Does Law Matter in Japan? The Emerging Role of Law, Lawyers, and Legal Institutions in the Revitalization of Japan

Gerald Paul McAlinn†

The Japanese have long had a reputation for being non-litigious and possessed of a low level of legal consciousness. In the Meiji Era (1868–1912), Germany provided the model for efforts to modernize law, medicine, science and various social institutions. During the period following the end of World War II Japan looked primarily towards the United States for inspiration. The administrative state under the direction of elite ministerial bureaucrats was remarkably successful in forging a partnership between government and industry known colloquially as "Japan Inc.," and then bringing about the "Economic Miracle" of Japan's rise from the ashes of defeat following World War II. Unfortunately, the methods and institutions that worked well for rebuilding contained the seeds of their own downfall. Japanese politicians and the public alike grew disillusioned with the central command economy dominated by unchecked ministerial discretion and a lack of transparency. The response was to launch a sweeping series of legal and institutional reforms over the past two decades. After 20 years, reforms and corresponding infrastructure are now in place for law, lawyers and legal institutions to take a central role in the revitalization of Japanese society.

INTRODUCTION

Japan has long been perceived as a society where formal law plays a secondary role to other more powerful behavior shaping social forces, such as communitarian values and internalized social norms enforced by peer pressure.¹ Japanese attitudes towards law can be traced to the traditions of village society,² elements of which can still be observed in modern Japan.

† Professor of Law, Keio Law School, Tokyo, Japan. Comments and questions are welcomed by the author at mcalinn@gmail.com. The author would like to thank A.D. Colin Trehearne, an exchange student at Keio Law School from the University of British Columbia Faculty of Law, for his research assistance.


2. Village society, or mura-shakai in Japanese, refers to the feudal organization of society
While it would be misleading to suggest that contemporary Japan remains a feudal village society, it would be equally wrong to ignore the roots of legal consciousness when considering the role of law in contemporary Japanese society. Legal consciousness as used here means the willingness to rely on formal law as a primary mechanism for social ordering and as a fundamental source for individual rights.

Of course, law has always mattered in Japan to a degree. The question is, why it seems to matter less in Japan than it does in other modern industrialized countries. Whatever the ultimate truth, there is no doubt that Japan has been perceived as a non-legalistic society by outside observers and considers itself as such as well. This perception may have been largely accurate through the mid-1980s, but the externalities of the past three decades have necessitated a distinct shift in legal consciousness and have set Japan on a road to revitalization through law.

This paper will trace the evolution of Japan from a society with a traditionally non-legalistic approach to social organization, to one where law, lawyers and legal institutions are seen as essential infrastructure for the nation. It will argue that there is now an explicit recognition in public policy that law is the answer to many of the problems facing Japan. The systematic and sweeping legal and human relationships based primarily on individual identity with a primary group and extending to progressively larger social groups. Each person’s identity begins with the closest group, the immediate and extended family, and moves outward to the larger unit of the village presided over by a headman. The village as a whole is ultimately a part of a larger “country” presided over by a feudal lord, or daimyo. In the village society, community values take precedence over individualism. Social mores and peer pressure, rather than formal law, keep every individual in his/her specified place and guarantee the faithful performance of duties. Individual rights are neither promoted nor protected. In traditional Japanese village society, the most severe punishments short of death was murahachibu, meaning the withdrawal by others in the offender’s village of the eight items of support required for existence. See John Owen Haley, Authority Without Power 58-66 (1991).

3. The question whether law matters is, of course, one of relativity. If the European and American traditions can be characterized by rule of law, East Asian countries are notable for their rule by individuals or ministerial bureaucrats. Rules are supposed to be benevolent and virtuous. Yu and Guernsey have the following to say about the rule of law, “The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.” Helen Yu & Alison Guernsey, Univ. of Iowa CTR. FOR INT’L Fin. & Dev., What is Rule of Law?, available at http://www.uiowa.edu/lifebook/fg/Rule_of_Law.shtml (last visited Feb. 11, 2011); See also World Bank, Rule of Law as a Goal of Development Policy, available at http://web.worldbank.org/WEBSITE/EXTERNAL/TOPICS/EXTLAWJUST/INST/0, contentMDK:20763583 menuPK:1989584-pagePK:210058-piPK:210062-theSitePK:1974062-isCURLY,0,0.html (“Economic growth, political modernization, the protection of human rights, and other worthy objectives are all believed to hinge, at least in part, on ‘the rule of law.’” (last visited Feb. 11, 2011).

4. For a classic exposition of this viewpoint by a prominent Japanese scholar, see Takayoshi Kawashima, Nihonjin No Hoishiki: The Legal Consciousness of the Japanese (1967).
reforms instituted over the last 20 years (mainly driven by the bursting of the "Bubble Economy" and the pressures of globalization) characterize this shift and cannot be understood in any other way than as a tacit awareness that the "old ways" are no longer suitable for meeting the challenges of a globalized world. While still in its relatively early stages, this transformation will inevitably lead to an even greater reliance on law and legal institutions in the future.

This paper is divided into four main parts. Part I traces a brief history of law in Japan, placing Japanese attitudes towards law in a broader historical context. Part II seeks to identify the essential elements of the model that allowed Japan to rise from the ashes of defeat at the end of World War II, resulting in what is commonly known at the "Economic Miracle." The failings of the model will also be highlighted in order to understand why systematic legal reform was considered to be essential for meeting the challenges of a global economy after the bursting of the Bubble Economy. Part III will discuss the main themes of the legal reforms that have spanned the past two decades, and demonstrate the increasing importance of law in Japanese society. The work of the Justice Reform Council will be the focus of part IV. Finally, the paper will conclude by arguing that while law may not yet operate in Japan in the same way and to the same degree as it does in other industrialized nations, such as the US, the arc of law is clearly ascending in Japan.

