

# DIVERSIFICATION OF THE JAPANESE JUDICIARY

Daniel H. Foote<sup>†</sup>

*Abstract:* Japan has a career judiciary. The Courts Act of 1947 provides that judges may be appointed from among prosecutors, attorneys, and law professors. In practice, however, the vast majority of judges come from a fourth category, “assistant judges,” who are appointed directly upon completion of the legal training program and typically serve through retirement. This continues a career tradition that dates back to the late nineteenth century. For nearly that long, the Japanese bar has been advocating that the career system should be abolished and that a substantial portion of the judiciary, if not all judges, should be drawn from among experienced attorneys.

The Justice System Reform Council (“JSRC”), which met from 1999 through 2001, strongly endorsed the importance of diversification of the judiciary, and set forth a two-pronged proposal for achieving that goal: 1) establishing a system through which assistant judges would “leave their status as judges” and “gather diversified experience” outside the judiciary and 2) promoting increased hiring of experienced attorneys and others to the bench. Utilizing the framework for analyzing court reform set forth by Malcolm Feeley in his classic work, *Court Reform on Trial: Why Simple Solutions Fail*, this Article examines the various efforts at diversification of the Japanese judiciary, with a special focus on the most recent set of reforms.

Cite as: Daniel H. Foote, *East Asian Court Reform on Trial: Diversification of the Japanese Judiciary*, 27 WASH. INT’L L.J. 7 (2017).

## I. INTRODUCTION

---

<sup>†</sup> Professor of Law, The University of Tokyo, and Senior Advisor, Asian Law Center, University of Washington School of Law.

I have benefited from presentations and discussions regarding this topic at several sessions of the Citizens’ Council (Shimin Kaigi, 市民会議) for the Japan Federation of Bar Associations (“JFBA”), and from helpful feedback following presentations at: 3rd Year Training Program for Assistant Judges, Legal Training and Research Institute, Japan, March 2008; Meeting of Japanese American Bar Association, Los Angeles, CA, October 2009; Conference: Decision Making on the Japanese Supreme Court, Washington University School of Law, St. Louis, MO, September 2010; Asian Law Lecture Series, University of Washington School of Law, Seattle, WA, October 2014; and Panel, East Asian Court Reform on Trial, Law & Society Association Annual Meeting, New Orleans, LA, June 2016. Above all, I have benefited from having had the opportunity to serve on the Committee to Evaluate Attorneys Seeking Appointment to Judicial Positions for the Daini (No. 2) Tokyo Bar Association, from the inception of that Committee in 2002 through 2014. Portions of my research were supported by the following grants, for which I wish to express my gratitude: Japan Society for the Promotion of Science (“JSPS”), Grant-in-Aid for Scientific Research, Base Studies C, No. 21530103 (Reexamination of the Substance and Process of Justice System Reform); JSPS, Grant-in-Aid for Scientific Research, Base Studies A, No. 25245002 (Empirical Research on Alternative Dispute Resolution Processes); and the Foundation for Research in Civil Dispute Resolution (Lawyers in Every Corner of Society?).

Notes regarding formatting and translations: For cites to works published in English, I have used the name order that appears in the publication. Otherwise, for Japanese names I have followed the order normally used in Japan: *i.e.*, family name first, followed by given name. Except as otherwise indicated, all translations are by me.

Among the recent reforms to the Japanese judicial system, the lay participation (裁判員, *saiban'in*) system for criminal cases has received the lion's share of attention.<sup>1</sup> Yet that is by no means the only noteworthy recent reform. The final report of the Justice System Reform Council ("Reform Council" or "JSRC"), issued in 2001,<sup>2</sup> contained recommendations for a wide range of other changes to the judicial system, many of which resulted in concrete reforms.<sup>3</sup> There were two sets of proposals related to the judicial appointment process: recommendations aimed at "diversifying" the judiciary<sup>4</sup> and at "reflecting the views of the public in appointment of judges."<sup>5</sup> This Article focuses primarily on the former set of reforms. As we will see, however, the latter set of reforms also comes into play.<sup>6</sup>

This Article uses Malcom Feeley's framework for analyzing court reform, set out in his classic work *Court Reform on Trial: Why Simple Solutions Fail*,<sup>7</sup> to evaluate the Japanese reform attempt. To summarize that framework briefly, Feeley identifies the following five stages in the process of judicial reform: 1) *diagnosis or conception*; 2) *initiation*; 3) *implementation*; 4) *routinization*; and 5) *evaluation*. As its name implies, the *diagnosis or conception* stage involves "the process of identifying problems and

---

<sup>1</sup> The works in English on the lay participation system include at least four books (ANNA DOBROVALSKAIA, *THE DEVELOPMENT OF JURY SERVICE IN JAPAN* (2016); DIMITRI VANOVERBEKE, *JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY* (2015); ANDREW WATSON, *POPULAR PARTICIPATION IN JAPANESE CRIMINAL JUSTICE: FROM JURORS TO LAY JUDGES* (2016); MATTHEW J. WILSON, HIROSHI FUKURAI & TAKASHI MARUTA, *JAPAN AND CIVIL JURY TRIALS: THE CONVERGENCE OF FORCES* (2015)), along with many articles. The list of works in Japanese would run several pages.

<sup>2</sup> SHIHŌ SEIDO KAIKAKU SHINGIKAI (司法制度改革審議会) [JUSTICE SYSTEM REFORM COUNCIL], SHIHŌ SEIDO KAIKAKU SHINGIKAI IKENSHO – 21 SEIKI NO NIHON O SASAERU SHIHŌ SEIDO (司法制度改革審議会意見書 — 21世紀の日本を支える司法制度) [RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL – FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE TWENTY-FIRST CENTURY] (June 12, 2001) [hereinafter JSRC RECOMMENDATIONS] <http://www.kantei.go.jp/jp/sihouseido/report-dex.html> (Japanese); <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (English).

<sup>3</sup> For an overview of the JSRC and its impact, see Daniel H. Foote, *Introduction and Overview: Japanese Law at a Turning Point*, in *LAW IN JAPAN: A TURNING POINT* xix, xx-xxxv (Daniel H. Foote ed., 2007) (hereinafter *A TURNING POINT*).

<sup>4</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 1.

<sup>5</sup> *Id.* at Ch. III, pt. 5, § 2.

<sup>6</sup> For an examination of the reforms aimed at reflecting public views and securing transparency in the judiciary's personnel process, see Daniel H. Foote, *The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan*, 88 WASH. U. L. REV. 1745, 1745–63 (2011) [hereinafter Foote, *Transparency*]. For a discussion of both sets of reforms at an earlier stage, see Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HŌSHAKAIGAKU (法社会学) 128–61 (2007) [hereinafter Foote, *Recent Reforms*].

