

して、心から感謝の意を表す。筆者は本稿に限らず、英文原稿を作成する場合にはほとんど常に両氏のご教導にあずかっている。ちなみに、伊藤先生は津田塾大学英文科のご出身で、母校の教職に携わりながら独学で司法試験に合格された異色の法律家、我が国ではまれなバリスターであった宇佐美六郎弁護士のもとで渉外法律実務の経験を積まれ、その没後同事務所を継承された方である。また太田氏は、カナダ生まれの日系二世(現在は日本国籍)、長年にわたり同事務所の英文ライティングの仕事を担当されている方で、かたわら少なからぬ数の我が国の学者(その中には国際的に高名な法学者も含まれる)の英文のチェックをされた経験をおもちと聞く。——もっとも、本稿は掲載誌への寄稿にあたって、スウェーデンの法学者の友人の意見を容れて若干修正・加筆した箇所もあり、その最終的な文責が筆者にあることはもちろんである。

萩原 金美

The Role of Law in Japanese Society: Comparison with the West, 19 University of British Columbia Law Review, 375 (1985).

Let me also refer to Wang Weiguo, Some Main Characteristics of the Traditional Legal Culture of China, Juridisk Tidskrift 1989—90 p. 588 et seq. That article will help the reader to a better understanding of this article.

- 1 This paper is based upon my lecture given at Lunds universitet, on April 11, 1991, as part of the program for "Internationella dagen: Öst-och Sydostasien". The conference was organized by student unions (AIESEC, ELSA, FLIE and UPF). The title of the lecture was originally suggested to me by Professor Reinhold Fahlbeck, Lunds universitet. He has stayed in Japan recently to study Japanese labour law and labour relations.
- 2 Cynthina Mayer, Japan: Behind the Myth of Japanese Justice, The American Lawyer July / August 1984 at 115 and 122.
- 3 See e. g. Koresuke Yamauchi, Reception av västeuropeisk rätt och den recipierade utländska rättens funktion i Japan (Juridiska föreningen i Lund, 1984).
- 4 The Time Magazine described Japan as the "Land Without lawyers"; Time, August 1, 1983 at 62.
- 5 See Masanobu Kato, The Role of Law and Lawyers in Japan and the United States, 1987 Brigham Young University Law Review, at 637—8. This paper is a very informative and comprehensive study on the subject.

付記

本稿は、スウェーデンの法律雑誌 Svensk jurist tidning Argang 77 3/92 s. 243以下に掲載されている拙稿 The role of lawyers in Japanese society against the background of Japanese cultural traditions の転載である。みられるようにそれほど深味のある内容ではないが（本来学生向きの講演原稿としてまとめたものである）、拙稿「再論「弁論兼和解」」（判例タイムズ769号（1992））、「民事訴訟法改正と争点等の整理手続」（判例タイムズ812号（1993））の中でも言及しており、掲載誌が我が国の読者の目に触れることはまず絶無に近いであろうから、本誌に転載させていただくことにした次第である（転載については掲載誌側の了承を得ている）。

なお、本稿の英文のチェックについては宇佐美法律事務所の伊藤和子弁護士および同事務所のスタッフである太田武氏から絶大なご教示を賜ったことを記

law in the Meiji era and finally the law reform enforced during the American occupation. It is very probable that American demands for free access of its lawyers may have the same sort of impact.

I have a rather optimistic view of the matter. It may be a good thing for the Japanese public as well as Japanese lawyers. The economic prosperity achieved by Japan has also created numerous problems in our society, of which serious damage to the environment is only one example. There are two sides to every coin. It is now time for the Japanese to place more emphasis on legal justice rather than on economic efficiency.

On the other hand, now that Japan has become an affluent country, there is a large influx of foreigners and foreign companies. Japan therefore cannot remain a harmonious society in which most people share common values and attitudes toward law. Resolution of disputes in the future will inevitably rely more on legal recourse than in the past.

All things considered, the importance of the role of lawyers will increase significantly. As a result, there will be drastic changes in the present legal system and lawyers' institutions. Some people may deplore such changes but I believe they should be welcomed by the Japanese because we should get more legal justice.

