

The New Japanese Law Schools

by

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April 1, 2004 is a remarkable day for legal education. That is the founding date of as many as seventy-two¹ new law schools in Japan. The world has never before seen so many new institutions of legal education founded on one day. While others have talked about making major changes in legal education, Japanese legal educators are making them.

Law schools are being introduced to Japan to meet an urgent need for lawyers in a legal system that historically has been underserved by legal professionals.² With only a few exceptions, the new law schools are offspring of existing university law faculties that will continue to exist independently of the law schools.

Developments in Japan should be of wide interest. John Henry Merryman observed that legal education is “a window on [a country’s] legal system.” It tells us much about “what law is, what lawyers do, how the system operates or how it should operate.”³ It is not coincidental that the reform in Japanese legal education is part of a larger reform in the Japanese legal system. The choices that are being made in Japan today will affect how the Japanese legal system will operate in the future.

Moreover, these developments should be of interest not only to those interested in Japan, but to legal educators the world over. A common concern of legal education is the

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¹ Seventy-two applications to open new law schools have been filed with the Ministry of Education and Science. It is expected that most, but not all, will be approved.

² The small number of attorneys in Japan has long been an issue. See, e.g., Kohei Nakabo, *Judicial Reform and the State of Japan’s Attorney System*, 11 PAC. RIM L. & POL’Y J. 147, *** (2002); JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* *** (1998).

³ *Legal Education There and Here: A Comparison*, 27 STANFORD L. REV. 859 (1974), reprinted with a prefatory note in JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER* 53 (1999).

tension between legal education as an academic discipline and as professional training.⁴ The new Japanese system will have law faculties, law schools and a national practical training institute. It is not yet clear how this tripartite system will affect the relationship between the practical and the theoretical.

This article reports on these ongoing developments in Japan as of late summer 2003. It begins with brief discussions of the overall legal reform underway in Japan and the present system of lawyer training in Japan. The article then turns to the reform. It first considers the reform in outline and then looks at some specific issues of the reform, namely those related to: (a) the kind of legal professional to be educated; (b) the institutions; (c) the students; (d) the faculty; (e) the substance of study; (f) the methods of teaching; and (g) the relationship between theory and practice.

1. The Justice System Reform Council Report

June 12, 2001 a national commission—the Justice System Reform Commission—released its final report [hereafter the “Reform Report”].⁵ The Reform Report is an impressive document of about 100 pages that mandates major changes in the civil justice, criminal justice, legal training and lawyer systems of Japan. The Commission consisted of a diverse group of thirteen representatives from various parts of society.⁶ While the Reform Report itself is an impressive achievement, what makes it extraordinary is that it has been fully adopted as national policy and is being implemented as such without the

⁴ See, e.g., AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 2 (1992) (“scholarship” versus “Practice”); Nili Cohen & Danie Friedmann, *Selecting Minds in a Multicultural, Besieged, Isolated Society*, 41 AM. J. COMP. L. 449 (1993); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

⁵ Justice System Reform Council, Recommendations of the Justice System Reform Council For a Justice System to Support Japan in the 21st Century, June 12, 2001 [hereinafter Reform Report], available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>. The Reform Report is the basis for the entire reform and is the source of information here about the future system unless otherwise stated. For how the Reform Report came to be, see The Justice System Reform Council, The Points at Issue in the Justice Reform, Dec. 21, 1999, at http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html, Koichiro Fujikura, *Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission*, 75 TUL. L. REV. 941, 942 n. 1 (2001); Gerald Paul McAlinn, *Law Reform in Japan: Building Infrastructure for the 21st Century*, in KENNETH L. PORT & GERALD PAUL MCALINN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN, 2nd ed., 113 (2003).

⁶ The members are listed at http://www.kantei.go.jp/foreign/policy/sihou/singikai/members_e.html.

political infighting that would be expected in other countries.⁷

The Reform Report is a mandate for increasing the role of law in Japanese society. The Rule of Law is at the heart of the reform. Chapter I of the Reform Report states:

... [T]his Council has determined that the fundamental task for reform of the justice system is to define clearly “what we must do to transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become ‘the shape of our country.’ ...”⁸

The theme of the Rule of Law runs like a leitmotif through the entire Report. The Report notes that the Rule of Law is an “essential base” for converting from an advance control system to an “after-the-fact review/remedy type society”⁹ that permits each and every person to “break out of the consciousness of being a governed object and [to] become a governing subject, with autonomy and bearing social responsibility ...”¹⁰

Given the increased role for law anticipated in Japanese society, and the fact that Japan has historically had a shortage of lawyers, the Reform Report considers it “indispensable to widely expand the quality and quantity of ... legal professionals” The Reform Report mandates an entirely new system of legal education. It requires that “[a]s the core of the system, graduate schools specialized in training of legal professionals (hereinafter referred to as ‘law schools’) shall be established.”¹¹

2. The Present Japanese System of Lawyer Training

The key to the present system of lawyer training in Japan is the national Legal Training and Research Institute (*Shiho kenshujo*, hereinafter, the “Institute”).¹² The

⁷ There is irony in this, for the Reform Report is an example of the “top down” governing that it opposes.

⁸ Reform Report Chap. I. (Further in Chapter I: “This reform of the justice system aims to tie these various reforms together organically under “the rule of law” that is one of the fundamental concepts on which the Constitution is based. Justice system reform should be positioned as the “final linchpin” of a series of various reforms concerning restructuring of “the shape of our country.”)

⁹ Reform Report Chap. I, Part 3, 3.