<sup>7</sup> MALCOLM A. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* 35–37 (1983).

considering solutions.”<sup>8</sup> During the *initiation* stage, “new functions are added or practices are significantly altered. This stage requires several decisions, [including]: Which of several alternatives will be adopted?”<sup>9</sup> The *implementation* stage “involves staffing, clarifying goals, and adapting to a new environment. Ultimately, it is the task of translating abstract goals into practical policies.”<sup>10</sup> As to the *routinization* stage, Feeley explains, “Unless a program is intended to be temporary or a single-shot effort, sooner or later it must be routinized . . . . Ultimately, the success of an innovation must be judged by how it performs under this routine rather than under its initial conditions.”<sup>11</sup> Finally, with respect to *evaluation*, Feeley observes that “new programs are usually assessed during their experimental (the first three) stages rather than their routine periods (the fourth stage).” He adds: “While such evaluations can tell us something about whether an idea can or cannot work, it tells us next to nothing about whether it *will* work. Little is known about the eventual, routine performance of new programs . . . .”<sup>12</sup>

After setting forth these five stages in the Introduction to his book, Feeley identifies several characteristics of institutions in which “change is most likely to succeed.” These characteristics include: the existence of highly trained professionals with diffused and flexible authority, broad and adaptable duties, and flexible roles and mobility.<sup>13</sup> Then, following a detailed examination of several concrete court reform efforts in the United States, Feeley sets forth an even longer list of “impediments to change.”<sup>14</sup> I will discuss Feeley’s impediments to change more extensively in Part VI.B. below during my assessment of the extent to which those factors apply in the context of the recent Japanese efforts at diversification of the judiciary. To provide a brief summary here, the impediments identified by Feeley in the United States context include: a lack of a sense of historical perspective in the *diagnosis or conception* stage;<sup>15</sup> the role of outsiders in the reform efforts, especially relevant at the *initiation* stage;<sup>16</sup> the problems of fragmentation, newness, and premature judgment at the *implementation* stage;<sup>17</sup> factors such as loss of momentum, co-optation and adaptation leading to backsliding at the

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 36.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 37.

<sup>12</sup> *Id.* (emphasis in original).

<sup>13</sup> *Id.* at 38.

<sup>14</sup> *Id.* at 191.

<sup>15</sup> *Id.* at 192–93.

<sup>16</sup> *Id.* at 196–97.

<sup>17</sup> *Id.* at 197–200.

*routinization* stage;<sup>18</sup> and problems such as lack of incentive for rigorous assessment, manipulation, and distortion at the *evaluation* stage.<sup>19</sup>

With this overview of Feeley’s framework, let us turn to the main focus of this essay: efforts at diversification of the Japanese judiciary. In the Japanese context, the concept of “diversity” in judiciary refers not to race, gender, or ideology, but to diversity in background and experiences. As a reflection of this mindset, the Reform Council stressed the importance of securing judges “with abundant, diversified knowledge and experience.”<sup>20</sup> These recommendations, in turn, relate to the traditional structure of the Japanese judiciary, in which most judges spend their entire careers within the judiciary.

The theme of diversification of the judiciary, as thus defined, is by no means new to Japan. To the contrary, utilizing the Feeley framework, one can point to at least six distinct periods of *diagnosis or conception*, dating back over a century. These include at least two earlier instances of *initiation* and *implementation* of efforts to promote diversification. As we will see, those prior efforts did not result in major changes to the dominant career pattern. Some fifteen years have now passed since the latest set of reforms entered the *implementation* stage. Thus, the system is well into what Feeley characterized as the *routinization* phase, and is ripe for *evaluation*.

## II. HISTORICAL BACKGROUND: THE PREWAR PERIOD

Prior to the Meiji Restoration of 1868, the system of courts in Japan was highly decentralized.<sup>21</sup> Soon after the Ministry of Justice (“MOJ”) was established in 1871, it set up a centralized nationwide court system.<sup>22</sup> Initially,

---

<sup>18</sup> *Id.* at 200–02.

<sup>19</sup> *Id.* at 202–05.

<sup>20</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 1.

<sup>21</sup> As outlined in HIRAMATSU YOSHIRO (平松義郎), KINSEI KEIJI SOSHŌHŌ NO KENKYŪ (近世刑事訴訟法の研究) [RESEARCH INTO CRIMINAL PROCEDURE LAW IN THE MODERN ERA] (1960), as translated and summarized in Yoshirō Hiramatsu, *Summary of Tokugawa Criminal Justice*, 22 L. IN JAPAN: AN ANNUAL 105 (Daniel H. Foote ed., trans., 1989). The Tokugawa shogunate and each of the feudal domains had their own court systems based on territorial principles; there were separate court systems for shrines, temples, and certain other organized bodies.

<sup>22</sup> With respect to the prewar system, *see, e.g.*, Takaaki Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 110, 110–17, 119–24 (Arthur T. von Mehren ed., 1963) [hereinafter LEGAL ORDER]; John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in A TURNING POINT, *supra* note 3, at 99, 115–17; ROKUMOTO KAHEI (六本佳平), NIHON NO HŌ TO SHAKAI (日本の法と社会) [JAPANESE LAW AND SOCIETY] 175–79 (2004); KANEKO HAJIME & TAKESHITA MORIO (金子一&竹下守夫), SAIBANHŌ (裁

there were no specified minimum qualifications, and most judges were appointed from among administrative officials.<sup>23</sup> From 1884, however, newly appointed judges were required to meet one of three criteria: possession of a law degree, qualification as a *daigennin* (代言人, legal advocate; predecessor to the *bengoshi* (弁護士, attorney), or passage of a special examination for appointment of judges.<sup>24</sup>

In 1890, the first comprehensive court law was enacted.<sup>25</sup> Article 58 of that law, the Court Organization Act, provided that candidates for the judiciary and procuracy must pass the examination mentioned above, then complete three years of training (later reduced to one and a half years) in either courts or prosecutors' offices.<sup>26</sup> Candidates then were required to pass a second examination prior to appointment.<sup>27</sup> Those who had served as imperial university professors or as *bengoshi* for at least three years were eligible for appointment without taking the exam or the training.<sup>28</sup>

Despite the exceptions authorizing appointment of professors and attorneys, the judiciary soon evolved into a career system. As of 1892, former officials from the MOJ and other administrative agencies still accounted for nearly half the judges, but over forty percent had already entered through the examination route. Notably, *only one* of the 1255 judges had been appointed from among the ranks of legal advocates.<sup>29</sup> By 1900, “nearly all” of Japan’s judges “had been selected through the process” set out in the Court Organization Act.<sup>30</sup> According to that Act, judges served for life,<sup>31</sup> although a later amendment established a mandatory retirement age, normally sixty-three.<sup>32</sup> Throughout the prewar period, judges and prosecutors were

判法) [COURTS LAW] 49–59 (4th ed. 2002).

<sup>23</sup> Hattori, *supra* note 22, at 114.

<sup>24</sup> ROKUMOTO, *supra* note 22, at 176.

<sup>25</sup> Saibansho Kōsei Hō (裁判所構成法) [Court Organization Act], Act No. 6 of 1890.

<sup>26</sup> *Id.* art. 58 (reduced to one and a half years pursuant to amendment in Act No. 10 of 1908).

<sup>27</sup> Graduates of imperial universities were exempted from the first exam but not the second. *Id.* art. 65(2).

<sup>28</sup> *Id.* art. 65(1). The Court Organization Act expressly used the term *bengoshi*, even though the Attorneys Act establishing that position and title was not enacted until three years later (Act No. 7 of 1893). The original bill for the Attorneys Act had been prepared in 1890. Its passage was delayed by opposition from *daigennin*; following revisions, it was enacted in 1893. Hattori, *supra* note 22, at 126.

<sup>29</sup> *Id.* at 121 n.36. Nearly ten percent held jurisprudence degrees from domestic or foreign universities.

<sup>30</sup> Haley, *supra* note 22, at 115.

<sup>31</sup> Saibansho Kōsei Hō [Court Organization Act], Act No. 6 of 1890, art. 67.