References :

Takao Tanase, *Management of Disputes: Automobile Accident Compensation in Japan*, 24 *Law & Society Review*, 651 (1990) is a remarkable article concerning the subject treated in my paper. Almost all important literature in English related to my article is mentioned at pp. 687—8 of his article. I will add a few additional texts: Yoshiyuki Noda, *Introduction to Japanese Law*, trans. and ed. Anthony H. Angelo (Tokyo, 1976) and Hideo Tanaka,

from this year (1991) the number of legal trainees will increase by 200 to 700. The total number is still very small from an international viewpoint. In any event it is one step in the right direction toward development of our legal profession.

The challenge from the outside comes from the U. S. For the past several years, trade friction between Japan and the U. S. has become more and more serious. As one of the demands for abolishment of non-tariff barriers, the U. S. has insisted that Japan allow free access to American lawyers. The Japan Federation of Bar Associations has categorically opposed this. In 1989, as a compromise, a law was enacted which allows foreign lawyers to practise in Japan within strict limits. The law provides that foreign lawyers meeting certain requirements will be permitted to practise in the specified field of foreign law. They are not permitted to deal with legal matters concerning Japanese law.

The U. S. is not satisfied with this solution. Even after the law came into effect, the U. S. continues to demand that restrictions be further liberalized.

So far there are about 60 foreign attorneys in Japan. Although most of them are American, there are a few English, French and others. It is a pity that there are not yet any Swedish attorneys in Japan. I hope some of the young law students in Sweden will aspire to establish a legal practise in Japan in the near future.

It is my view that, in the long run, the issue of foreign lawyers practising in Japan will have a decisive impact on the Japanese legal system and lawyers' institutions. Looking back on Japanese history, it seems that our legal system has always been changed dramatically by external pressures. First, the reception of Chinese law, then European

to almost what was demanded by the plaintiff. Although the plaintiffs eventually lost the case, they claim happily that they won the case in substance. Public interest actions concerning e. g. pollution, environmental damage and consumer protection have been increasing. Many public-minded attorneys are eager to take on such cases for a nominal fee or even no fee at all. The Japan Federation of Bar Associations supports this in many ways.

VI. The Prospects for the Future

Today, the Japanese legal system and legal profession are facing serious challenges, both from the inside and the outside. Recently, many of the brightest law students have rejected the difficult bar exam because they are able to find good employment with government departments and agencies or with leading private companies, on the basis of their scholastic records. It is therefore feared that those passing the bar exam will not necessarily be brilliant students but ones who are very tenacious and have good memories. It must be expected that such people often lack creativity and flexibility.

In order to attract young brilliant law students to the bar exam, the Justice Ministry proposed a few years ago to revise the bar exam to increase the number of successful candidates. But the Japan Federation of Bar Associations strongly opposed this proposal. Objections were especially fierce among the bar associations in rural areas. They were afraid that if the number of practising attorneys increased rapidly they would not have enough work and would therefore face economic difficulties.

After heated discussions, the Justice Ministry and the Federation of Bar Associations finally reached a compromise. Within three years

contract for a loan, lease or sale, even if a considerable amount is involved, they often use contract forms which are readily available in stationery stores. They almost never consult lawyers. And in rare cases where a dispute is taken to court, they expect the court to render a just decision despite the lack of a legally proper contract.

You may well understand that in such a society lawyers look like aliens. People respect them for their intelligence and expertise but shun them as much as possible. For example, the mere appearance of an attorney in a business transaction is considered to be an unfriendly act. My experience as an attorney also verifies this.

A recent poll revealed an interesting point.⁵ Compared with private enterprises, agencies in the central government, local governments, the diet and mass media, the judiciary enjoys the highest rating as being a fair and reliable organization. However, it received the lowest rating with respect to influence in policy formation and contribution to daily life. This survey seems to symbolize the role of law and lawyers in Japanese society.