¹⁰ Reform Report Chap. I. For a sharply critical view of the Rule of Law in Japan today from an American perspective, see CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* (2003). Goodman’s refrain is that in present-day Japanese law, “what you see is not what you get.”

¹¹ Reform Report Chap. I, Part III(2). Other reports about the reform in legal education include Fujikura, *supra* note ***; Noboru Kashiwagi, *New Graduate Schools in Japan and Practical Legal Education*, ZEITSCHRIFT FÜR JAPANISCHES RECHT, No. 12, 60 (2001); Akihiro Onagi, *Juristenausbildung in Japan*, JURISTISCHE SCHULUNG 2002, 721, 723; Yukio Yanagida, *A New Paradigm for Japanese Legal Training and Education—In Light of the Legal Education at Harvard Law School*, 1 ASIAN-PACIFIC L. & POLICY J. *** (2000), also available at <http://www.hawaii.edu/aplpj/1/01.html>.

¹² See Hakaru Abe, *Education of the Legal Profession in Japan*, in ARTHUR TAYLOR VON MEHREN (ED.), *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 153, 155-59 (1963); Akira Ishikawa, *Training*,

Institute is an agency of the Supreme Court. Aspiring lawyers—which includes private practitioners, judges and prosecutors—must all gain admittance to the Institute. Most applicants have undergraduate degrees, usually in law, but are not required to. Only a small number each year pass the test.¹³ Successful applicants have on average taken the test—which is given only once a year—five times. Those lucky few admitted learn in discussion classes and as apprentices the techniques of drafting judgments, indictments and pleadings. They are not charged tuition and receive a stipend at a level typically received by recent college graduates. Until recently the training period was two years; lately, to make room for more trainees, it was reduced to one-and-one-half years. Once the law school system is introduced, the training period will be reduced to one year and classroom instruction eliminated; only the apprenticeships are to be retained. At the end of the training period the apprentices take the Second Examination, which nearly all pass.

The Japanese system of lawyer training has its origin in an adaptation of the corresponding German system of the late 19th century.¹⁴ Similarities to the German system remain substantial.¹⁵ In Japan, as in Germany, the legal education system was created by the State to train its judges and is funded by the State. In Japan, as in Germany, aspiring lawyers study law at the university for four years. In Japan, as in Germany, prospective lawyers take an examination and are admitted to what was until recently a two-year period of practical training to become qualified as judges. In Japan, as in Germany, that training period begins with classroom type instruction in the skills of a judge and then continues with several month apprenticeships at the civil courts, criminal courts, administrative agencies, and law firms. In Japan, as in Germany, the Institute trains judges (and

Appointment and Number of Judges, in GOTTFRIED BAUMGAERTEL, GRUNDPROBLEME DES ZIVILPROZESS-RECHTS Band 2 (Japanisches Recht Band 19) 2-5 (1985); Jiro Matsuda, *The Japanese Legal Training and Research Institute*, 7 AM. J. COMP. L. 366 (1958).

¹³ For a detailed examination of the test, see Edward I. Chen, *The National Law Examination of Japan*, 39 J. LEGAL ED. 1 (1989).

¹⁴ Matsuda, *supra* note ***, at 368 n. 7, attributes it to the German Otto Rudorff, who drafted the law governing court organization. Regarding Rudorff and that law, see Wilhelm Röhl, *Deutsche Juristen in Japan: Otto Rudorff*, ZEITSCHRIFT FÜR JAPANISCHES RECHT, No. 5, 54, 60-61 (1998).

¹⁵ Cf. Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, ZEITSCHRIFT FÜR JAPANISCHES RECHT, No. 9, 23, 27 n. 11 (2000). For current descriptions of the German system of legal education, see Jürgen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301 (1993); Peter Gilles & Nikolaj Fischer, *Juristen- ausbildung 2003—Zur neuesten Ausbildungsreformdebatte in Deutschland*, 20 RITSUMEIKAN L. REV. 181-218 (2003).

incidentally lawyers) to apply law to facts. In Japan, as in Germany, the image of the judge colors the ideal of the legal professional.¹⁶

There is, however, one crucial difference between the systems of lawyer training in Japan and Germany: in Japan the number of candidates admitted to practical training is limited. According to the Ministry of Justice in 2002 only 1,183 out of a total of 41,459 applicants were admitted.¹⁷ Historically, no more than five percent of those who take the examination for admission to the Institute have been admitted. In Germany, on the other hand, most students who take the First State Examination that governs admission to the training program pass and are admitted to training. The effect of this difference is so great that German observers of Japanese legal education hesitate to apply German experiences to Japan.¹⁸

Since few students studying at Japan's law faculties are admitted to practical training, most students cannot reasonably expect to become lawyers. This fact colors Japanese legal education. It means that university education in law in Japan is not strictly speaking professional. Because most students do not become lawyers and do not expect to become lawyers, they do not receive professional training in lawyering, legal research and reasoning and clinical legal education."¹⁹ Professional training is exclusively the province of the national Institute.²⁰

As a consequence university education in law in Japan is not professional. The law faculties provide undergraduate instruction in law to students the vast majority of which will not become lawyers. They also provide graduate education to a small number of

¹⁶ See ALFRED RINKEN, EINFÜHRUNG IN DAS JURISTISCHE STUDIUM 135 (1977). Cf. Ishikawa, *supra* note ***, at .

¹⁷ The number is to be increased to 3000 by the year 2010. Reform Report Chap. I, Part 3, 2(2). Also noting the „key“ difference is Nottage, *supra* note ***, at 27 n.11.

¹⁸ See, e.g., Hans Peter Marutschke, *Juristenausbildung un Japan—aus deutscher Sicht*, 18 RITSUMEIKAN L. REV., 87, 91 (2001).