<sup>32</sup> *Id.* art. 74-2 (added by amendment, pursuant to Act No. 101 of 1921). The one exception to the retirement age of 63 was the president of the highest court, the Daishin'in, who served until 65. Judges retained their status for life.

frequently recruited to administrative positions in the MOJ.<sup>33</sup> Moreover, within the career judiciary, judges faced transfers and promotions on a periodic basis, decisions over which the Minister of Justice had authority.<sup>34</sup> While considerable mobility between the judiciary and procuracy existed during the early years,<sup>35</sup> after the passage of the Court Organization Act in 1890 movement between the two branches was rare.<sup>36</sup> The two tracks diverged; the judiciary and the procuracy each became firmly established as “elite professional bureaucracies.”<sup>37</sup>

Notably, these two tracks diverged even more greatly from a third track: that of attorneys. By 1880, attorneys were required to pass a nationwide examination to register as *daigennin*.<sup>38</sup> The passage of the Attorneys Act (*Bengoshihō*) in 1893 was part of an effort to increase professionalization and raise the status of the bar. These efforts included the new title *bengoshi*, along with a new examination system.<sup>39</sup> For the next thirty years, however, the examination for attorneys was conducted separately from that for prospective judges and prosecutors.<sup>40</sup> Although the examinations were combined in 1923, the career tracks remained separate. Until 1933, no additional training was required for those who became *bengoshi*. Even after a training requirement was added, training for attorneys was separate from training for judges and prosecutors, under the auspices of each local bar association.<sup>41</sup> Thus, by the early twentieth century the pattern of separation of the legal profession into three separate tracks (referred to in Japan as *hōsō sansha* (法曹三者, the “three branches of the legal profession”) had taken firm root.

The insulation of the judicial and prosecutorial tracks from the attorney track did not go unnoticed. As early as 1890, *daigennin* had begun urging the

---

<sup>33</sup> Hattori, *supra* note 22, at 125.

<sup>34</sup> *See, e.g., id.* at 123 (pursuant to art. 73 of the Court Organization Act, judges could not be removed to a different office or court against their will. However, it appears to have been taken for granted that judges would accept changes in their postings without protest).

<sup>35</sup> Haley, *supra* note 22, at 115–16.

<sup>36</sup> *Id.*; Hattori, *supra* note 22, at 125.

<sup>37</sup> Haley, *supra* note 22, at 115.

<sup>38</sup> *See, e.g.,* Hattori, *supra* note 22, at 118–19; DARRYL E. FLAHERTY, PUBLIC LAW, PRIVATE PRACTICE: POLITICS, PROFIT, AND THE LEGAL PROFESSION IN NINETEENTH-CENTURY JAPAN 115–18, 207–09 (2013).

<sup>39</sup> Hattori, *supra* note 22, at 126–27.

<sup>40</sup> *Id.* at 127–28.

<sup>41</sup> *Id.* at 128 n.65, 137–38 n.110. In many regions, the training system remained largely undeveloped by the time World War II started. In another difference that has taken on considerable significance in recent debates over the legal training process, at that time the attorney trainees were not paid, unlike the judge and prosecutor trainees, who were regarded essentially as apprentice civil servants and received regular stipends. *Id.* at 138 n.111.

MOJ to appoint judges and prosecutors from among their ranks.<sup>42</sup> Following passage of the Attorneys Act, *bengoshi* began to take up the call. By the turn of the century, organizations of attorneys had begun to push for judges to be hired from among practicing lawyers, under the slogan *hōsō ichigen* (法曹一元).<sup>43</sup> That term literally means “unification of the legal profession.” It has been used in various senses, including, at its broadest, simply a shared awareness of attorneys, judges and prosecutors as being members of the same profession. More commonly, it is used to describe the view that judges should be selected from experienced members of the bar, as is the case in Anglo-American legal systems.<sup>44</sup> That same slogan has continued to animate calls for reform to the judicial appointment process ever since. Accordingly, one can point all the way back to the late 1800s as an initial instance of *diagnosis or conception* of the issue. Even though the slogan has remained identical, motivations have shifted. At that time and for many years thereafter, the major objective was raising the status of attorneys, rather than diversifying the judiciary.<sup>45</sup> Whatever the motivations may have been, the calls went unheeded. The tradition of a career judiciary became ever more deeply rooted through the prewar period.

Shortly before World War II, the Japanese bar undertook a concerted effort to promote appointment of judges from among experienced attorneys. In 1937, the Japan Association of Attorneys established a Committee to Effectuate the *Hōsō Ichigen* System.<sup>46</sup> That committee prepared a resolution, undertook outreach to the MOJ and other relevant parties, and drafted a bill. The bill was introduced before the Imperial Diet in 1938, and would have amended the Court Organization Act to require that *all* judges *and* prosecutors

---

<sup>42</sup> FLAHERTY, *supra* note 38, at 264.

<sup>43</sup> *Id.*; Higuchi Shunji (樋口俊二), *Senjin ni Manabu Hōsō Ichigen no Gendaiteki Kadai* (先人に学ぶ法曹一元の現代的課題) [*Learning from Our Predecessors about Contemporary Challenges for Hōsō Ichigen*], 39 JIYŪ TO SEIGI, no. 2, at 32 (1988).

<sup>44</sup> *See, e.g.*, Hattori, *supra* note 22, at 139–40 n.116.

<sup>45</sup> *See, e.g., id.* at 139–40. Along similar lines, legal advocates and attorneys in the 1890s also objected to rules allowing former judges and prosecutors to receive licenses to practice law without undertaking any examinations out of concern that the less competent judges and prosecutors would resign (or, presumably, be nudged out of their positions in the downsizing that resulted from fiscal austerity measures) and then register as attorneys, thereby lowering the level of the bar. FLAHERTY, *supra* note 38, at 263; *see also* ŌUCHI HYŌE & WAGATSUMA SAKAE (大内兵衛&我妻栄), *NIHON NO SAIBAN SEIDO* (日本の裁判制度) [THE JAPANESE COURT SYSTEM] 26–27 (1965) (primary motivation for *hōsō ichigen* movement in the early 1920s was “leveling” the legal profession by eliminating the gap between judges and prosecutors, on the one hand, and attorneys on the other).

<sup>46</sup> Kishii Tatsuo (岸井辰雄), *Nihon Bengoshishi: Bengoshihō Sekō Ikō* (日本弁護士史：弁護士法施行已降) [*History of Japanese Attorneys: Since the Attorneys Act Took Effect*], in *BENGOSHISHI* (弁護士史) [HISTORY OF ATTORNEYS] 39 (Tokyo Bengoshikai [Tokyo Bar Association] et al. ed., 1939).

be appointed from among those with at least ten years of experience as attorneys.<sup>47</sup> The bill passed the House of Representatives. Yet when the Diet session came to a close it was still pending in the House of Peers<sup>48</sup> (where prospects for passage were low<sup>49</sup>), and it never became law.<sup>50</sup>

Notably, the rationale offered by the Japanese bar at that time focused explicitly on diversifying the judiciary. The resolution highlighted the complexity of matters coming before the courts and the need not only for legal knowledge, but for a deep understanding of society and human nature. To expect such understanding from those who had entered the judiciary directly upon completing legal education, without spending even a day as members of society and with no other experience, is “akin to climbing a tree in search of fish.”<sup>51</sup> Thus, in the late 1930s, one finds a striking example of *diagnosis or conception* of the concern over diversification, with a concrete reform proposal that took a major step toward the *initiation* stage before stalling.

### III. POSTWAR REFORMS

The next major developments occurred during the postwar reform process. The most important development to uniting the legal profession was a fundamental change in the training system. As mentioned earlier, under the prewar system there was a “rigid separation” between training for judges and prosecutors, on the one hand, and attorneys, on the other.<sup>52</sup> Following the postwar reforms, judges, prosecutors, and attorneys took the same bar examination. Those who passed undertook two additional years of training together, through the Legal Training and Research Institute (LTRI) under the auspices of the Supreme Court.<sup>53</sup> This reform had profound implications for

---

<sup>47</sup> *Id.* at 39–44.