I. Roots of Legal Consciousness in Japan

The history of law in Japan is characterized by the importation, adaptation and containment of foreign concepts in response to perceived deficiencies in indigenous socio-political and legal institutions. John Haley describes this process as follows:

The historical development of Japan's legal system divides rather neatly into two broadly defined periods. Each features an abrupt infusion of foreign ideas and institutions followed by a gradual process of indigenous adaptation. The first, during which Japan developed what might best be described as an ambivalent tradition, is characterized by the tensions between the ideas and institutions derived from early imperial Chinese law and those forged by native Japanese political and social forces. Japan's legal tradition and its first paradigm of legal control thus began with institutional and conceptual borrowings from T'ang China (A.D. 619-906) in the seventh and eighth centuries. The period ended with the short-lived efforts at institutional reform reverting to Chinese models immediately following the Meiji Restoration in 1868.... Reception, adaption, and containment of Western law characterize the second period. Beginning with early translations of French codes and the introduction of French legal institutions of the 1870s, Japan experienced the institutional transformation of the legal order into a modern, predominantly German-derivative, civil law
system as well as the adaption and ultimate containment of Western legal institutions during the first half of this century in the midst of rapid industrialization, worldwide depression, war and defeat. The process continued in postwar Japan, commencing with military occupation and the imposition of American-inspired constitutional and regulatory reforms.5

The importation and adaption of foreign constructs allowed the Japanese to develop and refine an effective model of social control. Administrative processes were left to a centralized bureaucratic state, while social control was managed by “arrangements for indirect governance based predominately on community-based consensual or contractual patterns of social control exemplified by the rural mura or village.”6

T’ang Dynasty Chinese law, steeped as it was in Confucian precepts,7 was embraced whole-heartedly by the feudal rulers of Japan who saw in it a system highly compatible with their vision of strict top-down hierarchy presided over by a supreme military ruler (the shogun) at the national level and by local lords (daimyo) at the regional level. Law was, in this system, primarily an instrument of control comprised of two main branches: administrative/regulatory and criminal. It did not embrace the notion that the subjects of the law were imbued with individual rights that could be asserted in a formalistic manner against anyone higher up in the hierarchy.8 Moreover, contact with the law by making a formal complaint was as likely to result in punishment of the claimant for failing to resolve the dispute without involving the authorities, as it would to the respondent. It is not surprising then that a system of law seen primarily as prescriptive in nature (i.e., prohibiting behavior under threat of torture or capital punishment, or requiring the payment of taxes) would be uninviting to the ordinary person who might come in contact with it.

The Japanese refined their social system through an enforced period of isolation lasting approximately 220 years (known as Sakoku, a period running from 1633 to 1853). Japan was closed to the outside world by order of the shogun and interaction with foreigners was severely limited.9 The Sakoku

6. Id.
7. The core tenets of Confucian philosophy are founded on ritual and relationship. By observing proper etiquette and by faithfully performing one’s duties in accordance with the nature of the relationship a harmonious balance can be maintained in society. The basic relationships of Confucianism were ruler to subject; father to son; husband to wife; elder brother to younger brother; and friend to friend. The duties owed were not, at least in theory, one way. Just as a subject has the duty to obey his or her ruler, the ruler has a duty to rule wisely in the best interests of the nation.
8. Haley, supra note 2, at 11, writes as follows: “Law in China, Korea and Japan before the adoption of Western legal institutions did not require a concept of rights for enforcement. The word ‘law’ meant punishment. Codes and statutes were administrative or penal. Legal rules were uniformly prescriptive. There were no rights only duties.”
9. During this period, foreigners were restricted to a single trading station managed by the Dutch and located on Dejima in Nagasaki, Japan. Dejima is a small island (120m x 75 m)
period ended abruptly with the arrival of the Commodore Perry and the
"Black Ships" off the coast of Izu on July 8, 1853. The American ships were
met by representatives of the shogun and ordered to sail to Dejima, which was
the sole trading post open to foreigners at the time. Commodore Perry ignored
these orders and sailed into Tokyo Bay with his gunships, where he presented
a letter from the then President Fillmore demanding various trading rights.

Unable to resist the firepower of the American Navy, the Japanese were
forced to open the country to the Western powers effectively ending over two
centuries of isolation. The shogunate (bakufu in Japanese) government, acting
on behalf of the Emperor, and the US quickly signed two treaties. The first
was the Convention of Kanagawa in 1854. This was followed by the United
States-Japan Treaty of Amity and Commerce of 1858, known as the "Harris
Treaty." The Harris Treaty, among other things, authorized the establishment
of foreign concessions, gave foreigners extraterritoriality, and imposed minimal
import taxes for foreign goods. Japan was compelled to sign similar treaties
in short order with the other great Western powers of Russia, France, Great
Britain, and The Netherlands (known collectively as the "Ansei Treaties").

The Harris Treaty and its progeny were viewed by the Japanese as grossly
unequal, especially with respect to their provisions that exempted foreigners
from Japanese laws and created consular courts so that foreigners would not be
subjected to procedures and rules they considered too barbaric compared to
those of the West. The painful recognition by the rulers of Japan that their
Sakoku policy of isolation had resulted in the nation's inability to withstand the

artificially created in the Bay of Nagasaki around 1634 by digging a canal separating the tip
of the peninsula from the mainland. The outpost was bordered by high fences and ingress
and egress were strictly limited. The shogun ordered all foreigners out of Nagasaki and
onto Dejima as a way of stopping the spread of foreign influence, especially in the form of
Christianity. The foreign traders were generally not permitted to leave the post and strict
rules were in place to limit social intercourse to the minimum required to provide Japan with
its needs. Japanese permitted to have contact with the foreigners on Dejima were carefully
vetted. Unauthorized contact with foreigners was severely punished. See Jurgis Elisonas,
Christianty and the Daimyo, in 4 The Cambridge History of Japan: Early Modern Japan 369
(John W. Hall et al. eds., 1991).

10. At this time, the emperor was still the titular head of state but all power resided in the
hereditary shogun. It was considered beyond contemplation for the emperor to meet in
person with foreigners.

wiki/Harris_Treaty (last visited, Jan. 15, 2011).

12. See Michael R. Austin, Negotiating With Imperialism: The Unequal Treaties and the Culture

13. Id. Article VI of the Harris Treat provided as follows: "Americans committing offenses
against Japanese shall be tried in American Consular courts, and, when guilty, shall be
punished according to American law. Japanese committing offenses against Americans shall
be tried by the Japanese authorities and punished according to Japanese law. The Consular
courts shall be open to Japanese creditors, to enable them to recover their just claims against
American citizens; and the Japanese courts shall in like manner be open to American citizens
for the recovery of their just claims against Japanese ...".
onslaught of the major Western powers soon led to abdication by the shogun and the return of power to the Emperor in 1867.