¹⁹ Setsuo Miyazawa, *Education and Training of Lawyers in Japan—A Critical Analysis*, 43 S. TEX. L. REV. 491, 492 (2002); Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, 1 ASIAN-PACIFIC L. & POL'Y J. 2, text at n. 62 (2000); YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 141 (1976); Yasunei Taniguchi, *Legal Education in Japan*, in PHILIP S.C. LEWIS (ED.), LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 295, 298-301 (1994). See Nottage, *supra* note ***, at 42 n. 61 (noting observation of Japanese student of lack of “practical orientation” and students doubts whether they will be able to use knowledge learned).

²⁰ Miyazaw & Otsuka, *supra* note ***. While the German system of legal education places predominant responsibility for professional training in the internship period, university legal education also contributes to this instruction. See Marutschke, *supra* note ***, at ____.

students who become law professors.²¹ In any given year there are approximately 45,000 undergraduates studying at nearly one hundred law faculties. The first year of education is given over to general courses. While classes in later years address law, they generally do so from a theoretical perspective and do not focus on case analysis. Typically they are large lecture classes and student participation is minimal.²² Law faculties usually are divided into departments: often jurisprudence and politics or, at some of the more recently founded faculties, jurisprudence and management law.

3. The Future Japanese System of Lawyer Training

The new system mandated by the Reform Report introduces law schools between undergraduate education and the Institute.²³ In the system being established, undergraduates are to apply for admission to law schools. Those that have undergraduate degrees in law will then spend two or three years in law school, depending upon the quality of their preparation, while those with undergraduate degrees in other subjects, will spend three.

The Institute will not, however, be eliminated. Law school graduates will continue to take the examination for admission to the Institute. Some of the practical training presently provided by the Institute is to be shifted to the newly-formed law schools.²⁴ Because the training period at the Institute is to be reduced to one year, and the number of places increased, the Reform Report anticipated that about 70-80% of all applicants with law school educations would be admitted.²⁵ It now appears, however, that since the number of new law schools will be greater than expected, the actual percentage of

²¹ Regarding graduate legal education, see Eric A. Feldman, *Mirroring Minds: Recruitment and Promotion in Japan's Law Faculties*, 41 AM. J. COMP. L. 465, 469 (1993).

²² See Eric A. Feldman, *supra* note ***, at 469 (1993); Nakabo, *supra* note ***, at ; Noda, *supra* note ***, at 141; Constance O'Keefe, *Legal Education in Japan*, 72 OR. L. REV. 1009, 1022 (1993); Mark Thompson, *Taking Law at Chūō: Japan's Approach to Legal Education is Different. But is it Better?* CANADIAN LAWYER (October 1986), as reprinted in CURTIS J. MILHAUPT ET AL., JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 41, 42 (2001).

²³ The Reform Report does not discuss why it did not adopt what would seem the most obvious solution to the shortage of lawyers in Japan: a large increase in the size of the Institute or the creation of additional institutes elsewhere in the country. Such an approach would be considerably less costly and difficult than creating 72 new law schools. Such a possibility was raised but not widely considered. Apparently it was felt that this would make too great demands on the limited resources of the judicial system, would cost too much, and might compromise the ability of the Supreme Court to control the education of lawyers. For a critical view of the reform from a New Zealander who has taught in Japan, see Nottaga, *supra* note ***, *passim*.

²⁴ Reform Report Chap. III, Part 2, 4(1).

²⁵ Reform Report Chap. III, Part 2, 2(2)d.

successful applicants will be significantly lower—perhaps as low as 25-35%. While the number of applicants admitted is to be increased, the principle of restricted admission is not to be abandoned. Free admission to practice of all who are qualified will *not* be introduced.

While the Reform Report does not anywhere state that it is following an American model, Japanese legal educators consider the model for the new system of legal education to be the American law school.²⁶ The Reform Report identifies four legal systems visited by the Commission: those of the United States, the United Kingdom, Germany and France.²⁷ Of these countries and Japan, the proposed reforms bear the closest resemblance to American legal education. The Reform Report mandates creation of new institutions that it pointedly calls “Law Schools” in contrast to the Faculties of Law. Just as are American law schools, these new Japanese law schools are to be “professional schools providing education especially for training for the legal profession.”²⁸ Just as do American law schools, they are to provide for a three-year period of training following a four-year undergraduate education. Just as American law schools provide for Socratic and other interactive dialogue with students, the new Japanese law schools are to provide instruction that is “bi-directional (with give-and-take between teacher and students).”²⁹

Japanese legal educators are looking to the United States as the principal model in implementing the reform in legal education. One pointedly observes: “[a] major issue of the proposed reform is whether Japan should adopt an American model law school, *i.e.*, professional education at the graduate level, while essentially doing away with the traditional Japanese method of teaching law at university.”³⁰ Delegations of Japanese legal educators have visited the United States. Japanese legal educators have invited numerous foreign legal educators to address them. The overwhelming majority have been Americans.³¹

²⁶ Yukio Yanagida, *supra* note ***, text at note 54.

²⁷ Reform Report Introduction.

²⁸ Reform Report, Chap. III, Part 2, 1.

²⁹ Reform Report, Chap. III, Part 2, 2(2)d.

³⁰ Koichiro Fujikura, *Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission*, 75 TULANE L. REV. 941, 942 (2001). See Nottage, *supra* note ***, at 34 (noting that proposals for reform seem to be influenced primarily by U.S. or German models).