Contrary to what I have been saying up to now, a (somewhat ambivalent) countervailing phenomenon illustrates the important role of courts and lawyers in Japanese society. Trials and judgments in certain matters are of great interest to the public and mass media. This means that people can use lawsuits to exert effective pressure on the government, large companies and other socially or economically influential organizations. Let me give you one successful example. A group of non-smokers sued Japanese National Railways for damage caused by the harmful effects of passive smoking and succeeded in having the number of non-smoking cars increased. During the course of the trial, the defendant increased the number of non-smoking cars

here.

I would like to add here a few more words on the current government policy. Why is the government so reluctant to make use of court procedure and why are people not strongly against this policy of the government? After all, Japan is a democratic country. My view is as follows.

Firstly, our national goal since the Meiji era has been to "catch up with the West". To realize this goal the government deemed it necessary to maintain a non-litigious society as much as possible.

Secondly, the bureaucrats who draft the laws and regulations tend to regard law as no more than an instrument for governing the country. They do not understand that litigating out of self-interest will contribute to the growth of law. They do not really understand how important the realization of law and right through court procedure is because, among other reasons, they have no experience of court practise. In this respect, there is a very important difference between our two countries. In Sweden, the upper rank civil servants in charge of legal work have received high level legal training as *notarie* and often as a *hovrättsfiskal*.

Thirdly, people by and large support government policy. People expect that the government will take care of them. Here again we see that the Japanese attitude is still quite "dependent on authorities". Our groupism also tends to support the government policy.

What I have just said to a great extent also explains why quasi-lawyers can manage their legal business in the public and private sectors. They do not seriously have to consider being sued for malpractice. Most of their work can be done by relying on forms in guidebooks or instructions from authorities. When lay people make a

administrative law and it dealt very little with civil law. Law was regarded mainly as an instrument for governing the people and not as an instrument to protect the rights and property of the people. The people therefore feared the law and the courts.

This idea of Chinese law originated from Confucian thinking. It was not favourable to legal justice. In Japan, especially, Confucianism taught people to pay blind obedience to the ruler rather than to the law.

Buddhism preached harmony and peace of mind and frowned on discord. In 604, Prince Shotoku, a devoted Buddhist, enacted the first written code called "The Seventeen Articles Constitution". This code was, in fact, not a constitution but essentially a set of instructions to officers and the people. One of the articles stated: "Concord is to be honoured". This article is even now often quoted by court mediators.

The fourth and most influential factor has been the governmental policies from the Tokugawa period up to the present. The governments have always tried to discourage people from using the courts. One glaring example of this governmental policy is the present legal aid system. I must emphasize that legal aid in civil and administrative matters in Japan is shamefully poor. The government spends less than 100 million yen for legal aid each year (about 4 million Swedish Crowns).

This is an unbelievably low figure, isn't it? It clearly reveals the government's distaste for lawsuits.

As to the fifth factor, our traditional groupism, the Japanese place great importance in maintaining a good social relationship. To cause trouble to others is considered to be a sort of sin. Litigation is considered to be one of the worst forms of trouble. How our groupism has been formed is in itself a difficult question which I cannot discuss

so unique. They are pretty much the same as people in other countries.

The third school claims to take the middle road between the two.

Recently, a very noteworthy book on the subject entitled "The Enigma of Japanese Power" has come out. The book was written by Karel van Volferen, a Dutch journalist who has lived in Japan for many years. In my view, this is one of the best works on Nihonjinron although many Japanese as well as foreign experts on Japan are very critical of the book and I myself think his view is somewhat one-sided.

In any event, it is not my present intention to explore this subject further. What I wish to point out is that the discussion on Nihonjiron is closely related to the issue I am going to discuss. With respect to the Japanese attitude towards law, there are also three different schools of thought, although they all have some variations. Unfortunately, I cannot here introduce these interesting theories. Here, I shall only express my personal views. My view may be classified as being in the third school of thought.

I think the Japanese attitude towards law can be characterized as "negative, passive and dependent on authorities". The non-litigious tendency of the Japanese and their disregard for the importance of lawyers are therefore inevitable results. What then is the cause of such an attitude ?