During the Meiji Restoration (1868-1912) period, the Meiji Emperor was restored as the head of state. Japan dispatched scholars and dignitaries to the leading Western powers to learn as much as possible about the science, law, medicine, customs and fashions of these countries and then to return home with this newly acquired knowledge. The goal was for Japan to "catch-up" and then to take its place among the modern nations of the world. Emulation was seen as the only way to earn the respect of the West and, thereby, to undo the pernicious effects of the unequal treaties. Japan would repeat this pattern many times thereafter when indigenous institutions were perceived to be inadequate by global standards.

The primary sources of influence during the Meiji Era were France and Germany, as indicated in the quote from Haley set forth above, with German based science, medicine and law holding sway in the end, prompting Japan to adopt a civil law system. The major codes of Japan (known as the Roppo, or six basic laws\(^\text{14}\)) remained in force and largely unchanged for nearly a century from their adoption in the last quarter of the nineteenth century.\(^\text{15}\) A similar, but more limited, process of importation and emulation was undertaken following the defeat of Japan in World War II. This time, Japan looked towards the US, as the victor, for inspiration. The reforms did not seriously consider abandoning the civil law system in favor of common law, but many of the post-World War II economic laws, such as the securities and banking laws bear a strong resemblance to their American counterparts.\(^\text{16}\)

There are two main points to be taken from this section. First, 'law' in Japan since the seventh or eighth century has been seen as being primarily public and prescriptive in nature. It was utilized as an instrument of social control in support of a feudal hierarchy, and not as a vehicle for establishing or protecting private, individual rights. This changed, at least superficially during the Meiji Era, when German style civil law statutes were adopted. However, without

\(^{14}\) The six basic laws of the Roppo are the Constitution, the Civil Code, the Commercial Code, the Criminal Code, the Code of Civil Procedure, and the Code of Criminal Procedure.

\(^{15}\) The one major exception is the Constitution, which was adopted on November 3, 1946. The Constitution was drafted in English by members of General MacArthur's General Headquarters staff during the Occupation period and was translated into Japanese prior to its adoption.

the necessary infrastructure in place and without a fundamental shift in legal consciousness, law in the form of individual rights did not gain a great deal of traction in Japanese society.  

Second, when faced with a crisis, Japan tends to look almost exclusively abroad for solutions. Laws and institutions are imported and adapted to fit pre-existing values, instead of being cultivated organically at home. The process has two interesting aspects. One, it allows Japan to stave off foreign criticism by pointing to formal rules and institutions that appear quite similar to those of other modern industrialized nations; and two, at the same time, the imported rules and institutions can be, in the words of Haley, adapted and contained so as not threaten core Japanese values. This is epitomized by the slogan *Wakon Yosai*, meaning “Japanese spirit; Western Learning.”

II. THE BURSTING OF THE “BUBBLE ECONOMY” AND THE DEMISE OF *JAPAN INC.*

The end of World War II found Japan defeated and devastated. The country lay in ruins and nothing short of a coordinated and all-out effort by the government, the business community, and the people could rebuild the nation. And that is exactly what happened. The government and the business community joined hands to form what became commonly known as “Japan Inc.” At the same time, the populace set to work with little or no concern for personal benefit or comfort. The watchword of the post-World War II period was personal sacrifice for the greater good. Virtually an entire generation was willing to join the effort. Duty, not right, was the prevailing theme.

---

17. To fully appreciate the situation it is necessary to understand a couple of additional points about Japanese society. First, maintaining harmony at almost any cost is of the highest priority. Direct confrontation in any form is abhorred. Second, Japanese do not like to say no directly to anyone because it could lead to confrontation and/or a loss of face. The Japanese have refined to an exquisite art the dichotomy of *tatemae* and *honne*. *Tatemae* refers to what appears on the surface, while *honne* concerns one’s true feelings or intentions. It takes time and experience to discern the difference, but being able to do so is fundamental to understanding Japanese motivation.

18. An illustrative example is the Act on Securing, Etc. of Equal Employment Opportunity and Treatment between Men and Women in Employment (Act No. 113 of 1972, as amended) which was enacted to eliminate discrimination against women in the workplace. The law did not, however, provide women with a direct cause of action, nor did it provide penalties against employers found to have violated its tenets. It leaned heavily, instead, on education and the creation of conciliation mechanisms whereby disputes could be resolved without resort to more formal court proceedings. Arguably, this law can be viewed as another example of *Wakon Yosai* in action with the western learning being in the form of statute establishing equal rights for women and the Japanese spirit being represented in the desire to resolve conflict harmoniously so as to preserve the employment relationship. That is to say, the statute aims to promote equality, not legal disputes over equality. See also supra note 17, regarding *tatemae* and *honne*.

19. For one perspective on why labor was so quiescent, see Ikuko Kume, *Disenfranchised Success: Labor Politics in Postwar Japan* (1998).

20. Some of the better known caricatures from this period are the image of the faceless, totally conforming, Japanese “salaryman,” living in cramped “rabbit-hutch” housing located at substantial commuting distances from the place of employment. The Japanese became rightly
A key feature of this period at the political level was an almost total deference by elected politicians to government bureaucrats. New laws were passed that were skeletal in design leaving almost all of the important interpretation and implementing regulations to the relevant ministries. People were satisfied with this system because they had confidence in the government “mandarins,” who were required to pass highly competitive and rigorous examinations before becoming civil servants. It was assumed that the ministries were attracting the best and the brightest of Japanese society and that these individuals would dedicate themselves selflessly to the betterment of Japan.

The state of Japanese collective legal consciousness during this period was persuasively articulated by Takeyoshi Kawashima, known as the father of sociology of law in Japan. In an influential series of writings, Kawashima argued that Japanese eschewed litigation and strict legal formalities such as detailed contracts for cultural reasons relating to a strong desire for social harmony and the flexible preservation of relationships. In the words of Kawashima,

Traditionally, the Japanese prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right and who is wrong in accordance with standards that are independent of the wills of the disputants. Furthermore, judicial decisions emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solution.

---

famous for hard work, taking fewer than five vacation days per year, until the government instituted a policy of adding a substantial number of public holidays as a means to force workers to enjoy more leisure time. See Gerald Paul McAlinn, Employment Law in Asia-Japan, 23 Asia Bus. L. Rev. 26 (1999).