³¹ Jurists from around the world have contributed and are reported in Japanese English language legal periodicals. From the United States alone there are over 20 contributions. For contributions with full texts, see William Burnham, *A Peek into the Future of US Legal Education: Any Lessons for Japan?*, 15 KWANSEI GAKUIN L. REV. 37-53 (2001); David F. Chavkin, *Curriculum Reform in American Legal Education: Potential Lessons for Reform of Legal Education in Japan*, 18 RITSUMEIKAN L. REV. 61-76 (2001); M. Fine,

4. Implementation of the Reform Report

The Reform Report sets the direction for the new law schools. It does not spell out the details of the new system. Those will be determined by the individual actions of all those charged with carrying out the Report. This section discusses issues that

US Legal Education: A Model for Japanese Education Reform, 3 WASEDA PROCEEDINGS OF COMPARATIVE LAW 51-93 (2000); Mary Kay Kane, *The Ideal American Law School and the Role of the AALS*, 19 NIHON UNIVERSITY COMPARATIVE LAW 124-29 (2002); Mary Kay Kane, *U.S. Legal Education—A Brief Sketch*, 18 NIHON UNIVERSITY COMPARATIVE LAW 155-61 (2001); David W. Leebron, *The Philosophy of Legal Education*, 19 NIHON UNIVERSITY COMPARATIVE LAW 115-24 (2002); Elliott S. Milstein, *The Association of American Law Schools and the American Bar Association: Overlapping Roles and Differing Agendas*, 18 RITSUMEIKAN L. REV. 49-59 (2001); Carl C. Monk, *Role of Legal Education in Improving the Quality of Justice*, 19 RITSUMEIKAN L. REV. 47-59 (2002); Myron Moskowitz, *The Problem Method of Teaching Law*, 4 Waseda PROCEEDINGS OF COMPARATIVE LAW 75-81 (2001); Paul D. Reingold, *Essay: Recent Trends in American Legal Education*, 15 KWANSEI GAKUIN L. REV. 17-35 (2001); Robert Vaughn, *Admissions Policies and Practices: WCL Admissions as an Example*, 19 RITSUMEIKAN L. REV. 99-108 (2002); Charles D. Weisselberg, *Building a Law School Clinic: The Experience of the University of California at Berkeley*, 5 WASEDA PROCEEDINGS OF COMPARATIVE LAW 121-32 (2002). For contributions marked only by titles or outlines, see: Lawrence M. Friedman, “The Role of Non-Doctrinal Courses in Law Schools: The Case of Legal History and Socio-Legal Studies, July 15, 2002,” 5 WASEDA PROCEEDINGS OF COMPARATIVE LAW 117 (2001); Ilhyung Lee, “Legal Education at the University of Missouri, July 25, 2002,” 5 WASEDA PROCEEDINGS OF COMPARATIVE LAW 133 (2002); John K. McNulty, “The Significance of Tax Law Courses for Law School Legal Education and the Practice of Law in the United States, October 18, 2001,” 4 WASEDA PROCEEDINGS OF COMPARATIVE LAW 227-31 (2001); Carl C. Monk, “The Structure and Method of Legal Education in U.S.A. and the Role of the AALS, December 10, 2001”, 4 WASEDA PROCEEDINGS OF COMPARATIVE LAW 259 (2001); Mark J. Ramseyer, “Current Japanese Scheme of Law School from American Perspective, November 29, 2000”, 3 WASEDA PROCEEDINGS OF COMPARATIVE LAW 195 (2000); Harry N. Schreiber, “Integrating History and the Social Sciences into Legal Education: the American Experience, June 7, 2001”, 4 WASEDA PROCEEDINGS OF COMPARATIVE LAW 105 (2001). For contributions that include other countries’ legal education systems, see

Multinational: James R. Maxeiner, *American Law Schools as a Model for Japanese Legal Education?* in English in 24 KANSAI UNIVERSITY REVIEW OF LAW & POLITICS 37 (2003), and in Japanese in 52 HOGAKU RONSHU 250 (2002); James R. Maxeiner, *The Professional in Legal Education: Foreign Perspectives*, An Address to the Faculty of Law of the Himeji Dokkyo-University, Himeji, Japan, June 26, 2003; James R. Maxeiner, *The Rule of Law in the Reform of Legal Education: Teaching the Legal Mind in Japanese Law Schools*, An Address to the Faculty of Law of Kansai University, Osaka, Japan, July 2, 2003;

Canada: Marilyn L. Pilkington, *Legal Education in the Province of Ontario: The roles of Universities and the Legal Profession*, 33 KOBE UNIVERSITY L. REV. 29-53 (1999); Frederik H. Zemans, *The Role of Law School Clinics in Canada: With a Comparison with the Bar Admission Course*, 5 WASEDA PROCEEDINGS OF COMPARATIVE LAW 283-301 (2002);

China (texts in Chinese): Li Hua-de, *Legal Education in the P.R.C.*, 4 WASEDA PROCEEDINGS OF COMPARATIVE LAW 117 *et seq.* (2001); Zeng Xianyi, *Legal Education in the P.R.C.*, 5 WASEDA PROCEEDINGS OF COMPARATIVE LAW 27 *et seq.* (2002);

Germany: Peter Gilles & Nikolaj Fischer, *Juristenausbildung 2003—Zur neuesten Ausbildungsreformdebatte in Deutschland*, 20 RITSUMEIKAN L. REV. 181-218 (2003); Peter Hanau, *Juristenausbildung in Deutschland*, 18 Ritsumeikan L. Rev. 77-85 (2001); Marutschke, *supra* note ***; Thomas Württenberger, *Zehn Thesen zur Reform von Ausbildung, Bildung und Forschung*, 15 RITSUMEIKAN L. REV. 79-87 (1999);