In my view, five main factors caused the formation of such an attitude toward law: Chinese law, Confucianism, Buddhism, governmental policies from the Tokugawa period up to the present and finally our traditional groupism. Historically, they have interacted with each other and, although the influence of the first three has waned remarkably, the last two are still very much evident.

As I stated earlier, Chinese law was centered on criminal-

I shall try to illustrate this point from another angle. Kanagawa Prefecture, where I live, has almost the same population as Sweden; namely a little over 8 million. Needless to say, the prefectural government and local government offices in the prefecture have a tremendous amount of legal matters to deal with. However, there are no lawyers in any of these government offices. What I am saying now may sound unbelievable to you but, with a bit of exaggeration, it can be said that Japan is a "lawyerless society".⁴

The Japanese attitude towards law and lawyers thus seems to be considerably different from that of other industrialized nations. What is the cause of this difference? That, in fact, is the subject of recent heated discussions in Japan.

V. The Japanese Attitude Towards Law

Firstly, I would like to say a few words on "Nihonjinron" (i. e. what is a Japanese). Are the Japanese really unique? If so, to what extent and in what way? These are favourite topics which Japanese as well as foreign observers like to discuss. These discussions are called Nihonjinron and a considerable number of books and articles on the subject have been published.

Roughly speaking, there are three different schools of thought.

The first school claims that the Japanese are absolutely unique. According to this school, the Japanese are the only people among the highly industrialized societies who think and act in the right handed way. This means that they are group oriented, human relations oriented, emotional and so forth. In this sense, the Japanese are very different from the Chinese, who are said to be very rationalistic.

The second school, on the contrary, claims that the Japanese are not

their citizens to be subjected to that system. Westernization of the legal system thus became a matter of paramount importance for the Meiji government. The idea was mainly to show Western countries that the Japanese legal system was similar to theirs. The new legal system, especially the civil code, was therefore not a living law of Japanese society and, as a result, neither the government nor the people cared about how the newly adopted codes really functioned in Japanese society.

IV. Some Statistics on Present Conditions

I have already commented on the present condition of Japanese lawyers. Here I would like to give a more detailed explanation using statistics.

Japan's population exceeds 120 million, which is roughly 15 times that of Sweden. Nevertheless, the total number of lawyers is only about 17 000. According to my (somewhat out-dated) statistics the total number of your Swedish counterparts (judges, public prosecutors and advokater) is about 4 000. By Swedish standards, we would have about 6 000 judges, prosecutors and attorneys.

Turning to the number of court cases, Swedish *länsrätter* (the first instance administrative courts) alone deal with more than 150 000 cases yearly whereas the total number of civil and administrative cases which the Japanese district courts handle is less than 130 000 a year. (We do not have administrative courts so administrative cases are handled by the ordinary courts). While it is admitted that a simple comparison of the number of cases does not necessarily reflect the difference in litigiousness of people in the two countries, I believe these figures will serve to indicate that Japan is not a very litigious society.

In any event, it appears to have been in the Tokugawa period that the characteristic of traditional Japanese attitude toward law was decisively formed. That attitude seems to remain stubbornly unchanged even today, despite the remarkable modernization and industrialization of Japanese society.

III. Glancing at Japanese Legal History—from the Meiji Era

More than a century has passed since the Meiji Restoration (1867-1868). During this time the Japanese have experienced many dramatic changes. Japan adopted a Western legal system based mainly on German law and, after the second world war, some reforms modelled after American law have been made especially in the Constitution and in the field of criminal procedure.³ Japan is now a modern industrialized society. Why then does such a traditional attitude toward law still remain deeply rooted? To understand this it is important to know what the true intention of the Japanese government was in adopting the Western legal system in the Meiji era (1867-1912).

The major incentive for the Meiji government to adopt a Western style Constitution and statutes was purely political. One of the greatest and most urgent problems the government faced was the revision of unequal treaties with Western countries which had been concluded at the end of the Tokugawa period. Under these treaties, all foreign citizens enjoyed extraterritoriality and the Japanese government had no power to decide the rate of customs duty on imported goods. The Meiji government therefore demanded that these treaties be revised as quickly as possible. However, the governments of Western countries would not agree to such demands because they looked down on the outdated Japanese legal system and did not accept

sive Shogunate samurai governments ruled Japan.