21. Former Prime Minister Yasuhiro Nakasone captured both the strength of, and confidence in, the bureaucracy nicely when he wrote: “The state bureaucracies of Japan and France have been called the most competent in the world. The Japanese bureaucracy, through its culmination of knowledge and experience, works like a giant think tank for the nation... [But political] leadership was not always forthcoming. To the extent that the politicians were weak policymakers, the Ministry of Finance, the Ministry of International Trade and Industry, and recently the Ministry of Posts and Telecommunications, expanded their powerful influence on policymaking.” See Yasuhiro Nakasone, Politicians, Bureaucrats, and Policymaking in Japan in Unlocking the Bureaucracy’s Kingdom: Deregulation and the Japanese Economy, 41-42 (Frank Gibney, ed., 1998); See also Tom Ginsburg, Dismantling the Developmental State? Administrative Procedure Reform in Japan and Korea, Am. J. Comp. L. 585-586 (2001).


23. Takashi Uchida & Veronica A. Taylor, Japan’s ‘Era of Contract’, in LAW IN JAPAN A TURNING POINT 455 (Daniel H. Foote ed., 2007) (“Kawashima’s account of Japanese style contract consciousness depicted Japan in the immediate post-World War II period as a place in which, on the one hand, the binding power of mere agreements was relatively weak, while, on the other hand, oral agreements underpinned by social trust predominated.”).


He traced this tendency to "the nature of the traditional social group in Japan" with its emphasis on hierarchical order and on group harmony.26

The cultural view of the Japanese as being non-litigious and unwilling to view law as a source of individual rights, when combined with a deeply engrained respect for hierarchical authority, undoubtedly helps to explain why politicians gave great deference and discretion to ministerial officials, and why the bureaucrats were able to work single-mindedly on the recovery mission without fear of bothersome challenges to their policies and practices. The government proved to be remarkably astute in bringing about Japan's unparalleled economic success and it is not surprising that politicians and the citizenry alike were willing to defer to such an approach.

Unfortunately, the model that produced the "Economic Miracle" of Japan's post-World War II recovery showed itself to be ill-suited to an increasingly prosperous society under close scrutiny and escalating pressure from global forces.27 Foreign competitors complained about Japan's closed markets and the incestuous close relationship between regulators and industry. By the late 1980s, an economic bubble, based on unrestrained bank lending secured mainly by over-inflated stock and real estate values, began to rise. The bubble burst in 1990, and what it revealed was not pretty. The collapse threw Japan into a financial tailspin leading to what soon became known as "The Lost Decade" of the 1990s.28 Lending came to a standstill, companies struggled to cut costs (driving up unemployment), and consumers stopped spending.

The financial problems of Japan resulted in a near collapse of the economy and precipitated a crisis every bit as poignant as the appearance of Commodore Perry's Black Ships. Government bureaucrats once lauded for engineering a spectacular recovery were now subjected to criticism for allowing the economic bubble to grow unchecked. The media uncovered and reported a seemingly endless trail of public corruption involving financial institutions, government officials and organized crime. In one notorious case, a Ministry of Foreign

26. *Id.* Substantial literature has been generated in response to Kawashima arguing, in essence, that the attributes observed by Kawashima can be attributed to institutional impediments such as the relatively small number of lawyers and judges, and the lack of effective legal remedies. See, e.g., John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD., Summer,1978 at 359-390. ("Few misconceptions about Japan have been more widespread or as pernicious as the myth of the special reluctance of the Japanese to litigate. In emphasizing this peculiar Japanese response, most commentators ignore the distaste for litigation and preference for informal dispute resolution common to most societies. As noted at the outset of this article, censure of litigation is arguably as much a part of the traditional Christian heritage as it is a legacy of Confucianism. What distinguishes Japan is the successful implementation of this interdiction through institutional arrangements.").

27. It could be argued that Japan in the immediate post-war era experienced a second sakoku period of isolation. With most of the world's attention being paid to Europe, Japanese industry was able to rebuild in a protectionist cocoon until the economy became so powerful it could no longer be ignored by foreign competitors.

28. For one analysis and a strong summary, see Charles Yuji Horioka, *The causes of Japan's 'lost decade': The role of household consumption*, 18 JAPAN & WORLD ECON. Dec. 2006, at 378-400.
Affairs official was fired for allegedly expropriating over 2.5 million dollars from the government to fund an extravagant lifestyle that involved buying high-priced condos in Tokyo and race horses he named after his mistress.  

Other well-publicized scandals involved revelations that banks and financial institutions had employees on their payroll responsible mainly for maintaining good relationships with Ministry of Finance (so-called MOF-tans) and Bank of Japan (BOJ-tans) officials. These employees were responsible for obtaining information about internal government policies and practices, at the same time as influencing bureaucratic directives in a favorable manner. This was accomplished, in part, through providing ministry officials with extravagant entertainment in Ginza hostess bars and on golf outings. The denouement came in January of 1998 when the public prosecutor raided the offices of the Ministry of Finance and arrested two high ranking officials on bribery charges.  

These scandals rocked the establishment and left the Japanese public shaking its collective head in disapproval. The result was a precipitous drop in the level of confidence in the government, especially the bureaucrats at the formerly all powerful Ministry of Finance. At the same time, government officials


32. As part of the reforms directed at the financial industry, the Ministry of Finance was stripped of much of its jurisdiction, which was then vested in a new Financial Supervisory Agency reporting directly to the Office of the Prime Minister. The newly created FSA was staffed by former MOF employees. In a 2001 speech by Minister for Financial Services Hakuo Yanagisawa entitled “Japan’s Financial Sector Reform: Progress and Challenges” the reasons behind these reforms were explained as follows:

Japan’s financial administration has undergone major change for the past few years. In June 1998, the financial supervisory functions were separated from the Ministry of Finance and entrusted to the independent Financial Supervisory Agency. Then in July 2000, the planning functions for financial sector policies were merged with the supervisory functions under the Agency, and the Financial Services Agency, FSA, was established. Through this re-organization, the jurisdiction over all aspects of financial administration including policy planning, supervision and inspections for banking, securities and insurance firms has now been completely separated from the Ministry of Finance. These changes in Japan’s administrative structure of financial policies are the direct reflection of the Finance Ministry’s failure to efficiently cope with the bubble economy. The Ministry of Finance, which has led Japan successfully to her economic prosperity in the post World War II, and in fact even since Japan’s modernization, was held responsible for the emergence of bubble economy in the latter 1980s, and its delays in containing the financial instability in the aftermath of the bubble’s collapse in 1990s.
were being criticized for the practice of *amakudari* (literally, to descend from heaven), which is the Japanese expression used to describe the custom of senior government officials retiring from government and taking up high-profile sinecure positions in the private (often with companies formerly under the retiree’s jurisdiction) or the public (often in non-profit entities funded, wholly or in part, by industry) sector. *Amakudari* was seen by the public as another, and even more inidious, form of corruption.  