Korea: Dai-Kwon Choi, *Proposed Legal Education Reform in Korea: Toward Professional Model*, 18 RITSUMEIKAN L. REV. 93 (2001); Kun Yang, *Developments in the Proposal for Korean Professional Law Schools*, 33 KOBE UNIVERSITY L. REV. 85-96 (1999);

United Kingdom: David Miers, *The Role of Universities in the Training of Lawyers in the United Kingdom*, 33 KOBE UNIVERSITY L. REV. 55-83 (1999).

implementation raises.

a. Unitary Profession

Perhaps the most basic issue of professional legal education is the type of legal professional to be educated, *e.g.*, judge, lawyer.³² The Reform Report stands by the model of a unitary system of legal education, *i.e.*, lawyers on the one hand and judges and prosecutors, on the other, are to receive the same education.³³ Indeed, the Reform Report encourages appointing more lawyers as judges.³⁴ Less clear, however, is what the model for that unitary legal professional is to be.

The Institute focuses on training judges more than on training lawyer-advocates.³⁵ While the Reform Report takes as a model for legal education the American law school, it does not model future Japanese legal professionals on their American counterparts. In the United States, unlike in present-day Japan, all persons who wish to become legal professionals, whether as lawyers or as judges or otherwise, are required to be trained as advocates, that is, as private lawyers. It is the role of the advocate to find a way to the client's desired resolution through shaping of the law, the facts, and the judgment of the dispute. The lawyer is seen as "social engineer".³⁶ Judges revel in making political

³² The nature of personnel is critical in assessing a legal system. Cf. Max Rheinstein, *Comparative Law and Legal Systems*, in 9 *International Encyclopedia of the Social Sciences* 204, 208 (1968), reprinted in 1 MAX RHEINSTEIN—GESAMMELTE SCHRIFTEN 239, 246-47 (1979) ("The essential difference between common law and civil law lies in the technical structure of court procedure, in the different conceptual framework within which legal thought moves, and in the underlying cause of these differences: the diversity of the personnel by which the machinery of the administration of justice is handled and guided.").

³³ Until 1947 attorneys had separate training programs. Abe, *supra* note ***, at 154-55. The unitary training is seen by some as of "great value since it contributes to understanding between lawyers of various categories." Noda, *supra* note ***, at 142. But others have found unitary education wanting. Yasuhei Taniguchi called it "a near impossible task" and recommended a division of the training program as "[t]he fundamental solution." Yasuhei Taniguchi, *Shiō Kenshū nī okeru hōsō kyōiku (Legal Education at the Legal Training Institute: An Introduction)*, 25 JIYŪ TO SEIGI 7-12 (1974), as translated in 1 Henderson & Haley, *supra* note ***, at 439, 442. This is a major issue in reform of German legal education as well. German law requires that to become lawyers, candidates must establish their suitability to be judges. The German Lawyers' Association challenges this requirement as an anachronism. See *Bericht des Ausschusses der Justizministerkonferenz zur Koordinierung der Juristenausbildung für die Konferenz der Justizministerinnen und Justizminister vom 11. bis 13.6.2001* in Trier, at 29-30, available at <http://www.justiz.nrw.de/jm/landesjustizpruefungsamt/aktuelles/pdf/bericht.pdf>; and reprinted in JURISTISCHES SCHULUNG 2001, 933; Nikolaj Fischer, *Die neue „anwaltsorientierte“ Juristenausbildung*, ANWALTSBLATT 2003, 319.

³⁴ Chap. III, Part 5, 1(2).

³⁵ This remains so even though lawyers make up the largest share of graduates. See Taniguchi, *supra* note ***, at 304.

³⁶ Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 773 (1988) (American law school professors have a "deep-rooted belief that lawyers are social engineers"); Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering*,

decisions.³⁷ Students are trained to identify a precise point in controversy and to argue for resolving that controversy favorably. Legal argument is the end in itself.³⁸

While the Reform Report wants law schools to enable lawyers to be “doctors for the people’s social lives,”³⁹ it does not put forward a major revision in the respective roles of judges and lawyers in the Japanese legal system or a move from a Civil Law style to an American Common Law approach. All jurists will continue to be trained as judges. And the role of the judge is the neutral applier of the law to the facts, not that of advocate.

b. Institutions

Japanese law faculties are intensely competitive. Notwithstanding that legal education in Japan is not directed toward producing lawyers, still success on the examination for admission to the Institute serves as a measure—perhaps *the* principal measure—of the quality of a law faculty. Historically just five law faculties—two public (Tokyo and Kyoto) and three private (Waseda, Chuo and Keio)—have accounted for about two-thirds of successful applicants to the Institute. According to the Ministry of Justice, in 2002 each of these had more than one hundred successful applicants; no other law faculty had as many as fifty and most had fewer than ten. When the Reform Report was issued there was a general expectation that only about twenty new law schools would be created.⁴⁰ That would have corresponded to about the number of law faculties that typically have at least ten successful applicants to the Institute. But the number of applications to open law schools was much higher than twenty. Seventy-two applications were filed—all but a

Religion, and the Search for Professional Identity, 30 RUTGERS L.J. 143, 176-77 (1998) (“A century after Holmes, however, in the midst of the celebrated “crisis” in the legal profession, the position of the American lawyer as social engineer extraordinaire was taken for granted to a greater extent than ever by the legal elite—the bench and the academy.”)

³⁷ See, e.g., CHARLES E. WYZANSKI, WHEREAS—A JUDGE’S PREMISES 6 (1965). See generally Mary Ann Glendon, *The Ways and Tastes of Magistrates in A NATION UNDER LAWYERS* 111-73 (1994).