<sup>48</sup> KANEKO & TAKESHITA, *supra* note 22, at 231.

<sup>49</sup> *See* ŌUCHI & WAGATSUMA, *supra* note 45, at 28–29.

<sup>50</sup> The bill reportedly was reintroduced in each of the two subsequent sessions of the Diet, but suffered the same fate each time, evidently meeting strong opposition by the MOJ. It has been reported, however, that the Ministry appointed over 70 attorneys to posts in the judiciary and procuracy between 1938 and 1940, perhaps in order to placate the bar association. Higuchi Shunji, *supra* note 43, at 32–33.

<sup>51</sup> Resolution reproduced in Kishii, *supra* note 46, at 39–41.

<sup>52</sup> Hakaru Abe, *Education of the Legal Profession in Japan*, in LEGAL ORDER, *supra* note 22, at 153–54.

<sup>53</sup> *E.g.*, Hattori, *supra* note 22, at 137–38. It was only near the end of that two-year period that determinations were made as to which candidates would proceed on the judge track, prosecutor track, and attorney track. For a detailed discussion of the postwar reforms to the legal training system by the then-president of the LTRI, *see* Abe, *supra* note 52. In 1999, the training period was reduced to eighteen months, and thereafter to just over one year; but, despite occasional suggestions that the program should be limited to prospective judges, prosecutors, and courtroom litigators, the Japanese bar remains deeply committed to unified training for all entrants to the legal profession. For detailed examinations of the Japanese



the sense of identity among members of the three branches of the profession, as well as those with attorney status.<sup>54</sup>

The postwar reforms also provided the bar with another opportunity to push for *hōsō ichigen* in its more particularized sense. Most of the postwar reforms to the Japanese legal and judicial systems took place under the auspices of the Allied Occupation of Japan, which lasted from the end of the war in 1945 through early 1952, led by General Douglas MacArthur, the Supreme Commander for the Allied Powers (“SCAP”).<sup>55</sup> Japanese authorities embarked on some legal reforms even before the Occupation did so. In meetings of the Justice System Revision Council, established under the MOJ in late 1945, attorneys urged that all judges and prosecutors be drawn from experienced lawyers.<sup>56</sup> They renewed the call in two other reform councils the following year.<sup>57</sup> Although the Revision Council ended up rejecting the proposal, it endorsed a statement expressing the desire that preparations be made so *hōsō ichigen* could be achieved in the near future.<sup>58</sup>

At least one member of the Occupation publicly voiced his support for *hōsō ichigen*.<sup>59</sup> His views did not reflect the overall stance of the Occupation, however.<sup>60</sup> The Occupation was concerned (as were many Japanese judges

---

legal training system, including consideration of later reforms, see Rokumoto, *Legal Education*, in A TURNING POINT, *supra* note 3, at 190, 213–14; Daniel H. Foote, *The Trials and Tribulations of Japan’s Legal Education Reforms*, 36 HASTINGS INT’L & COMP. L. REV. 369 (2013).

<sup>54</sup> For a discussion of the impact on “the ideal of unification,” see Abe, *supra* note 52, at 167–70.

<sup>55</sup> For overviews of the reforms to the legal and judicial systems under the Occupation, see, e.g., Alfred C. Oppler, *The Reform of Japan’s Legal and Judicial System under Allied Occupation*, 24 WASH. L. REV. 290 (1949); ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK (1976).

<sup>56</sup> USHIOMI TOSHITAKA (潮見俊隆), SHIHŌ NO HŌSHAKAIGAKU (司法の法社会学) [SOCIOLOGY OF THE ADMINISTRATION OF JUSTICE] 176–78, 199–201 (1982). The Council was the Shihō Seido Kaisei Shingikai (司法制度改正審議会). For an overview of the Council’s establishment and activities, together with minutes of its deliberations, see 2 NAITŌ YORIHRO (内藤頼博), SHŪSENGO NO SHIHŌ SEIDO KAIKAKU NO KEIKA (ICHI JIMUTŌKYOKUSHA NO TACHIBA KARA) (終戦後の司法制度改革の経過 (一事務当局者の立場から)) [THE COURSE OF POSTWAR REFORM TO THE JUSTICE SYSTEM (FROM THE STANDPOINT OF A SINGLE MEMBER OF THE ADMINISTRATIVE AUTHORITIES)] 2–46 (1959). The original, appearing in two volumes, was reprinted as NIHON RIPPŌ SHIRYŌ ZENSHŪ (日本立法資料全集), BEKKAN (別巻) 91 & 92 [COMPLETE COLLECTION OF MATERIALS ON JAPANESE LEGISLATION, SEPARATE VOLUMES 91 & 92] (1997).

<sup>57</sup> See 2 NAITŌ YORIHRO, *supra* note 56, at 71–72; USHIOMI, *supra* note 56, at 201.

<sup>58</sup> 2 NAITŌ YORIHRO, *supra* note 56, at 46 (minutes of meeting held on December 18, 1945).

<sup>59</sup> In March 1946, Captain Anthony Maniscalco, a member of the Public Safety Division of the Civil Intelligence Section, sent the MOJ a “private draft” in his “personal capacity as one who might be involved in the justice system reform process,” expressing support for a system in which judges and prosecutors would be selected from law professors or attorneys with at least three years of experience. Japanese language summary contained in *id.* at 54–55.

<sup>60</sup> In February 1946, Alfred Oppler joined General MacArthur’s General Headquarters and became the head of the unit (renamed the Courts and Law Division later that year) in charge of reforms to the judiciary.

themselves) that the judiciary had been under the control of the MOJ and insisted on establishing an independent judiciary.<sup>61</sup> Moreover, the Occupation sought to position the newly established Supreme Court (which replaced the *Daishin'in* as the highest court) outside the traditional career system. They envisioned that the fifteen justices on the Supreme Court would come from a broad range of backgrounds.<sup>62</sup> For courts below the Supreme Court level, though, the Occupation did not insist on a shift to the *hōsō ichigen* model. Under the Constitution<sup>63</sup> and the Courts Act of 1947<sup>64</sup> (which replaced the prior Court Organization Act), the judges of the lower courts are appointed by the Cabinet from a list of persons nominated by the Supreme Court. The Occupation also sought to provide means for dealing with “incompetent or otherwise objectionable judges.”<sup>65</sup> They aimed to replace life tenure with a system in which judges must be reappointed every ten years (again from a list of persons nominated by the Supreme Court),<sup>66</sup> until they reached a mandatory retirement age (sixty-five for lower court judges).<sup>67</sup> Furthermore, the Supreme Court was given express authority to assign positions for lower court judges.<sup>68</sup> This effectively confirmed the practice of rotating judges to new positions on a regular basis. Finally, rather than providing for immediate appointment of candidates as full judges following successful completion of the LTRI training program, Article 42 of the Courts Act required at least ten years of experience in one or more of several specified categories. In connection with the debate over diversification of the judiciary, it is important to note that, from the time that Act was enacted in 1947, those categories have included *prosecutor*,

---

Oppler himself had been an administrative law judge in Germany, which had a career judiciary; his chief assistant, Thomas Blakemore, had studied law in Japan prior to the war and was familiar with the judicial system. As a whole, they and the other Occupation authorities were comfortable with the career system. *See, e.g.*, Oppler, *supra* note 55, at 86–87, 91–93, 98–99, 305–13.

<sup>61</sup> *See, e.g.*, GOVERNMENT SECTION: SUPREME COMMANDER FOR THE ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN, SEPTEMBER 1945 TO SEPTEMBER 1948, at 200 (1948) [hereinafter SCAP].