Viewed from the point of legal history, there is a significant difference between the legal systems prior to the Tokugawa period and during the Tokugawa period (1603-1867). Prior to the Tokugawa period and especially in the Kamakura period (1192-1333), the Japanese were very litigious and the government was also eager to administer justice.

On the other hand, during the Tokugawa period the central government as well as the local governments hated civil suits. The government's policy was to either discourage civil suits or at least to regard them as worthy of little official concern. Rendering judgments in civil matters was a kind of benevolence of the government which tried as much as possible to settle cases by conciliation. Statutes were kept strictly secret and only the Chief Officer of the agency in charge of legal matters (Bugyo etc.) had access to them. As a result there existed no legal profession or legal training. Because there was no separation of powers, administrators dealt with trials and judgments. The Tokugawa period lasted for nearly 300 years and during this period Japan closed its door to foreigners. The Japanese therefore had no means to acquire knowledge of the Western legal system.

Meanwhile, at the later stage of this period there gradually appeared experts who assisted litigants in drafting legal documents and advising on procedures. These people were called "Kujishi". The opinion of legal historians on the Kujishi are divided. The majority view is that the Kujishi were either moneylenders or innkeepers and certainly did not command much respect from the public. On the other hand, some historians regard them more highly as the forerunners to today's Japanese attorneys.

viewed from a functional perspective. For example, many officials of the cabinet legislation bureau, who are not qualified lawyers, are professionally speaking very good lawyers. (Roughly speaking, some of these high-ranking civil servants may correspond to "rättschefer" in Swedish ministries).

For the sake of convenience, I shall hereafter use the designation "Lawyer" for qualified lawyers and "quasi-lawyers" for all other people who do legal work in the public and private sectors. Although I do not think the latter may be an appropriate appellation, the prevailing view is to adopt such terminology.

II. Glancing at Japanese Legal History—up to the Meiji Restoration (1867-1868)

To understand the role of lawyers in Japanese society today, it will be necessary, or at least useful, to take a brief look at Japanese legal history. It is said that Japanese law belongs to the Chinese legal family, as do Korean and Vietnamese law. To what extent Japanese law has been influenced by Chinese law is debatable. However, most scholars seem to agree that our traditional attitude toward law has been strongly influenced by its Chinese counterpart. Japan's first written code in a true sense begins with Ritsuryo in 701 which was patterned after that of China. The *Ritsu* in Ritsuryo means a criminal code and *Ryo* mainly an administrative code. One of its characteristics was the lack of private law which contrasts sharply with Roman law as well as the old Germanic law. Five centuries later, the Kamakura Shogunate which deprived the emperor's government of political powers, enforced Ritsuryo as well as the law of custom. Since then, until the Meiji Restoration in the middle of the 19th Century, succes-

One may wonder how the legal system in a highly industrialized society like Japan can function well with such a small number of lawyers. As this is the question most often posed by foreign observers, I will do my best to provide an answer although it seems to be not an easy task.

In Japan, the work of a practising attorney is for the most part limited to courtroom work.

Employees in government departments and agencies perform very important legal work such as drafting laws and regulations. Employees in the legal department of large companies do work similar to in-house lawyers of companies in Western countries. For example, the legal department of Toyota, the largest Japanese car maker, has a legal staff of about 60 people which deals with all the important legal business of the company. All of them are not qualified lawyers and it is said to be the proud boast of the Chief of the Legal Department of Toyota that his staff performs much better service for the company than would be possible by outside attorneys.² This appears to be the general consensus of all large Japanese companies.

Additionally, there are in Japan numerous specialists who deal only with specific legal matters. To cite some of these specialists, there are about 16 000 Judicial Scriveners who prepare legal documents mainly concerning registration of real estates, about 35 000 Administrative Scriveners who prepare legal documents related to administrative matters, about 56 000 Tax Attorneys apart from Certified Public Accountants and about 3 300 Patent Attorneys.

