiho Kensatsu-cho's* attached to the District Courts; and 448 *Ku Kensatsu-cho's* attached to the Summary Courts). Also, there is a bar association (*bengoshikai*) for each of the prefectures and one national organization representing all of the lawyers in Tokyo called the *Nihon Bengoshi Rengokai* (hereafter referred to as *Nichibenren*).

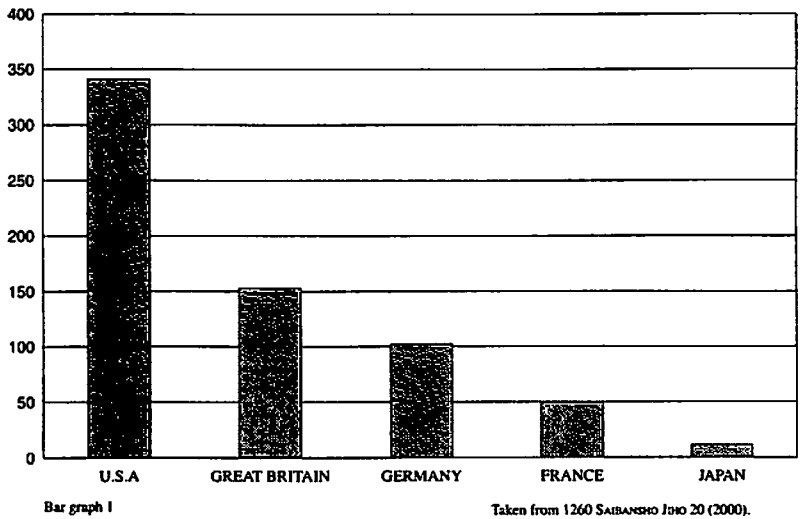
In principle, to become a judge, prosecutor, or lawyer, a person must pass a national bar examination (*shiho shiken*) administered by the Ministry of Justice. Thereafter, the person must enter The Legal Training and Research Institute (*Shiho Kenshujo*) and be trained for a period of one and a half years in the various areas of the law and legal system after which the person must pass another examination in the end before being

sent to the court to become an assistant judge (*hanji-ho*), to the prosecution office to become a prosecutor (*kensatsu-kan*), or register with the local bar association to become an attorney (*bengoshi*).

In 1999, there were 2,949 judges, 2,223 prosecutors, and 17,283 attorneys. Many have mentioned in the past that Japan has very few lawyers for a country of its economic and legal status. Bar graph 1 shows a comparison of the numbers of lawyers in the various countries.

At present, there is discussion of increasing the numbers for the legal profession. Previously, the annual numbers for those that could become lawyers (pass the national bar examination) was limited to 500. The present number is at 1000. The number is to increase in the near future. More details on the

NUMBERS OF LAWYERS PER 100 THOUSAND IN POPULATION



Bar graph 1

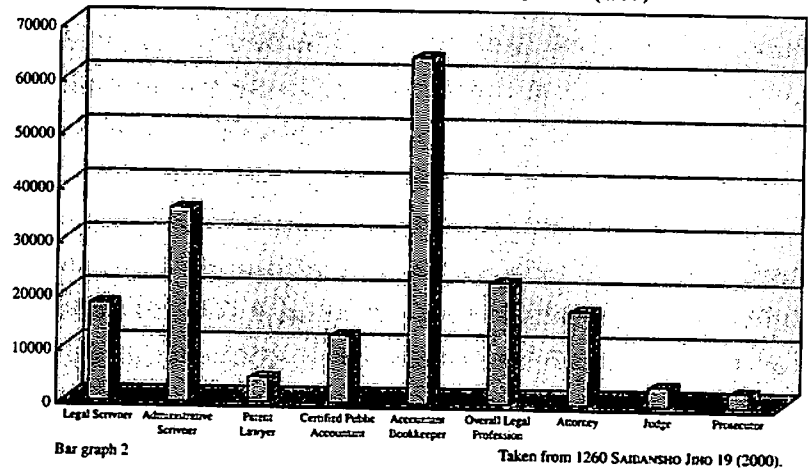
Taken from 1260 Saibansho Jiho 20 (2000).

increase will be mentioned in the Judicial Reform section. The

national bar examination is considered one of the most difficult, if not most difficult, national examinations. On the average, only one of fifty of those who take the examination pass, and usually have taken it four to five times. Furthermore, the average age of those who pass the bar examination is about thirty. In Japan, there are approximately 105 law departments, and each year 42,000 students graduate from these university law departments, however, only a small group of them attempt at taking the examination and fewer pass. A reform program for restructuring the legal education and training systems is presently being considered by the Council for Judicial Reform established in 1999.