<sup>62</sup> *See, e.g.*, Oppler, *supra* note 55, at 311. One goal for broadening this composition of the Supreme Court was to raise the Court’s prestige. Even more importantly, the change reflected the intent that the Supreme Court should serve a check on the other branches of government, and in doing so should approach matters from a broader standpoint than had been the case previously. As envisioned, Supreme Court justices ever since have come from various backgrounds (albeit with highly standardized appointment patterns), always including at least one or two from outside the traditional legal profession. *See* Haley, *supra* note 22, at 105–12.

<sup>63</sup> NIHONKOKU KENPŌ [KENPŌ] (憲法) [CONSTITUTION], art. 80 (Japan).

<sup>64</sup> Saibanshohō (裁判所法) [Courts Act], Act No. 59 of 1947, art. 40.

<sup>65</sup> SCAP, *supra* note 61, at 201.

<sup>66</sup> NIHONKOKU KENPŌ [KENPŌ] (憲法) [CONSTITUTION], art. 80 (Japan).

<sup>67</sup> Saibanshohō (裁判所法) [Courts Act], Act No. 59 of 1947, art. 50. For Supreme Court justices and Summary Court judges, the retirement age is 70. *Id.*

<sup>68</sup> *Id.* art. 57.

*attorney*, and *professor of law*, as well as *assistant judge*.<sup>69</sup> In turn, Article 43 provides that assistant judges are to be appointed from those who have completed apprenticeship training.<sup>70</sup>

To be sure, the Court Organization Act of 1890 also authorized appointment of attorneys and law professors to the judiciary, but that authority was rarely used. In sharp contrast, during the early postwar years, a substantial number of attorneys were appointed as judges. That does not include the lower-ranked Summary Court judges, many of whom came from the bar during that period.<sup>71</sup> In 1947 and 1948, before the first class completed the newly established LTRI training program, the only newly hired judges came from among attorneys. In 1949, seventy-two members from the first LTRI class were hired as assistant judges. There were sixty more attorney appointees that year. Attorneys continued to account for between 15% and 35% of judge appointees each year through 1954, and, with the exception of two years in the mid-1950s, for over 10% through 1960. All told, during the fourteen years from 1947 through 1960, attorneys constituted nearly 25% of the lower court judges hired. Thus, one can point to the early postwar years not only as an instance of *diagnosis or conception*, but as an instance of *initiation* and even *implementation* of steps toward diversification.

That said, the change did not last. The level of attorney appointments gradually declined through the 1950s and dropped off dramatically after 1962. Thus, the incipient trend toward diversification of the judiciary withered by the early 1960s. Japan's career judiciary became firmly re-entrenched. The overwhelming majority of judges entered as assistant judges immediately after completing LTRI training and proceeded through reappointments every ten years (and regular transfers to new positions, typically every three years) up until retirement.<sup>72</sup>

---

<sup>69</sup> *Id.* art. 42(1).

<sup>70</sup> *Id.* art. 43.

<sup>71</sup> With the exception of data for the even-numbered years between 1948 and 1954, the figures contained in this and the following paragraph are calculated from a table in KANEKO & TAKESHITA, *supra* note 22, at 234. The data for the missing years is contained in the same table in the prior edition of that book, KANEKO HAJIME & TAKESHITA MORIO, (金子一&竹下守夫), SAIBANHŌ (裁判法) [COURTS LAW] (3rd ed. 1994).

<sup>72</sup> As noted above, the mandatory retirement age for lower court judges is sixty-five. Although the exact numbers are not publicized, a fair number of judges retire early, most of whom become attorneys. *See, e.g.*, Igaki Yasuhiro (井垣康弘), *Watakushi no Kōsō Suru "Hōsō Ichigen Seido"* (私の構想する「法曹一元」制度) [*The "Hōsō Ichigen" System as I Conceive It*], 51 JIYŪ TO SEIGI no. 1, at 76 (2000) (of approximately sixty assistant judges who entered the judiciary together in 1967, only about half were still on the bench in 2000; of the remainder, the great majority became attorneys or notaries); Watanabe Chihara (渡辺千原),

#### IV. THE PROVISIONAL JUSTICE SYSTEM INVESTIGATION COMMITTEE: THE ROAD TO AND THE AFTERMATH

Proponents of *hōsō ichigen* did not give up. The next major proposal emanated from the Japan Federation of Bar Associations (“JFBA”), the governing body for the nationwide bar. In March 1954, the JFBA executive board approved an “Outline for *Hōsō Ichigen*.”<sup>73</sup> A few years later, JFBA received an important ally, the Japan Bar Association (“JBA,” Nihon Hōritsuka Kyōkai, 日本法律家協会), a prestigious voluntary organization that includes judges, prosecutors, and legal academics, as well as practicing lawyers. In June 1961, the JBA board of governors approved its own “Concrete Outline for Realization of *Hōsō Ichigen*.”<sup>74</sup>

The two proposals shared the view that the assistant judge system should be discontinued and judges should be drawn from persons with experience outside the judiciary. However, they differed considerably on the specifics. Under the JFBA outline, all judges and prosecutors would be appointed from among experienced attorneys. JFBA, as the governing body for the bar, would have authority to prepare the list of candidates for the judiciary.<sup>75</sup> In addition to highlighting the value of the real-world experience from attorneys, the JFBA proposal stressed the goal of democratizing the judiciary and procuracy. By replacing career judges and prosecutors with attorneys, the reform would break the cycle of dominance by bureaucratic elites.<sup>76</sup> In contrast, under the JBA outline, judges would be drawn from those with rich experience as attorneys, prosecutors, or in other types of related legal work.<sup>77</sup> Thus, the JBA viewed the shift away from the traditional career system primarily in terms of diversifying the judiciary.<sup>78</sup>

---

*Bengoshi e no Tenshoku: Zenshoku Keiken no aru Bengoshi no Gyōmu Tokusei to Bengoshikan* (弁護士への転職：前職経験のある弁護士の業務特性と弁護士観) [*Occupation Change to Lawyer: Special Work Characteristics and Views on Lawyers by Lawyers with Prior Employment Experience*], in HENDŌKI NO NIHON NO BENGOSHI (変動期の日本の弁護士) [JAPANESE LAWYERS IN A TIME OF CHANGE] 160, 172–75 (Satō Iwao (佐藤岩夫) & Hamano Ryō (濱野亮) eds., 2015).

<sup>73</sup> KANEKO & TAKESHITA, *supra* note 22, at 231.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Furthermore, since all members of the legal profession would begin their legal careers as practicing lawyers, the JFBA would also take charge of the LTRI training program. *Id.*

<sup>76</sup> ŌUCHI & WAGATSUMA, *supra* note 45, at 32–33.

<sup>77</sup> *Id.* at 32–33; KANEKO & TAKESHITA, *supra* note 22, at 231. The JBA envisioned that in the future those who passed the bar exam and completed LTRI training increasingly would enter legal work in government agencies or other bodies, ŌUCHI & WAGATSUMA, *supra* note 45, at 33.