³⁸ Richard Stith, *Can Practice Do Without Theory? Differing Answers in Western Legal Education*, 80 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE (ARSP) 426, 433 (1994). (“An excellent student is one who can argue either side of a case with equal facility, who is trained to be a ‘hired gun’.”) This (as well as other aspects of the litigation system) helps explain two other features of American legal life. (1) The party with the better lawyer should win. (2) Counseling clients is not so much about whether particular action is within or outside law, but about who might argue that the proposed action is improper and whether they would have a colorable claim.

³⁹ Reform Report Chap. III, Part 2, 2(1)a. The sentence continues with Professor Maxeiner’s favorite line in the Report: “as persons with kind hearts who can deeply sympathize with the happiness and sorrows of people who are going through their one and only life.”

⁴⁰ Cf. Fujikura, *supra* note ***, at 943.

handful came from the 93 universities that have law faculties.⁴¹ Apparently even universities with few successful candidates for the Institute concluded that, to be competitive at the undergraduate level, they need to have law schools.

Of the new law schools, 22 are public and 50 private.⁴² The future law schools state in their applications the number of students they would like to admit in their initial year. Of the 72 applications filed, 22 are for an entering student body of 100 or more, while 50 are for an entering student body of less than 100 students. Projected total initial enrollments are 1790 at public schools and 4160 at private schools. Since the program will be a variable two-or-three year one, the total size for each school should be somewhere between double and triple the entering size, probably somewhat closer to the larger number. That means most law schools would have fewer than 300 students.

The Reform Report seems to anticipate an easy initial accreditation of the new law schools.⁴³ As this is written the Ministry of Education and Science is reviewing the applications; newspaper reports suggest that as many as twenty of the applications may be in trouble. Japanese legal educators expect that even among the schools that do receive tentative approval now, a substantial number will not receive permanent approval when they are reviewed again in a later year.

While some of the new law schools will be independent institutions,⁴⁴ most will be affiliated with universities. Still they all are to have substantial independence. They will be administratively separate from the law faculties. They will control their own admissions,⁴⁵ and are to grant their own degree, a Juris Doctor. (*Homu Hakase*). At leading private universities (*e.g.*, Kansai, Ritsumeikin) new law school buildings are nearing completion or are in planning. The new law schools will not, however, control their own budgets. This may be just as well, since they are not expected to be the cash cows that their American counterparts are.

Financing of the new law schools portends to be a divisive issue.⁴⁶ Law schools will be dependent on tuition from their students and on other resources that their

⁴¹ The number of 93 comes from the Reform Report, Chap. III, Part 2, 2(5).

⁴² As reported at <http://dna.asahi.com>.

⁴³ Reform Report Chap. III, Part 2, 2(4) (*e.g.*, “wide-spread participation of schools should be permitted”).

⁴⁴ Both the Tokyo and the Osaka Bar Associations are creating law schools.

⁴⁵ Reform Report Chap. III, Part 2, 2(2)c (“judging applicants shall be left up to the independent judgment of each law school according to its own educational philosophy”).

⁴⁶ Financing has been a major point of concern. See Fujikure, *supra* note ***, at 945-46.

universities may make available. The new law schools at public universities have announced low tuitions of about ¥ 780,000 a year (or about \$6,750). Private law schools had spoken of tuitions in a range of ca. ¥ 1,750,000 to ¥ 2,350,000 (\$15,000 to \$22,500) . Since this is considerably more than the public universities, to remain competitive, the private universities called for government support. The Ministry of Education and Science has announced support in three forms. First, it will provide a subvention so that the tuition at private law schools is no more than ¥ 300,000 above that of public schools. Second, it will increase the level of scholarship support available to most students from ¥ 130,000 a month to ¥ 200,000. Third, it will provide increased support for specific law school related projects. Whether all these goals will be realized, remains to be seen.

c. Students

A concern of many Japanese legal educators about future law schools is whether they will be able to obtain sufficient, high quality students. Since a school's prestige—and therefore its ability to attract students—is likely to be dependent on its success in placing graduates in the national Institute, it is imperative that a new law school enroll students likely to pass the test. This is all the more important now that it appears that fewer than half of law school graduates will be admitted to the Institute. Of the 5950 students potentially entering April 1, 2004, no more than 1500 are to be selected for the Institute in 2006.

Tuition is expected to be higher than university tuition generally. At Kansai University, which is typical of private schools, undergraduate tuition is about ¥ 900,000 a year, or about \$7750 and is about one-third more than that of public universities. Law school tuition at one of the new law schools might be even more than double that. High tuition may discourage students from attending, especially if a place in the Institute is not seen as probable to the tuition payer.⁴⁷

Two different bodies have created and are administering standardized law school admissions tests. In addition, the law schools are supplementing the standardized tests with their own examinations. Scheduling these supplemental tests is forcing the new law schools to make important tactical, competitive decisions. They will not be able to give them until winter 2003/2004, but will use them to determine admission for April 1. Schools must take care that they do not schedule their exam on a day that might cause them to lose

⁴⁷ See Miyazawa, *supra* note ***, at 495; Nottage, *supra* note ***, at 39.

candidates to another school also testing that day.

The new Japanese law schools are already discovering some of the techniques employed by American law schools to maximize their success rate on the bar exam: granting scholarships to the very best students and providing loans to good students. They are also likely to require that graduates of law faculties with less than sterling records take three rather than just two years to complete the law school program.