Peripheral to the legal profession (*hoso*), there are other professional positions such as the legal scrivener (*shiho shoshi*), administrative scrivener (*gyosei shoshi*), patent attorney (*benrishi*), certified public accountant (*konin kaikeishi*), and ac-

LEGAL PROFESSION AND OTHER PROFESSIONAL POSITIONS RELATING TO THE LAW IN JAPAN (1999)



Bar graph 2

Taken from 1260 Saibansho Jiho 19 (2000).

countant / bookkeeper (*zeirishi*) that assist in legal matters, but are not considered in the same group as judges, prosecutors and attorneys. Also, there are civil mediators who mediate civil cases in the district courts, and mediators for family matters in the family courts. The numbers of people in these professions can be seen in bar graph 2.

1.2 The Role of the Judiciary

The Editorial at the beginning of this section praised the 1997 Supreme Court decision (51 Minshu 1673 (1997)) concerning separation of church and state. It is the first case concerning separation of church and state that the Supreme Court has declared unconstitutional. The most famous case in this area is the long standing precedent of the case concerning the constitutionality of public money expended for a Shinto-style ground-breaking ceremony (*jichinsai*) in the city of Tsu (see, 31 Minshu 533 (1977)). The 1977 Court noted that a system strictly separating church and state to be unrealistic and virtually impossible. It concluded that the Shinto-style ground-breaking ceremony was chiefly secular and customary, and that its initiation did not have the effect of promoting or encouraging Shinto religion or of oppressing or interfering with other religions. It, therefore, could not be considered as falling within the category of religious activities prohibited by Article 20. On the other hand, the 1997 Court declared that *tamagushi-ryo* offerings had a religious nature to it and that public money could not be expended. The general public would see the prefecture as promoting or encouraging Shinto religion in a

special way, and in this manner, paying tribute to the war dead using public money would violate Articles 20 and 89 of the Constitution.

The general public and scholarly opinion have asserted for a more active Supreme Court, more decisions in the same tone as the one mentioned in the Editorial. However, although the Court has been quite active in its role as the court of last resort in terms of appeals, it has been much more passive in its role as a constitutional court exercising judicial review. According to former Supreme Court Justice Masami Ito, there are five reasons for the Court's passivity. First, the cultural value of harmony (*wa*) is strong within the Court eliminating conflicts that may arise from differences of opinion. Also, in relation to this, the Court conveys a sense of courtesy toward the other political branches of the government, namely the legislative and administrative. Second, Justices are put in a very difficult position since many cases brought to the Court are long term disputes with a *fait accompli*. For this reason, Justices opt to resolve cases by the simple application of the law, avoiding constitutional decisions, if possible. Third, the Court is burdened with so many cases, that there is a stronger conscience within the Court to resolve these cases in the role of a final appeals court instead of a constitutional court. Fourth, the Court is somewhat reserved in transferring cases to the Grand Bench. Therefore, in many cases, the Petty Bench either avoids making constitutional decisions or approves the constitutionality of the case by referring to court precedent. Fifth, and finally, since the model Justice in Japan is to be one without a

particular opinion, this makes it difficult for the existence of minority opinions. According to former Justice Ito, these reasons make it difficult for the Supreme Court to take the role of an active constitutional court (see, M. ITO, SAIBANKAN TO GAKUSHA NO AIDA (Yuhikaku, 1993) pp. 116–137).

Professor Eiji Sasada suggests that the beginnings of this passive "legal" environment may have been strongly influenced in the 1950s by Professor Hajime Kaneko's scholarly opinion on judicial power and his interpretation of "concrete cases" and "legal disputes." Legal disputes, according to Professor Kaneko, pointed to cases that mainly involved concrete interests or a conflict of interests that could be resolved or corrected by the application of the law. Furthermore, legal problems that did not involve concrete interests including constitutional issues and legal interpretation were not included in his definition of legal disputes. Professor Kaneko stressed that the courts could not review abstract or hypothetical issues, that legal disputes presented to the courts had to be concrete cases and controversies (see, H. KANEKO, SHIN-KENPO TO SHIHO, (Kokuritsu Shoin, 1948) p. 46). In a later article written in 1952, he explained that constitutional issues were not to be special cases and were to be considered under general theory of litigation law. And that, "the courts which have no political responsibility must be cautious not to create a judicial dictatorship or judicial factionalism by involving themselves in political conflicts or being used for political purposes by deciding too quickly on issues not ripe for decision." To Professor Kaneko, constitutional matters were to be "politically" debated by those representatives who