<sup>78</sup> The JBA also envisioned the establishment of a new body to screen candidates for the judiciary and supervise legal training. In its conception, that body, as with the JBA itself, would include representatives

Despite their differences, the two outlines agreed on the importance of diversifying the judiciary. So when the Diet passed a bill in May 1962 establishing the Provisional Justice System Investigation Committee (“Investigation Committee” or “Committee”), proponents of *hōsō ichigen* might well have thought their long cherished goal was nearing realization.<sup>79</sup> The Committee operated under the Cabinet. It consisted of twenty members, including three judges, three prosecutors, and three attorneys, and was chaired by University of Tokyo Professor Emeritus Wagatsuma Sakae.<sup>80</sup> A major impetus for the Committee was the difficulty of attracting sufficient new judges. As a result, existing judges were overburdened, leading to delays in processing cases.<sup>81</sup> The enabling legislation called on the Committee to investigate “fundamental and comprehensive measures urgently needed . . . so as to ensure proper operation of the justice system,” with a particular focus on the following two items: 1) “matters related to the *hōsō ichigen* system” (which the legislation further defined as “the system under which, in principle, judges are appointed from among those who possess qualification as lawyers and have engaged in legally related work other than as judges”), and 2) “other items related to the appointment system and salary system for judges and prosecutors.”<sup>82</sup> Although the Investigation Committee completed its deliberations over fifty years ago, the experiences of that period hold deep relevance for recent debates and developments. Accordingly, it is helpful to review the Committee’s deliberations and recommendations together with the response to those recommendations.

The Committee devoted a considerable portion of its deliberations, and nearly fifty pages of its final report, to the *hōsō ichigen* issue. The report discussed the importance of diversifying the judiciary, and criticized the bureaucratic nature and other weaknesses of the traditional career system.<sup>83</sup> Yet the tone of the deliberations and the final conclusions were far from the hopes and expectations of *hōsō ichigen* proponents. Based in part on prior

---

from all three branches of the legal profession. KANEKO & TAKESHITA, *supra* note 22, at 231.

<sup>79</sup> Rinji Shihō Seido Chōsakai Setchihō (臨時司法制度調査会設置法) [Provisional Justice System Investigation Committee Establishment Act], Act No. 122 of 1962 [hereinafter Establishment Act].

<sup>80</sup> The other members were seven Diet members, two businesspeople, and one additional legal scholar.

<sup>81</sup> *Rinji Shihō Seido Chōsakai Ikensho* (臨時司法制度調査会意見書) [*Report of the Provisional Justice System Investigation Committee*], 16 HŌSŌ JIHŌ, no. 8, at 1 (1964) [hereinafter *Investigation Committee Report*] (reprinted as a special supplement).

<sup>82</sup> Establishment Act, art. 2.

<sup>83</sup> *Investigation Committee Report*, *supra* note 81, at 19–21, 32–37.

experience and survey results,<sup>84</sup> the Committee raised numerous doubts about the feasibility of attracting sufficient attorneys to enter the judiciary. The Committee noted various practical barriers: burdens associated with the regular transfers (which are especially hard on those with families); responsibilities to existing clients; judges' heavy workloads; loss of income due to the disparity in pay levels between attorneys and judges; loss in retirement allowances and pension benefits from switching employment; and the complexities of judicial duties.<sup>85</sup>

The Committee also identified a long list of conditions that would need to be met in order to achieve successful implementation of *hōsō ichigen*.<sup>86</sup> The first essential precondition, in the view of the Committee, was a “dramatic increase” in the size of the legal profession.<sup>87</sup> Other requirements for success included alleviating the great disparity in the level of attorneys in urban and rural regions, raising public trust in attorneys, and strengthening attorneys' sense of public service, as well as improving working conditions, pay and other benefits for judges.<sup>88</sup> Quite apart from the practical barriers and preconditions, several Committee members expressed doubts about attorneys' qualifications, and they raised concerns about dangers associated with appointing lawyers to the bench, including “the tendency to overly individualistic attitudes” among attorneys.<sup>89</sup> They also expressed praise for the merits of the existing career system, including its strengths in ensuring fairness, integrity, and legal stability.<sup>90</sup>

As its conclusion, the Investigation Committee stated:

---

<sup>84</sup> Notwithstanding the number of attorneys who entered the judiciary in the early postwar years, *see supra* notes 71–72 and accompanying text, by 1964, former attorneys constituted only 14% of the judiciary. In a survey conducted by the Supreme Court in 1961, only four out of 142 attorneys with 10–12 years of experience surveyed expressed an interest in joining the judiciary. *Investigation Committee Report, supra* note 81 at 52–53.

<sup>85</sup> *Id.* at 53.

<sup>86</sup> *Id.* at 38–41.

<sup>87</sup> *Id.* at 38. The report used the phrase *hiyakuteki zōka* (飛躍的增加).

<sup>88</sup> *Id.* at 38–41.

<sup>89</sup> *Id.* at 36.

<sup>90</sup> *See, e.g., id.* at 33–38. Moreover, it bears note that the concerns and criticisms listed in the official report evidently were toned down considerably. Ōno Masao, *Hōsō Ichigen no Rinen to Bengoshi no Sekinin* (法曹一元の理念と弁護士責任) [*The Principle of Hōsō Ichigen and the Responsibility of Attorneys*], 15 *JYŪ TO SEIGI*, no. 12, at 6 (1964).

The *hōsō ichigen* system (as defined in the [Establishment Act]), if it is achieved smoothly, would be *one*<sup>91</sup> desirable system for Japan.

However, the various conditions that would serve as the base for achieving this system are not yet in place.

Accordingly, at the present time, improvements in the existing system should be undertaken while bearing in mind the strengths of the *hōsō ichigen* system, and at the same time sufficient consideration should be given to preparing the base referred to above.<sup>92</sup>

The first concrete recommendation for action called on the three branches of the profession “to cooperate so that as many suitable attorneys, prosecutors, etc., as possible may be appointed as judges.”<sup>93</sup> Yet as Wagatsuma, who chaired the Committee, noted the following year, the bar and many other observers regarded the final report as representing the “funeral” for *hōsō ichigen*.<sup>94</sup> Members of the bar, he added, were angry to see this funeral, whereas many judges and prosecutors were “relieved.”<sup>95</sup>

As to his own vision, Wagatsuma offered the following:

Personally, I would like to see the number of candidates accepted to the LTRI roughly doubled, resulting in about 1000 new entrants to the legal profession each year. If those new entrants could not all be absorbed as judges, prosecutors, and attorneys, they should enter posts handling legal matters as government officials or join legal departments in banks and companies. And those who had attained experience in these varied occupations would then become judges. I anticipated that this sort of approach to preparing the base would arise naturally from our deliberations.<sup>96</sup>

---

<sup>91</sup> The word “one” (一つ) in the recommendation carries the distinct connotation that it is not the only desirable system.

<sup>92</sup> *Investigation Committee Report*, *supra* note 81, at 185 (emphasis added).

<sup>93</sup> *Id.*

<sup>94</sup> ŌUCHI & WAGATSUMA, *supra* note 45, at 178.

<sup>95</sup> *Id.* at 178–79, 181.

<sup>96</sup> *Id.* at 179–80. Wagatsuma stressed that he did not mean to imply that the assistant judge system would be abolished. Rather, he felt it would be desirable if the career system accounted for about half of all

To place this comment in context, after ranging between 224 and 346 during the period from 1949 through 1960, the number of bar exam passers rose to 496 in 1963, 508 in 1964, and 554 in 1966. That proved to be the highest point for the next quarter century. From 1967 through 1990, the number of passers hovered at about 500 per year, with a high of 537 and a low of just 446. It was not until 1999, thirty-four years after Wagatsuma's statement, that the number of passers reached 1000.<sup>97</sup> Also, until 2000, the Attorneys Act prohibited attorneys from entering full-time employment in governmental entities.<sup>98</sup> Lastly, until 2003, the Attorneys Act required attorneys to obtain authorization from their local bar association before entering employment in banks or companies.<sup>99</sup> As of the mid-1960s, it was virtually unheard of for lawyers to work in companies; and it is only over the past decade that the number of in-house lawyers has begun to rise substantially.<sup>100</sup> In sum, Wagatsuma was well ahead of his time—or, to put it differently, Japan was very slow to recognize the wisdom of his vision.