The Reform Report places considerable weight on the diversity of the student bodies of the new law schools. Selection of applicants is to consider students from non-law faculties as well as “working people and others.” Law schools are to secure the opportunity for becoming lawyers to those “with limited funds,” “working people” and residents of areas without law schools.⁴⁸ It encourages development of evening law schools and distance law schools as well as support systems of scholarships, loans and tuition exemption.⁴⁹

d. Faculty

Most faculty members of the new law schools will come from the existing law faculties. Some will transfer full-time, while others will have split responsibilities between the law faculties and the law schools. There has been significant competition for new faculty. While decisions on staffing have mostly been made locally by committees at the respective universities, the Ministry of Education and Science must approve the choices. It has been imposing a fairly rigorous review of academic credentials. For example, it has refused to authorize a criminal procedure professor to teach criminal law, and it has demanded that professors show *recent* publications in the field they intend to teach.

The impending division of existing faculties into new law school faculty and old legal department faculty has not been as productive of as much dissension as one might have expected. In part that may be because conditions of employment are to be similar at the law faculties and the law schools and it is not yet clear which, if either, will be preferable. Faculty members who teach more philosophical subjects such as legal history and jurisprudence, seem to be opting for the law faculties, while faculty members who teach subjects closer to practice, seem to be gravitating to the law schools.

⁴⁸ Reform Report Chap. III, Part 2, 2(1)c.

⁴⁹ Reform Report Chap. III, Part 2, 2(3).

By law at least one-fifth of the faculty of the new law schools must come from practice. The Reform Report—noting the role of legal education as a bridge between theoretical and practical education—considers the participation of practitioner-teachers as “indispensable.” Accordingly it directs reconsideration of restrictions on multiple job restrictions that might preclude practitioners from also serving as law school teachers. It calls for setting qualifications for teachers that consider “to a large degree” the teacher’s “capacity and experience as a practitioner.”⁵⁰

Since most law school faculty members are to be coming from the existing law schools, creating employment and tenure standards apart from the university generally have yet to receive top priority. Most are expected to begin developing separate standards, if at all, only after they begin operation. Here much remains open.

e. Substance of Instruction

One of the most critical issues of implementation of the Reform Report is the substance of instruction to be provided in the new law schools. The Reform Report mandates that law schools “should provide highly advanced legal education especially for training legal professionals in order to build a bridge between theoretical education and practical education ...”⁵¹ There is yet, however, no consensus as to what kind of practical education law schools should provide and how they should share educational responsibilities with the existing faculties of law and with the national Institute. Only now are the new law schools beginning to develop their curricula that eventually will contribute to deciding these issues. They are planning practical courses familiar in American legal education such as moot court, legal clinics, and externships. But they are also looking to practical courses more similar to German-style education, such as seminars that unite civil law and civil procedure, criminal law and criminal procedure, and so on.

Historically practice in Japan has meant the activities of judges, prosecutors and litigation lawyers. Practice has not generally referred to counseling and drafting services.⁵² Practical has generally meant the skills required in the former kind of practice. Many of those behind the present reform are believed to have the former narrow view of practice.

⁵⁰ Reform Report Chap. III, Part 2, 2(2)e.

⁵¹ Reform Report Chap. III, Part 2, 2(2)e.

⁵² Cf. Nottage, *supra* note ***, at 30-34 (prophesying that Japanese legal practice in 2020 will become more “proactive”).

But others—particularly those from industry—are more likely to see practical legal education in legal subjects of use in business, e.g., antitrust, intellectual property, and international business transactions.⁵³

With respect to sharing responsibilities with the faculties of law, the general outline is fairly clear: the law faculties—even more than before—will emphasize general education and only the basics of the legal system. The law schools will focus on compulsory instruction in core legal subjects of private and public law. They will, above all, focus on the ability to think in legal terms.⁵⁴ They also are likely to teach the more “practical” business courses.

Less clear is how the law faculties will share responsibilities with the national Institute. The shortening of the time at the Institute from what was originally two years to what will be one year is accompanied by the expectation that the law schools will pick up some of the instruction presently provided at the Institute. In particular, they are expected to cover what is now covered in classroom type instruction in judgment drafting.⁵⁵ But at least until the law schools are firmly established, they not supplant completely the classroom instruction that the national Institute provides in practical skills.⁵⁶

It will be interesting to see whether Japanese law schools focus on *practice* and the *practical* or on the *professional*. The similarities of these three words—both in concept and sound—make it easy even for native English-speakers to slip from one concept to the other. By *practice*, we mean the day-to-day activities of private lawyers, judges and prosecutors; by *practical*, we refer the day-to-day tasks that a legal professional must do and the skills needed. By *professional*, we mean something different: we mean the method of legal thinking common to all jurists. It is broader than the mere practical; it is the way that lawyers go about their profession.

The specifics of the future law school curricula are beginning to become clear. Many law schools will require even students who have had a background in legal studies to

⁵³ Kashiwagi, *supra* note ***, at 61.

⁵⁴ Masato Ichikawa, *Ritsumeikan University Proposal from Kyoto Private School of Law and Politics to Ritsumeikan Kyoto Law School*, 18 RITSUMEIKAN L. REV. 23, 37, 40 (2001).

⁵⁵ Cf. Reform Report Chap. III, Part 2, 2(2)d (“Law schools should provide educational programs that, while centered on legal theory that takes into account reasonable solutions to problems arising in the world of practice, introduce practical education (e.g., basic skills concerning factual requirements or fact finding) with a strong awareness of the necessity of building a bridge between legal education and legal theory on the basis of systematic legal theory.”); Chap. III, Part 2(4)(1); Ichikawa, *supra* note ***, at 42.