had concrete interests at stake. And, only after both sides had exhausted their arguments using all available materials and not being able to come to a satisfactory resolution should the courts accept the case. Only then, was there significance in deciding issues of this kind. (see, Kaneko, 6 JURISTO 37 (1952)) According to Professor Kaneko, the role of the judiciary was to merely check those issues and matters already established by the legislative and administrative branches. The judiciary was not to take charge and decide on the course of action or direction for these matters. This stance may have been influenced by in large part by the repercussions of World War II, in that, an enormous change for the country was expected in restructuring society and to meet international standards. An active judiciary that declared new legislation, attempting to meet these necessary changes (at times restricting the rights of citizens), to be unconstitutional would have had a detrimental effect on the development of the country as a whole. One might remember President Franklin D. Roosevelt's anxiety caused by the United States Supreme Court's negative stance during the implemention of the New Deal.

The significant power, responsiblity and influence that the judges have had during this period, as described by Professor John O. Haley, has developed to an extent that many believe the legal system as a whole now needs an overhaul to meet the needs of a changing society. Many of the scholarly opinions now look more to the contents of the constitution and stress that the judiciary's highest priority should be oriented toward the protection of fundamental rights and not a compromise of

them. Two major legal reforms (one taken place immediately after World War II and the other one taken place in 1964) and several amendments to the specific legal codes (most recently, the amendments to the Code of Civil Procedure in 1996 establishing a small claims court and providing for a more speedier trial in civil cases improving various procedures, etc., . . .) have taken place under the constitution to improve the legal system. A brief and partial description of the present third attempt for legal reform will be explained in the following section.

2. Judicial Reform (*Shiho Kaikaku*) and Its Objectives

2.1 The Council for Judicial Reform (*Shiho Kaikaku Iinkai*)

The establishment of the Council for Legal Reform was a culmination of various recommendations to reform the overall legal system from a citizen's perspective. The *Nichibenren* as well as the *Keidanren* and other private organizations provided strong support for reform. Furthermore, the Liberal Democratic Party, the Administrative Reform Council, the Deregulation Commission, the University Advisory Council and other public advisory councils recommended legal reform to provide for a better balanced restructuring of the complete system.

"The Law to Establish the Council for Judicial Reform (hereafter referred to as Judicial Reform Law)" was passed and promulgated on June 9, 1999. According to article 2 of the Judicial Reform Law, the purpose of the Council is to, 1) clarify the role of the judiciary for the twenty-first century; 2) assist

in the realization of a more useable judicial system for the general public; 3) establish a system of citizen participation in the judicial system; 4) strengthen and develop the system and functions of the legal profession; and 5) reform other aspects of the judicial system as needed.

There are thirteen members (representing not only the legal field, but a relatively wide range of backgrounds) on this Council, and the presiding Chairman of the Council is Professor Koji Sato of Kyoto University. The minister in charge of this council is the Prime Minister. Also, it was decided that the minutes to each Council meeting were to be disclosed to the public. The Council is to convene for a period of two years before presenting its final recommendations for legal reform to the Diet.

2.2 The Agenda and Expectations

The first seven meetings of the Council began with initial hearings on the various ideas and demands of reform from the speakers recommended by each of the members of the Council. The representatives of the Ministry of Justice, the Supreme Court, and the *Nichibenren* were also invited to give their comments to the expected reforms.

After these hearings, Chairman Sato organized the issues to be discussed in developing the legal reform proposal. The issues were divided into two large categories of discussion which were the reform of the infrastructures of the legal system and legal profession. Issues to be discussed concerning the reform of the legal system included such matters as the expansion of the legal aid system, examination of the alternative disputes

resolution system, information disclosure within the judiciary, strategies in attaining regional balance in numbers of attorneys, methods in speeding up civil and criminal trials, the use of experts and professionals in supporting specialty cases, reconsideration of the public defense system for the accused, and the possibilities of a national jury system or a lay judge system to establish a judiciary that is more attuned to the ordinary citizen.

Issues to be discussed concerning the reform of the legal profession included such matters as the increase in numbers of attorneys, prosecutors and judges, education and training of those prospective candidates of the legal profession, and the possibilies of deregulating the career-based judgeships and openning them up to experienced lawyers through a special appointment process.

Let us examine two separate issues that will affect the system in a significant manner if introduced.