Wagatsuma was critical of the judges and prosecutors who were relieved to see the “funeral” for *hōsō ichigen*, stating, “the harms of the career system are far more serious than they realize.”<sup>101</sup> He expressed much greater frustration, however, with the attitude of the bar. In his words, “[w]hen matters relating to reform of the justice system come up, no matter how small the issue, members of the bar say that if *hōsō ichigen* is adopted, those problems will all be solved immediately, but if it isn't adopted things won't improve.”<sup>102</sup> “They offer their assurances that, once they put their minds to it and undertake preparations, there will be enough attorneys who desire to enter the judiciary, but they don't offer any particular concrete measures to be

---

judges, with the remaining half coming from a broad range of backgrounds outside the judiciary. *Id.* at 181.

<sup>97</sup> See, e.g., Rokumoto, *supra* note 53, at 213–14.

<sup>98</sup> Bengoshihō (弁護士法) [Attorneys Act], Act No. 205 of 1949, art. 30, sec. 1 (prior to revision pursuant to Act No. 128 of 2003). The general prohibition was not abolished until 2003. In 2000, however, an exception was added for fixed-term positions in national government agencies. That exception was accompanied by the passage of a separate act authorizing such appointments. *Ippanshoku no ninkitsuki shokuin no saiyō oyobi kyūyo no tokurei ni kansuru hōritsu* (一般職の任期付職員を採用及び給与の特例に関する法律) [Act regarding Special Exceptions for the Hiring and Salaries of Regular (Public) Employees on a Fixed Term Basis], Act No. 125 of 2000.

<sup>99</sup> *Id.* art. 30, sec. 3 (prior to revision pursuant to Act No. 128 of 2003).

<sup>100</sup> See, e.g., Nihon Soshikinai Bengoshi Kyōkai (日本組織内弁護士協会) [Japan In-House Lawyers Association], *Kigyōnai Bengoshisū no Suii* (企業内弁護士数の推移) [*Trends in the Numbers of Lawyers Working in Corporations*] (2017), <http://jila.jp/pdf/transition.pdf>.

<sup>101</sup> ŌUCHI & WAGATSUMA, *supra* note 45, at 180–81.

<sup>102</sup> *Id.* at 178.



taken.”<sup>103</sup> In explaining why the Investigation Committee did not set out more clearly what sorts of changes to the existing system were needed, Wagatsuma said: “That’s because we could not reach consensus on those matters. What astonished me most of all is that even on the topic of increasing the size of the legal profession, the attorneys on the Committee couldn’t agree among themselves.”<sup>104</sup>

As it turned out, by raising pay levels and undertaking improvements to working conditions,<sup>105</sup> the judiciary regained the ability to recruit sufficient new assistant judges. As alluded to earlier, the Committee also called for the establishment of a “Justice Council,” including representatives of each of the three branches of the profession and other persons of learning and experience, to consult on issues of importance, “such as cooperation on matters relating to . . . the size of the legal profession [and] interchanges within the profession.”<sup>106</sup> JFBA refused to participate in the proposed Council, feeling that the Committee’s treatment of *hōsō ichigen* and other matters represented a betrayal.<sup>107</sup> When coupled with the prevailing attitude, explicitly endorsed by a 1970 Diet resolution, that “matters related to justice system reform should be achieved based on consensus by the three branches of the legal profession,”<sup>108</sup> this refusal to participate left many matters (including, notably, the Committee’s recommendation for a major increase in the size of the legal profession) effectively in limbo. Moreover, whatever Wagatsuma may have felt personally, the Committee report seemed to signal the burying of *hōsō ichigen* for many years to come.

In sum, the period leading up to the establishment of the Investigation Committee, together with the Committee deliberations, almost certainly represents the most extended and detailed *diagnosis* of the issue of diversification of the judiciary ever undertaken in Japan. Yet rather than leading to *initiation* and *implementation* of reform measures, those deliberations and their aftermath further entrenched the career judiciary. The number of attorneys appointed to the judiciary had already begun to decline by

---

<sup>103</sup> *Id.* at 181.

<sup>104</sup> *Id.* at 179.

<sup>105</sup> *Investigation Committee Report*, *supra* note 81, at 191–94.

<sup>106</sup> *Id.* at 191.

<sup>107</sup> KANEKO & TAKESHITA, *supra* note 22, at 232; KOBAYASHI MASAHIRO (小林正啓), KONNA NICHIBENREN NI DARE GA SHITA? (こんな日弁連に誰がした?) [WHO TURNED JFBA INTO THIS?] 160, 230 (2010).

<sup>108</sup> Resolution of the Committee on Legal Affairs of the Upper House, *quoted in* KOBAYASHI, *supra* note 107, at 118.

the early 1960s. Thereafter, such appointments virtually dried up. During the twenty-four-year period from 1964 through 1987, attorneys accounted for only forty-two of the 1681 judges and assistant judges appointed—under 2.5% of the total.<sup>109</sup>

#### V. RECRUITMENT OF ATTORNEYS FOR JUDICIAL POSITIONS IN THE LATE 1980S AND 1990S

Nearly a quarter of a century passed before the next major development, one that went beyond *diagnosis* to *initiation* and took concrete steps for *implementation*. This time, the impetus came not from the bar but from the judiciary. In March 1988, the Supreme Court issued a document entitled The Main Points for Hiring and Selection of Judges. In it, the judiciary announced the plan to hire approximately twenty judges annually from among attorneys under the age of fifty-five with at least fifteen years of practice experience. As the reason for this new policy, the Supreme Court highlighted the desire to hire judges with broad experience, able to handle complex and diverse cases arising from advances in society.<sup>110</sup>

Chief Justice Yaguchi Kōichi (矢口洪一) was responsible for initiating this policy.<sup>111</sup> Yaguchi was deeply familiar with the *hōsō ichigen* issue, having served on the support staff for the Investigation Committee. In a set of memoirs, published in 1993,<sup>112</sup> Yaguchi rejected the view, sometimes espoused by attorneys, that, “due to the career system, judges inevitably are ignorant of the ways of the world whereas attorneys are never lacking in that regard.”<sup>113</sup> At the same time, he voiced support for diversifying the judiciary, stating, “From my many years of experience I feel there is no need to be wedded to the career system . . . . In today’s complicated society, I don’t think it’s necessarily desirable to insist on only one pure system.”<sup>114</sup> He went on to say, “I believe it’s good for judges from various backgrounds to work together, improving their abilities . . . by sharing their experiences and viewpoints.”<sup>115</sup>

---

<sup>109</sup> KANEKO & TAKESHITA, *supra* note 22, at 232.

<sup>110</sup> *Id.* at 233 (summary of Hanji Saiyō Senkō Yōryō (判事採用選考要領) from the Japanese Supreme Court (1988)).

<sup>111</sup> *See, e.g.*, YAGUCHI KŌICHI (矢口洪一), SAIKŌSAIBANSHO TO TOMO NI (最高裁判所とともに) [TOGETHER WITH THE SUPREME COURT] 43 (1993).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 44.

<sup>114</sup> *Id.* at 43.

<sup>115</sup> *Id.* at 44.