The use of administrative guidance (*gyoseishido*) was also brought into the spotlight. Administrative guidance is an informal process used by ministry officials to instruct Japanese companies as to what they should or should not do. It is innocuous enough in theory (and undoubtedly has analogs in most regulatory systems), except that every business person called to a powerful ministry such as the Ministry of International Trade and Investment (MITI) would have had little doubt that receiving guidance was tantamount to getting an order. From a legal perspective, the recipient of administrative guidance would have no real ability to challenge the authority on which the order was based out of fear that any form of challenge could result in retaliation at some later point. Administrative guidance was a powerful tool of the bureaucrats in directing Japan’s economic recovery by allowing them to control behavior far beyond their legal mandate. But, in the hands of government officials already graced with broad discretionary powers, it had a strong potential for abuse.

Finally, Japan became keenly aware as a nation that it was facing other equally pressing challenges unrelated to the problems of systemic corruption. Chief among these is the fact that Japanese society is aging at a rapid pace. By the year 2020, over 30% of Japan’s population is projected to be over the age of 65, and total population has already started to decline. The pension system is showing serious strain and unemployment (as well as underemployment) has taken its toll on the younger generation as the system of lifetime employment has crumbled.  

The responses to these challenges were multifaceted, but contained a central unifying theme. Japan needed to transform itself from a central command style government to a more deregulated economy and society where the creativity of the individual could be unlocked. People had to be weaned from the notion

---

33. For a journalistic but clear summary of the issue and many of its effects, see Hiroko Nakata, *Amakudari* too entrenched to curb?, *The Japan Times Online*, May 29, 2007, [http://search.japantimes.co.jp/cgi-bin/nn20070529j1.html](http://search.japantimes.co.jp/cgi-bin/nn20070529j1.html).


36. *Id.*
that a benevolent bureaucracy could take care of everything and private, citizen-driven institutions had to be put in place to encourage and support innovation. For this, the government looked to legal reform.

III. LEGAL REFORM

A detailed recounting of the extensive legal reform initiatives undertaken from the early 1990s through the present is beyond the scope of this paper.\textsuperscript{37} For present purposes, it is sufficient to note that virtually no aspect of society escaped scrutiny, nor was any major law left untouched. Many of the most basic Japanese laws, such as the Criminal Code, had gone without amendment since their adoption at the end of the nineteenth century.\textsuperscript{38} The process looked for all intents and purposes very much like a second Meiji with scholars and delegates scouring the West for best practices, new systems and new institutions. One of the central slogans of reform was *kokusaika* (internationalization). Law and legal institutions were given a place of prominence in the reform efforts and thus can rightly be said to be the primary engine for change.

One of the first, and arguably most important, reforms was the passage of the Administrative Procedure Act (Act No. 88 of 1993, "the APA"). The APA was passed to ensure fairness and transparency when dealing with government ministries.\textsuperscript{39} It requires all administrative agencies to establish review standards,\textsuperscript{40} and to make them "as concrete as possible,"\textsuperscript{41} and available to the public.\textsuperscript{42} In cases where the agency renders a disposition denying permission for some activity, the agency is obligated, in principle, to provide reasons for its decision.\textsuperscript{43} Administrative agencies are required to hold public hearings when dispositions are likely to impact parties other than the applicant so that the agency can factor in third party interests.\textsuperscript{44} Even more detailed procedures and protections aimed at giving parties in interest notice and an opportunity to be heard are required when an adverse disposition will be rendered.\textsuperscript{45}

\textsuperscript{37} For a comprehensive review of the legal reforms pertaining to business, see generally *Japanese Business Law* (Gerald Paul McAlinn ed., 2007).

\textsuperscript{38} The Constitution remains as the only major legal document to come through the process without being amended. There have been calls from time to time to amend the Constitution, especially Article 9 ("Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. 2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.").

\textsuperscript{39} *Gyōsōshitsu-zukuri-hō* [Administrative Procedure Act], Law No. 88 of 1993, art.1.

\textsuperscript{40} APA, *supra* note 39, art.5(1).

\textsuperscript{41} APA, *supra* note 39, art. 5(2).

\textsuperscript{42} APA, *supra* note 39, art. 5(3).

\textsuperscript{43} APA, *supra* note 39, art. 8(1).

\textsuperscript{44} APA, *supra* note 39, art. 10.

\textsuperscript{45} APA, Chapter 3 Adverse Dispositions, Articles 12 through 31. In essence these articles give parties appearing before an administrative agency the right to present their case formally and to challenge the adverse disposition.
The APA stops short of banning administrative guidance. Instead, it mandates that "persons imposing Administrative Guidance shall take care that their actions must not exceed, in the slightest degree, the scope of duties or affairs under the jurisdiction of the Administrative Organ and that the substance of Administrative Guidance is, to the utmost degree, realized based solely upon the voluntary cooperation of the subject party." The wording of the APA leaves little doubt that unbridled discretion by government bureaucrats was part of the problem and not the solution. It is naïve to assume that, even after the passage of the APA, compliance with administrative guidance is always voluntary and that parties still do not have a concern over indirect retaliation in the future for failing to comply. Nevertheless, the roots of a system entrenched in legal principles (as opposed to one premised on unchecked administrative state power) were planted by the APA. It is not a coincidence that the National Diet (the legislative branch of government) chose the reining in of the ministries as one of its first post-Bubble legal reforms.

Around the same time, an Administrative Reform Committee ("ARC") was created to explore improvements across the administrative apparatus. In December 1997, ARC delivered a report to the Prime Minister recommending wide-spread deregulation, greater public access to government information, stronger consumer protections (including the passage of a product liability law), and enhanced enforcement of the anti-monopoly laws. This led to the adoption of a three-year plan to promote deregulation.