2.1.1 Citizen Particiaption in the Judiciary

The first issue concerns the possible adoption of a jury system or lay judge system. Both systems enable citizen participation in the judicial system. Although presently, the Japanese legal system enables citizens to participate in various ways as mediators for the Family Court (*chotei i'in*), judicial mediators for the Summary Court (*shiho i'in*), members of the Prosecution Council (*kensatsu shinsakai*), and the citizens' periodic review of Supreme Court Justices during general elections (Article 79, Constitution), all of these positions are said to be peripheral to the main judicial procedure. The Council for Legal Reform has put on its agenda a reconsideration of the present system in

order to make the judicial system more familiar and open to the citizen, as well as to introduce and to apply the diverse values and knowledge citizens can offer to the judicial system. According to the Council, one way in achieving substantive participation of citizens would be to adopt either a jury system or lay judge system.

The jury system is not new to Japan. A jury system existed in Japan established by the Jury System Law (*Baishin Ho*) of 1923, and actually functioned from 1928 to 1943 when the Law was temporarily suspended until the end of the war. Under this Law, jury trials were allowed for certain types of criminal cases when requested by the defendant. To qualify as a juror, one had to be a male of thirty years of age or older, and have paid national taxes of three yen or more for at least two years. The jury's verdict was based on a majority vote, however, the presiding judge had the discretion to overrule the verdict by retrial with a new jury. Also, appeals were not allowed. For these and other reasons, the number of jury trials decreased annually. By 1938, there were only four jury trials requested.

Recently, scholars have asserted many reasons for reconsidering the jury system. The reasons include doubts about the court decisions in administrative litigation, problems arising from the bureaucratic judgeships, and assertions for more transparency within the judiciary.

On the other hand, opponents to the jury system assert that the verdicts of the jury are less predictable and inconsistent compared to the present system based on judicial documentation and career judges making decisions. In other words, there

will be less unity and stability in jury decisions. Others argue that the jury system itself does not fit the Japanese character since traditionally many people prefer to have the authorities (*okami*) make decisions since they are not accustomed to debating issues and asserting their own opinions.

In arguing against the jury system, some argue that if the present system is to adopt either a jury system or a lay judge system, the latter would fit the Japanese character and legal system better than the former. Using the European system as a model, the lay judge would be chosen by recommendation, and in many cases, he or she would have special knowledge or experience in a particular field. The number of lay judges in a case would usually be twice the number of career judges. In theory, the lay judge(s) may have the last word and write an independent decision for the court since the verdict is based on a majority vote after a full discussion of the issues with the career judge(s). Opponents of the lay judge system argue that this system only represents a partial representation of citizen participation. Unlike the jury system not everyone would be eligible to become a lay judge. Others argue that the lay judge(s) will have litte effect over the overall case since the career judge(s) will overpower them and control the final decision.

Professor Takashi Maruta, a strong proponent of the jury system, asserts that citizen participation in the judiciary has been long neglected especially by the legal profession itself. The legal reform of the legal profession is a necessary requirement for a successful implementation of a citizen participation program whether it be a jury system or lay judge system. Ac-

cording to Professor Maruta, career judgeships close off any connection with the public. A system for checking the decisions of judges by the public is necessary. The Council's agenda in deregulating the career-based judgeships and openning them up to experienced lawyers through a special appointment process would improve the legal environment in this regard. This would require an increase in attorneys and judges. These kinds of changes will help in bringing the development of a reliable system of citizen participation a step closer to reality. Professor Maruta explains that "real" citizen participation in the judiciary would have the following characteristics: 1) the participation of as many citizens as possible (preferably without special credentials) in a responsible judicial decision-making process (or selection process); 2) citizens participating in the decision-making process (or selection process) would be independent of any outside influence; and, 3) a judge (or deciding party) would base his or her decision on the citizen's recommendations. Unfortunately, present systems of "citizen" mediators and others as previously mentioned do not satisfy these characteristics. For example, although the role of the mediator involved in civil and family matters is becoming more and more significant, the selection process is not open and many of those selected have special credentials or experience. For this reason, selected mediators are said to be an unbalanced stratum of citizens. Also, the content of the mediation is not disclosed and the mediator does not have independent power to make decisions; he or she is there only to assist the presiding judge. As far as being selected as a member for the Prosecu-

cil, this council itself is not part of the judicial power but part of the administrative power. Also, the decisions by the Council are not absolute. The prosecution can disregard the Council's decisions. The system of the citizens' review of Supreme Court Justices was initially established with democracy and citizen participation in mind, to give the power and right to dismiss Supreme Court Justices to the people. However, because of insufficient disclosure of information on the Justices before the review, and the procedure requiring an "X" for dismissal and "no answer" denoting approval and not neutrality, the system has failed to work in the manner initially planned. So far, no Justices have been dismissed by this system. Thus, according to Professor Maruta, the present system falls short of a satisfactory system and is in serious need of change (for more information on Professor Maruta's opinion, see, Maruta, 459 HOGAKU SEMINAR 57 (1993); Maruta, 5 SHIHO KAIKAKU 20 (2000)).