⁵⁶ See Ichikawa, *supra* note ***, at 42.

spend three years in law school. For these students, and for those students who did not have an undergraduate education in law, the first year will be devoted to courses on the fundamentals of Japanese law. The second year, which for the better graduates of law faculties given advanced placement, will be the first year of law school instruction, will consist of three principal types of courses, many of which will be compulsory: (1) seminars and other deepening courses in the basic areas of law studied in undergraduate school (e.g., civil law, criminal law, constitutional law, commercial law, criminal procedure, civil procedure) (60%), (2) practical instruction by experienced practitioners in civil, criminal and administrative procedure that combines the procedural law with the respective substantive law; and (3) electives (e.g., international law, intellectual property law, tax law). The third year will consist of similar types of courses, but students will be expected to spend more of their time on practical and elective courses. The elective courses typically will include legal philosophy and foreign and comparative law, but not legal history. It does not appear, however, that elective courses will be so numerous or the time available sufficient to create a specialization along the lines of the German *Wahlfach* or the *de facto* American specialization. Perhaps this will come if the pressure of the Institute's examination is reduced.

There is concern whether Japanese law schools will be able to provide adequate practical instruction. Although by law at least 20% of faculty members are to come from practice, some legal educators fear that this may not be enough and that present faculty members will be unable to provide the needed instruction.⁵⁷ Moreover, Japanese legal educators report that they are having difficulty locating suitable professors from practice. In Japan, public servants such as judges and prosecutors can earn more than ¥ 25 million a year, that is, in excess of \$200,000. To facilitate placing professionals in the new law schools, the Ministry of Justice in cooperation with the Supreme Court have established a new system to send prosecutors and judges to the law schools for three-year terms. The law schools will provide the usual funds for professors and the state will make up the difference. Because there is no comparable system to send private lawyers to the law schools, it may be more difficult to engage competent private practitioners. Pessimism that existing law faculty members are not themselves able to teach professional legal skills

⁵⁷ See, e.g., Kashiwagi, *supra* note ***, at 65.

seems unwarranted. After all, in the United States law school education completely supplanted law office education and did so by using law professors who had no practical experience.⁵⁸ Difficulties in staffing may depend upon whether the law schools focus on professional “thinking like lawyers” or on more technical practice skills.

f. Teaching Methods

The Reform Report calls for a shift in the method of legal education from the unilateral mass lecture typical of present-day law faculties to a “small group education system” that provides “bi-directional (with give-and-take between teacher and students) and multidirectional (with interaction among) students.”⁵⁹ Bringing this change about would be a marked departure from the historic pattern. Japanese students in law (or elsewhere) are simply not accustomed to participating in class.⁶⁰ To get them to do that will require substantial effort on the part of faculty members many of whom themselves are accustomed largely to lecturing. In seeking to re-orient their students, Japanese law school professors will be at a disadvantage in comparison to their American colleagues whose first year law school classes are the apparent model for the Reform. In first year American law school classes, most students have had little or no prior experience to the law. In first year Japanese law schools classes, on the other hand, most students will have had exposure to law. That forecloses introducing a new teaching method as just a part of the new substantive material.

g. Scholarship

Japanese law faculties have a rich tradition of legal scholarship.⁶¹ It is said, however, that that tradition has led to a disdain for practice.⁶² The Reform Report finds traditional legal education lacking both as basic liberal arts education and as specialized legal education. It notes that at the postgraduate stage “the major purpose has been to train academic researchers.” This has led, it concludes, to a “gap between education and actual legal practice.”⁶³ The Report calls on law schools that develop from that university tradition “to change themselves by shifting their principle from the traditional one focusing

⁵⁸ The most famous of which was James Barr Ames. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 38 (1983).

⁵⁹ Reform Report Chap. III, Part 2, 2(2)d.

⁶⁰ See Takashi Uchida, *Legal Education in Japan*, 12 CORNELL L. FORUM No. 1, 7, 9-10 (June 1985).

⁶¹ See Marutschke, *supra* note ***, at ____.

⁶² Kashiwagi, *supra* note ***, at 62.

⁶³ Reform Report Chap. III, Part 2, 1.

on research and study to a new one truly forcing on education of students.”⁶⁴

Some Japanese law professors are concerned that the creation of law schools and the new emphasis on teaching practical skills are likely to lead to a deprecation of traditional legal scholarship. Others lament that in the future law schools scholarship may remain of equal importance with practical legal education.⁶⁵ Leaders of new law schools believe that increased emphasis on practical teaching need not lead to a decline in scholarship. While it is still too early to tell what the result will be, foreign experiences may be instructive. In Japan legal scholarship is generally of the dogmatic kind, that is, it is concerned with developing the law as a body of rules applied by courts. Japanese legal scholarship is not generally social science scholarship; such scholarship, usually as political science, has a secure—and separate—place in the faculties of law. It is in countries such as the United States, where legal scholarship has to a large extent become social science scholarship, that there is a “disjunction” between law and practice.⁶⁶ In Civil Law countries, such as Germany, where law professors to a substantial extent write and interpret the law—dogmatic scholarship has a secure place. The connection to practice serves to enhance scholarship by linking law to the reality of practice. Looked at this way, creation of law schools in Japan could strengthen traditional legal scholarship—at least in practical fields—by bringing scholarship more in line with “real world” issues.

⁶⁴ Reform Report Chap. III, Part 2, 2(2)a.

⁶⁵ Kashiwagi, *supra* note ***, at 63.

⁶⁶ See Brian Leiter, “Why is it so easy to get tenure in law schools,” The Leiter Reports, August 23, 2003, at <http://webapp.utexas.edu/blogs/archives/bleiter/000179.html#000179>.