Some people are of the opinion that these specialists should all be categorized as lawyers. The total number of Japanese lawyers would then exceed 100 000. This is perhaps a rational contention when

university law departments. This gives the impression that most graduates of law departments take the exam. This is not the case as, according to statistics, the average applicant succeeds in passing the exam only on his sixth attempt.

A person who has successfully passed the national bar examination must serve two years as a legal trainee at the Judicial Training Institute of the Supreme Court to undergo training as a would-be judge, public prosecutor or practising attorney. This trainee period is broken down into eight months for collective training at the institute and the remainder for field training consisting of eight months in a court, four months in a public prosecutor's office and four months in an attorney's office. At the end of this two year training period, there is a final exam which most trainees are able to pass without difficulty. Only then are they qualified to be appointed as assistant judges or public prosecutors, or to become practising attorneys (called "Bengoshi" a counterpart to the Swedish "Advokat"). In Japan, when we use the appellation "qualified lawyers", we mean such people. In this sense, even a professor at law is not necessarily a lawyer because most of them neither take the bar exam nor undergo legal training as legal trainees. However, after some years of teaching, a professor at law can qualify for judgeship or can become a qualified lawyer by a special provision of law.

It is often said that the number of lawyers in Japan is remarkably small. This is true in terms of qualified lawyers. We have altogether about 17 000 qualified lawyers. Judges (including assistant judges), number about 2 000, public prosecutors a little over 1 000 and practising attorneys almost 14 000. (Summary court judges and vice prosecutors are not included as they do not need to be qualified lawyers).

generally have a rather superficial knowledge of law. But this poses no problem for them because most graduates of the law department expect already from the beginning of their studies to enter governmental departments and agencies or find employment with private companies. Only a few, less than one out of ten, aspire to become a qualified lawyer. (I will explain later on, what exactly it means to be a qualified lawyer.) Nowadays there are about 80 universities which have a law department and they produce more than 30 000 graduates every year.

You may ask, what kind of work law students eventually perform, with such poor legal knowledge. This question concerns not only our employment system but also our socio-economic structure. In Japan, with the possible exception of technological departments, university education is not expected to provide a high level of professional skill, which again is quite different from its Swedish counterpart. The employers usually provide whatever special training is necessary for particular jobs. It is closely related to the life-long employment system and also aims at nurturing the employees' loyalty to the employer or organization. I suspect employers do not necessarily want newcomers who are already overly specialized because it tends to hinder in-service training efficiency and job-rotation within the organization.

On the other hand, a student aspiring to be a qualified lawyer must overcome an extremely difficult barrier. To be a qualified lawyer in Japan, it is necessary to pass the national bar examination which is one of the most difficult of the national examinations. Each year about 25 000 applicants take this exam but only about 500 pass it. The ratio of success is therefore approximately two percent. The number of applicants is near to the total number of annual graduates of

論 説

The role of lawyers in Japanese society against the background of Japanese cultural traditions¹

Kaneyoshi Hagiwara

I. Difficult Definition of a Lawyer in Japan

In commencing my talk on the subject, I must first of all comment on the difficulty encountered in defining just what a lawyer in Japan is. In his paper "Marknadsföring av jurister", SvJT 1983, professor Per Olof Bolding said that a lawyer (jurist) is "anyone who has finished the courses of the law department". According to his definition every graduate of a law department is regarded as a lawyer in Sweden. I am aware that "notarietjänstgöring" denotes special prestige and not everyone can get a "notariepost". But this is another matter.

In Japan, it is impossible to apply the same definition as in Sweden. Legal education in Japan is held at undergraduate level as in many European countries. But the substance and standard of legal education in Japan are quite different from their Swedish or German counterparts. Although Japanese law students study for four years at a university, about one and a half of those years are spent on so called general culture subjects such as foreign languages, literature, philosophy, history and so forth. Thus, legal education is limited to, at most, two and a half years. As a result, graduates of the law departments