Similarly motivated legal reforms, beginning in the early 1990s, were instituted in the financial area, leading to the "Big Bang" package of deregulation in 1996. These reforms included the first major changes to the Foreign Exchange and Foreign Trade Control Law (Act No. 228 of 1949) in 18 years, the first wholesale revision of the Bank of Japan Act (Act No. 89 of 1997) in 55 years, and amendments to over 20 other existing laws, some of which dated back to the late 1800s. The goal of the "Big Bang" reforms was to turn

46. The APA devotes all of Chapter 4, consisting of Article 32 through 36 to the issue of administrative guidance.
47. APA, supra note 39, art.32(1).
51. One commentator contended that the proposed reforms of the Japanese "Big Bang" were far more comprehensive than those undertaken by either the US in the 1970s or the UK in the 1980s. See Peter Del Vecchio, Big Bang on Whumper? Essential Insights into Japan’s Financial Deregulation 6 (1998). The Commercial Code was amended nearly ten times in the 1990s. See Motomi Hashimoto, Commercial Code Revisions: Promoting the Evolution of Japanese
Tokyo into an international financial center by making the Japanese market
“free, fair and global” so it could proudly stand as an equal with the New York
and London markets. The Financial Supervisory Agency was established to
make this vision a reality, taking its jurisdiction from the bailiwick formerly
ruled by the powerful Ministry of Finance.

Additional reforms were undertaken in the field of education (a major
tHEME being to equip young Japanese with the skills needed to meet the
challenges of the future), health and welfare, and commercial and company
law. Fundamental changes were made to the way companies were established
and governed when a new Company Act (Act No. 86 of 2005) was enacted
with effect from May 1, 2006. A leading commentator describes the significance
of this legal reform as follows: “Among the accomplishments of these revisions
are a complete overhaul of provisions regarding corporate governance, the
abolition of the private limited company (yugen kaisha) as a permitted corporate
form, the introduction of a completely new kind of company (a limited liability
company called a godo kaisha), and a rationalization of methods and structures
used in mergers and acquisitions.” Extensive reform proposals extended to
the size, nature, and structure of government. Ministries were consolidated
and efforts made to lessen the burden on the populace resulting from too much
government.

There is one final set of policy initiatives worth noting for what it says
about the perception of the role of law in the revitalization of Japan. The
government, faced with a stagnating economy; a declining manufacturing
base, and a population that seemed to lack an entrepreneurial spirit, turned
to intellectual property as a savior. The Strategic Council on Intellectual
Property (comprised of the Prime Minister, Cabinet officers, and leaders from
the academic and legal communities) was formed, and in 2002 it released an Intellectual Property Policy Outline (“Outline”). The Outline

52. Christopher P. Wells, Financial Services and Regulations, in JAPANESE BUSINESS LAW 554
(Gerald Paul McAlinn ed., 2007).
53. Provisions regarding companies were formerly found in the Commercial Code.
54. Keiko Hashimoto, Katsuya Natori & John C. Roebuck, Corporations, in JAPANESE BUSINESS
Law 91(Gerald Paul McAlinn ed., 2007).
55. On the 1999 Obuchi-era reforms, see Yuko Kaneko, Government Reform in Japan (1999),
available at http://www1.biglobe.ne.jp/~iam/httpdocs/pdf/downloads/llondon99-
http://www.kantei.go.jp/foreign/971228finalreport.html.(the need for SmaLLer government). In
2001 the Headquarters for Administrative Reform was created in the Cabinet. Its
hmtl (last visited Feb. 10, 2011).
56. STRATEGIC COUNCIL OF INTELLECTUAL PROPERTY, INTELLECTUAL PROPERTY POLICY OUtLINE (2002),
available at http://www.kantei.go.jp/foreign/policy/titeki/index_e.html (last visited
Jan. 18, 2011) [hereinafter, Outline] (The Strategic Council on Intellectual Property was
established under the Cabinet Office of the Prime Minister of Japan. The Council maintains
a homepage where its major reports, including the Outline are available).
stated that it was Japan’s goal “to connect the results of creativity in diverse fields such as technology and culture with the development of industry and the improvement of people’s lives, thereby becoming ‘a nation built on intellectual property.’”

To become a nation built on intellectual property, it was seen as necessary to establish “in Japan an appreciation of the importance of invention and creation.”

The Diet promptly passed the Basic Law on Intellectual Property (Act No.122 of 2002) ("Basic Law") to promote the creation and exploitation of new technology in a manner that would add value and support the realization of a dynamic economy and society. Intellectual property was seen as being critical to the development of a “rich culture” and to the “international competitiveness and sustainable development of Japanese industry.” The Basic Law carefully delineated the responsibilities of the national and local governments, universities, and business enterprises in this endeavor. It also established new Intellectual Property Policy Headquarters and designated the Prime Minister as the responsible minister with jurisdiction to oversee the work of the Headquarters.

To support the laudable objectives of the Basic Law, the Diet passed the Act for Establishment of the Intellectual Property High Court (Act No. 119 of 2004 “the IP High Court Act”). The IP High Court was established as a special branch of the Tokyo High Court. It has jurisdiction to hear all appeals from final judgments involving intellectual property that were formerly within the jurisdiction of the Tokyo High Court, as well as appeals from final judgments rendered by district courts in cases where specialized knowledge is required.

This section has endeavored to give readers a sense of the breadth and scope of the legal reform efforts undertaken in response to the collapse of the bubble economy. The wholesale makeover of laws, regulations and institutions strongly supports the assertion that the rule of law is perceived as being central to the future of Japan. Law is bound to matter more than ever in the coming years as legal consciousness becomes more deeply engrained. Notwithstanding the extensive revisions to statutory law, there were two pieces of the puzzle left to be completed before the transformation from an administrative state to a rule of law state could be effective. These were: (i) the development of a cadre
of legal professionals capable of breathing life into all of the new laws, and (ii) the involvement of the citizenry in the justice system so that the people would see it as something that is both accessible and useful. After all, law and lawyers will have little impact on society if people and businesses do not appreciate their value.