Whether or not the Council decides on either, much of the present system will need to be changed. A process that may take several years at the least. However, if implemented, one thing is certain. Much of the information previously undisclosed or unknown to the citizen will be disclosed and simplified so that the ordinary citizen will be able to participate more readily. This itself will be a significant improvement bringing the citizen closer to the judicial system.

2.1.2 Legal Education and Training

Another issue that is considered quite significant within the reform concerns the legal education and training for those future candidates entering the legal profession. As previously

mentioned, those who hope to become attorneys, prosecutors, or judges must pass a national bar examination. However, although this examination is meant to check whether or not each person has the potential scholarship and necessary skills to enter the legal profession, for some reason it does not require a completion of an integrated/systematic legal education offered at the many law departments throughout Japan. What it does require is the ability to score high on a six subject written examination. Mainly for this reason, many of those who decide to take the bar examination attend private prep-schools that specialize in the bar examination. The numbers for those who pass this examination are restricted to the numbers that can be admitted into The Legal Training and Research Institute, where they are trained for a year and a half. Scholars such as Professor John O. Haley refer to this Institute as the only "law school" in Japan, presumably because of the above-mentioned situation. At present, only three percent of those taking this national bar examination pass and enter the Institute.

This situation has been combined with the present problematic situation of college-aged students decreasing due to the decrease in the overall birthrate. The Ministry of Education has been promoting universities and colleges to reform each's program to meet this situation. Many social science oriented programs, including law departments have experienced a significant decrease of enrollment in recent years and have connected with the legal reform agenda to reconsider or improve their programs. Initial "law school" proposals by various scholars and law departments combined the undergraduate pro-

gram reforms with the law school plan. However, these proposals required students to enter law school (graduate program) during their third or fourth year in the law department. These proposals gave advantage to those already in the existing law departments and went against the legal reform ideas that stressed the field of law would be better off with more people of different backgrounds. Other "improved" proposals thereafter were still very narrowly tailored in that they did not consider people who wanted to return to college after working for a few years or those people being sent by companies to attend professional schools for the purpose of continuing education.

According to Professor Takeshi Kojima, law school proposals heretofore will need to consider the following six essential points. First, the emphasis on legal education will need to be shifted from the traditional undergraduate level to the graduate level.

Second, law schools will need to aim for a system that will enable the majority of their graduates to enter the law profession, namely, a program that will maintain high quality and produce legal professionals through the normal educational process.

Third, the law curriculum should focus on the major legal codes (*roppo*) incorporating a socratic teaching method in order to develop the student's analytical skills. In addition, legal clinical courses should be included to provide practical training to the students within the curriculum.

Fourth, the law school should provide an equal opportunity for entrance to those students majoring in subjects other than

law (i.e., economics, literature, foreign languages, engineering, etc., . . .). This interdisciplinary environment will hopefully promote a more creative thought process producing a higher quality professional in the field of law.

Fifth, since it is expected that there will be a number of strategically located law schools (one idea is to locate law schools in each of the High Court jurisdictions) throughout the nation, it is hoped that the creation of these future law schools will help develop a more diverse legal education overall. The future plan is to have each law school limit their class to 150 students reducing the differences that arise from the size of class or school. Also, because of the limited numbers per school, and a diffusion of schools located throughout Japan, it is hoped to assist in bringing more legal profesionals into the suburbs and less populated areas.

Sixth, and finally, the idea of having graduation from law school a quailification to take the national bar examination will be seriously considered to improve legal education overall. Some believe, however, that this new qualification will eliminate the present equal opporutnity in taking the examination. However, another perspective would suggest that a more diverse social stratum of people will enter law school if scholarships and internships can be arranged, and if qualifications to enter the legal profession are changed (for more details see, 3 SHIHO KAIKAKU 25 (1999)).

The present law education provides students with general education and specialty courses in the law. As previously mentioned, only a minority of students decide to challenge the bar

examination. Most graduates enter companies as generalists. In any case, the present law education will need to change. The "new" law schools in the future will provide law education for those with the objective of entering the legal profession. Tomorrow's society will need more legal professionals and specialists in certain areas of the law to meet the needs of an increase of a variety of legal disputes as a result of a complex society immersed in information and internationalization.

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