IV. THE JUDICIAL REFORM COUNCIL

The task of building legal infrastructure and involving citizens in the justice system fell to the Judicial Reform Council (“Council”), which was established in June 1999, pursuant to the Act concerning Establishment of Judicial Reform Council (Act No.68 of 1999 “the Council Act). The Council was a 13 member, blue ribbon panel of experts composed of jurists, academics and leaders of society. It was made a part of the Prime Minister’s Cabinet Office, instead of being under the Ministry of Justice (as might have been expected for an advisory council dealing with the justice system), with its final recommendations to be submitted directly to the Prime Minister for acceptance and implementation. The Minister of Justice at the time of the Council’s establishment reported to the Diet as follows:

In the 21st century, the Japanese society will become more complex, varied and international, and that deregulation and other reforms shall transform our advanced-control type society into a post-check type society. Changes of the society in many ways will make the role of administration of justice more crucial than ever. It is indispensable to reform [to] reinforce the judicial function so that it will be able to respond to the social needs.\(^6\)

The mission of the Council was further refined in a Supplementary Resolution of the Judiciary Committee of the House of Representatives. The Council was charged with examining important issues “such as [the] introduction of [a] judicial appointment system under which most judges are appointed from those with legal practice experience as lawyers (hereinafter referred to as “Hosoichigen”\(^6\)) and reinforcement of the quality and quantity of the legal profession, public participation in the judicial system and the relationship of

---

67. Points at Issue, supra note 66, at 8 (Hosoichigen is the Japanese word used to denote the legal profession in its entirety. The Council referred to Hosoichigen as: “The existence of a large stock of lawyers sharing the concept of the rule of law and their wide range of activities in various fields of a society based on a spirit of mutual reliance and unity is the basis to sustain the administration of justice.”).
human rights and criminal justice.” With respect to the judiciary, under the old system judges were career bureaucrats appointed directly after passing the national bar examination. While generally recognized as being bright and impeccably honest, judges in Japan have been criticized for being too theoretical and for being out of touch with the real world and the practical concerns of the parties that come before them. The proposal for remediating this was to have most judges appointed after they had obtained experience as practicing attorneys. Additionally, judges (and public prosecutors) are now encouraged to take two to three years leaves of absence to work in private practice.

The work of the Council was centered in three main areas: (1) broadening the judiciary, (2) expanding and improving the delivery of legal services, and (3) opening the legal system to the public. This mission was confirmed by the Council Act, which provided as follows:

The Judicial Reform Council shall consider fundamental measures necessary for judicial reform and judicial infrastructure arrangements by defining the role of the Japanese administration of justice in the 21st century. The agenda of the Council may include the realization of a more accessible and user-friendly judicial system, public participation in the judicial system, redefinition of the legal profession and reinforcement of its function. The JRC shall state its opinion to the Cabinet based on the results from investigations and deliberations conducted according to the preceding provision.68

On June 12, 2001, the Council delivered a final report to the Prime Minister, titled “Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century” (the “Recommendations”).69 The Recommendations reflected input from the judiciary, the prosecutors, the bar, the business community, and the public. Fact-finding missions were sent to courts and law firms to solicit opinions. The Council also heard reports from designated groups who visited a number of foreign countries to study the legal systems and issues being confronted there.

The Council summarized its end-game as follows:

For a person to actively form/maintain social connections as an autonomous being, the cooperation of administration of justice (the legal profession) is indispensable which can offer legal service to suit the needs of concrete conditions of every individual instead of an easy reliance on standardized administrative regulations. Like medical doctors who are indispensable for people’s health-care service, administration of justice (the legal profession) should play the role of so-called ‘doctors for the people’s social life.’ We are in the process of abolishing unclear advance

68. Points at Issue, supra note 66, at 1.
69. The Council Act, art. 2.
control of administration through economic structural reform and administrative reform to shift to a post-watch/remedy society in order to establish a freer society. In such a society, it is a natural prerequisite to establish a system in which all kinds of disputes among the people are solved properly and promptly under fair and clear legal rules so that people in weak positions shall not suffer unfair disadvantages. We are trying to improve the quality of governing capability of the political sector through political/administrative reforms in order to substantiate popular sovereignty, in which it is assumed that keeping a watch of activities of the public sector is required to avoid unfair infringement of the people's fundamental human rights through excessive activities. It is the administration of justice that is expected to play a crucial role in this context.\footnote{Points at Issue, supra note 66, at 3.}

It is interesting that the analogy used by the Council is to doctors. This implies that Japanese society is somehow ailing and that more and better lawyers can provide the cure. The Council can thus be seen as throwing down the gauntlet of challenge in this remarkable passage to the very core of the traditional role and function of law and the legal profession. The role of the legal profession in the Council's vision has both a public and a private function. On the public front, Japan must switch from an administrative state characterized by broad grants of discretion to bureaucrats, to a society ruled by law where regulations are clear and transparent. In the private sector, the legal profession must form the foundation on which the infrastructure of private rights is built. The role of law and lawyers, however, is not only to resolve private disputes in an equal, prompt and fair manner. The rule of law also contributes to good government by serving as a "watch dog" against administrative abuses, thereby promoting further the notion of individual fundamental human rights.

The Council divided the issues before it into two broad categories. The first concerned structural issues such as expanding access to lawyers and the courts, improving civil and criminal procedures to meet contemporary standards, and encouraging and facilitating public involvement with the legal system. The second category addressed the human resource problem revolving around the quantity and training of judges and lawyers. Finally, the Council recognized that the legal system would have to be internationalized like the rest of Japanese society and an appropriate budget would have to be secured in order to implement meaningful reform.

The Council focused attention on the "Three Pillars of Justice System Reform." The three pillars identified were: (1) creating "a justice system that meets public expectations" by being accessible and understandable to the public, (2) reforming "the legal profession supporting the justice system" by securing a cadre of professionals that is "rich both in quality and quantity," and (3) establishing "the popular base" through the development of public
trust and the encouragement of public participation in the legal system.\textsuperscript{72}

In the conclusion to the Recommendations, the Council wrote:

These Recommendations propose extensive reforms that relate to the very foundation of all aspects of the justice system. These reforms constitute sweeping reforms of the existing system that originated based on the Constitution that was established in 1947, for the first time in a half century, and from the viewpoint of the general public as the users of the system. One reason why such a huge reform must be carried out all at once is that it is clear there have been problems in past efforts to reform and improve the justice system. All three branches of the legal profession should seriously reflect on the fact that the reforms of the Japanese justice system that have been carried out heretofore, mainly by the three branches of the legal profession, can hardly be said to have responded flexibly to changes in the society and economy. While paying due heed to the independence of the judiciary, the reforms and improvements of the justice system this time must be carried out in a manner that is visible to and easily understood by the general public, with the major objectives of making clear the locus of responsibility, responding properly to social and economic conditions and to the needs of the people, and securing and strengthening accountability and transparency, without being imprisoned by past history.

Of course, it is necessary to proceed with reforms and improvements in the system while making reference to the practical and specialized views of the courts, the public prosecutors offices, the bar associations and legal scholars. Yet how the justice system should be (\textit{shihon no arikata}) is not something that should ever be allowed to be decided in accordance with the wishes only of the three branches of the legal profession, as was the case in the past. Moreover, extra care should be taken so that such a perception never is held again. To that end, it is incumbent on the three branches of the legal profession to sincerely accept external assessments and to respond to them appropriately. Most important of all is to fully draw out the views and consciousness of the actual users of the justice system and to reflect them appropriately in the reforms and improvements of that system.\textsuperscript{73}

Clearly, the Council tried in its Conclusion to head off any efforts on the part of the judges, prosecutors and private bar to hijack and subvert the Recommendations. The legal profession is admonished for its past failures at self-reform and for creating a system that is run by, and for the convenience of, the institutional participants at the expense of the public. The purpose of the justice system is, after all, to serve the interests of the citizenry.

Two of the more interesting and provocative recommendations, both of

\textsuperscript{72} Recommendations, supra note 70, at 12-13.

\textsuperscript{73} Recommendations, supra note 70, at 91-92.
which were adopted and are now in operation, were the establishment of a post-graduate professional law school system and a lay-judge system for serious criminal matters. The lay-judge system came into effect on May 21, 2009, with the first case being held in Tokyo in August 2009. Under the lay-judge system, a panel of six citizens and three professional judges sit en banc to hear criminal cases. The intended benefits of the system are two-fold: (i) judges will have the benefit of input from ordinary people; and (ii) citizens will have a deeper involvement with the legal system. While voting is on a majority basis, at least one of the professional judges must be in the majority for a verdict to be valid. Since its inception, over 1,000 cases have been heard and lay-judges have acquitted at least one defendant and have issued a death penalty verdict.

The law school system was modeled on the US system. On April 1, 2004, 68 law schools opened their doors to students. Prior to the institution of the law school system, law was an undergraduate course. The law school system was intended to increase drastically both the quantity and quality of lawyers. The Council recommended that Japan add 3,000 new lawyers per year by 2010. Unfortunately, for a variety of reasons, that objective has not been met, with only around 2,200 new lawyers admitted each year.

The Recommendations were truly remarkable in their call for total transformation from an administrative state to one modeled on Western principles of the rule of law. The Council reaffirmed that the proposed reforms to the legal system were part of a larger process of social change underway in Japan, including political reform, administrative reform, promotion of decentralization, and reform of the economic system via deregulation. The Recommendations were not offered nor were they meant to be considered in a vacuum. Rather, they form an integral part of the larger effort to promote accessibility, accountability and transparent administration throughout the core institutions of Japan. The ultimate aim is “to tie all of the reforms together organically under ‘the rule of law.’” Thus, positioning justice system reform as the “final lynchpin” of a series of various reforms concerning restructuring of ‘the shape of our country.’” Finally, the “various reforms assume as a basic premise the people’s transformation from governed objects to governing subjects and at the same time seek to promote such transformation. This is a transformation in which the people will break out of viewing the government as the rule (authority) and instead will take heavy responsibility for governance.

74. The conviction rate in Japan exceeds 99% so an acquittal is a rare event. See J. Mark Ramseyer & Eric B. Rasmusen Dept. Econ., U Conn., Why is the Japanese Conviction Rate so High? 2-3 (1999), available at http://129.3.20.41/eps/le/papers/9907/9907001.pdf (last visited Feb. 11, 2013) (“In 1994, Japanese district court judges convicted 99.9 percent of all defendants (49,598 out of 49,643). See also David T. Johnson, Criminal Justice in Japan, in Law in Japan A Turning Point 147 (Daniel H. Foote ed., 2007) (“Criminal justice in Japan may be best known for its high conviction rates. Almost every person who is tried is convicted, conviction rates range between 95 and 97 percent—substantially higher than comparable rates in other democratic countries.”).
themselves, and in which the government will convert itself into one that responds to such people.\textsuperscript{75}

With respect to the roles of the justice system, the legal profession and the people in this herculean effort at transformation, the justice system is expected to operate so as to eliminate injustice from society. This is to be accomplished by the prompt and fair handling of individual complaints and the provision of effective remedies to right wrongs. The courts must assume their rightful place alongside the Cabinet and the Diet as one of the three separate but equal branches of government. The courts must protect the rights of the weakest members of society and stand as a bulwark against abuse by those in power, especially as Japanese society moves from paternalistic and intrusive government involvement to a deregulated and decentralized model. In short, the justice system “must be one that establishes predictable, highly clear and fair rules through the resolution of disputes and effectively checks violation of the rules.”\textsuperscript{76}

CONCLUSION

A number of closely related themes emerge from the post-bubble legal reforms and the Recommendations of the Council. The first and most significant is the desired shift from a paternalistic, “approval in advance” oriented society revolving around all-powerful governmental ministries to one that is decentralized and deregulated. The message is clear. The people of Japan should no longer blindly rely on elite government bureaucrats to lead society into the future. For a new and more vibrant society to be born, the players in the system and the population at large need to work hand-in-hand to shape Japanese society and the operation of its central institutions, including the system of justice.

Second, the role of government in this new society is to enforce existing rules evenly and to prevent fundamental unfairness. Beyond that post-checking function, the government should not be a major factor in the daily lives of the Japanese. If successful, Japan will have evolved from a closely controlled, group-oriented society to one based on the concept of individual rights.

This transformation necessarily means an increased role for law, lawyers and legal institutions. A pronounced shift towards the rule of law goes hand-in-hand with the move from a top-down system of governance to a populist one. Private and public matters alike will be resolved by reference to clear and transparent rules and regulations that are subject to judicial review.

Kawashima advocated a cultural explanation for Japan’s relatively low level of legal consciousness. Nevertheless, he anticipated that as Japan modernized there

\textsuperscript{75} Recommendations, supra note 70, at 9-10.

\textsuperscript{76} Recommendations, supra note 70, at 11.
would be a tendency of increased litigiousness, as found in many industrialized
societies.77 Haley, for his part, pointed to structural impediments to the broad
use and relevance of law in Japanese society.78 Legal reforms such as those
Japan undertook through the 1990s and into the first decade of the present
century cannot be expected to produce immediate changes. Nevertheless, the
direction is clear and only time will tell if cultural explanations continue to
prevail or if they gradually erode now that the structural impediments have
been removed and the infrastructure put into place.

77. See Ginsburg, supra note 1.
78. See Haley, supra note 26.