In a later chapter of his memoirs (focused primarily on a program, which Yaguchi also initiated, of sending young judges to the United States and Europe to study the jury system and other forms of lay participation), Yaguchi returned to the career system:

Having been a witness to judicial administration in the postwar era, I recognize the many strengths of Japan's career judicial system, but I've also felt a number of doubts. Given that it's a career system, regular training is essential for assistant judges . . . , but if the training from start to finish is confined to internal training within the judiciary, there's a tendency to become detached from the feelings of the general public. That's why I've placed efforts into training outside the judiciary and to overseas experience.

How about boldly adopting *hōsō ichigen*? . . . Under current circumstances, even if we were to appoint judges from among attorneys, we would be limited to an extremely low number. In that case, is there some system by which we could maintain the strengths of the career system while directly reflecting the views of the public in trials?

[It was with that thought in mind] that we undertook investigation and research [into the jury and lay participation systems], to consider whether they would be appropriate for Japan.<sup>116</sup>

As these quotes reflect, Yaguchi viewed both diversification of the judiciary and the lay participation system as means to expose career judges to external influences and thereby broaden their perspectives.

Yaguchi's reference to "plac[ing] efforts into training outside the judiciary and to overseas experience" bears especial note. Reflecting back on his career, Yaguchi commented, "With the exception of a handful of judges who undertook study abroad, within the judiciary there was no thought at all of trying to learn anything from society, other than from the legal academy."<sup>117</sup> As of the early 1970s, at most two or three judges each year went to the United States for study. As soon as he became head of the Personnel Bureau in the Supreme Court General Secretariat in 1970, Yaguchi proposed that half of

---

<sup>116</sup> *Id.* at 114.

<sup>117</sup> *Id.* at 88.

each class of judges should attain experience abroad. He reports that the proposal initially was met with the traditional attitude that study abroad was a reward, akin to a “medal for meritorious service.” He kept at it though, and in 1972 the judiciary initiated a special program to send assistant judges abroad to study in the United States, England, Germany and France.<sup>118</sup> The University of Washington School of Law was one of the earliest schools to participate in that program, and has received an assistant judge from Japan as a visiting scholar every year since 1977.<sup>119</sup> By the time Yaguchi penned his memoirs in 1993, he reported that the judiciary was sending between ten and twenty assistant judges abroad for study each year, and that overall, including short term fact-finding missions, well over fifty judges were going abroad every year.<sup>120</sup>

In addition to the study abroad program, in the early 1980s, when he was Secretary General at the Supreme Court General Secretariat, Yaguchi took the lead in establishing a program to have about ten senior assistant judges, typically those in their tenth and final year as assistant judges, spend three to four weeks working in major newspapers.<sup>121</sup> As Yaguchi explained, the genesis for that idea was that “correctness” and “promptness” are both important values for judges. However, those values sometimes are regarded as being in conflict. He felt that, by experiencing work at newspapers, which demand accuracy but constantly face strict deadlines, judges would develop a better appreciation for how to achieve both values at the same time.<sup>122</sup> Thereafter, the program for having judges undertake training outside the judiciary expanded to companies (with both short and long term programs), government ministries and agencies (two-year terms), embassies and consulates outside Japan (also two years), and other types of postings.<sup>123</sup> As Yaguchi reflected on the establishment of this program, he stated:

For companies and government ministries and agencies, setting up these sorts of external training programs may not be so difficult, but it took a great deal of resolve and a change in thinking for the judiciary to tackle this matter. Within the

---

<sup>118</sup> *Id.* at 90.

<sup>119</sup> See John O. Haley, *Asian Law Center: The First Half Century, the First Decades: 1961–2000*, in *LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW* 7, 13 (John O. Haley & Toshiko Takenaka eds., 2014).

<sup>120</sup> YAGUCHI, *supra* note 111, at 90.

<sup>121</sup> See *id.* at 88–89.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 89.

judiciary, the illusion was widely shared that having no contact with the outside world was proof of judicial independence. For that reason, at the start I anticipated there would be considerable resistance from the places we approached as settings for the external training experiences. The fact we were able to achieve this program without meeting such resistance may reflect a changing in the mood of the times.<sup>124</sup>

Yaguchi added, “The fact that a single system could continue for forty years, with no influence from changes in the societal environment, is in itself quite remarkable. Moreover, it was only in the postwar era that the judiciary had come to be completely inbred.”<sup>125</sup> He noted that, as a consequence of the establishment of the programs for overseas study and training outside the judiciary, some judges had become attached to the vigorous nature of those activities and had decided to give up their judicial careers and become attorneys.<sup>126</sup> While he was sad to see this happen, he viewed it as part of the learning process in developing a new model for judges suited to the changing times.<sup>127</sup>

Yaguchi earned the nickname “Mr. Judicial Administration.”<sup>128</sup> He spent nearly two-thirds of his forty-two year judicial career in administrative posts, including serving as head of the Supreme Court’s General Secretariat and as head of the Civil, Administrative, and Personnel Bureaus within the General Secretariat. Some critics appear to regard all his actions skeptically, suspecting ulterior motives aimed solely at advancing the interests of the judiciary. In that vein, the lead article in a special issue on *bengoshi ninkan* (the appointment of attorneys to the judiciary) of *Jiyū to Seigi*, the flagship journal of the JFBA, published in 1993, characterized the 1988 initiative seeking to recruit attorneys to the judiciary, “undertaken unilaterally from on high, completely ignoring the bar association,” as an “effort to kill two birds with one stone, by filling vacancies in the understaffed judiciary while deflecting public criticism of judge/prosecutor exchanges.”<sup>129</sup>

---

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 90.

<sup>127</sup> *Id.*

<sup>128</sup> *See, e.g., id.* at 82.

<sup>129</sup> Shimomura Sachio (下村幸雄), *Bengoshi Ninkan no Konnichiteki Igi* (弁護士任官の今日的意義) [*The Current Significance of Appointing Attorneys to the Judiciary*], 44 *JİYŪ TO SEIGI*, no. 4, at 5, 6 (1993). The reference to “judge/prosecutor exchanges” refers to a practice, dating from the early postwar years, in which a number of judges each year were seconded to the Ministry of Justice, where they served as

Yaguchi's reputation as "Mr. Judicial Administration" may very well have allowed him to push for initiatives from which others would have shied away from. Whether or not he himself favored introducing the jury system to Japan, a strong case can be made that his willingness to place the imprimatur of the Chief Justice on a serious investigation of the topic opened the door to introduction of the lay judge system nearly twenty years later. In any event, the impact of his initiative on appointing attorneys to the judiciary was immediate. During the six-year period prior to 1988, there had been *zero* appointments of attorneys to the judiciary.<sup>130</sup> Had the Supreme Court sought agreement with JFBA before undertaking the initiative, it likely would have led to protracted deliberations. By "unilaterally" announcing the new policy, the judiciary was able to jump-start the process. Although the judiciary did not reach its stated target of twenty new appointments per year, in 1988 five attorneys were appointed as judges, followed by four more appointments (two judges and two assistant judges) the following year.<sup>131</sup>

The initiative also served as the spur to action for the bar. After the initiative was announced, the bar undertook behind the scenes discussions with the Supreme Court and the MOJ.<sup>132</sup> Then, following his election as President of JFBA in 1990, Nakabō Kōhei declared justice reform as a major theme of his two-year term.<sup>133</sup> As part of its efforts, JFBA undertook a survey of its members regarding the Supreme Court's initiative and related matters.<sup>134</sup> While over 18% of the nearly 2500 respondents regarded the initiative as "nothing more than a stopgap measure to meet the need for more judges," nearly 80% viewed it as a step in the right direction, albeit more than half expressed the need for further revisions to the standards and procedures.<sup>135</sup> Based in part on those results, JFBA undertook formal negotiations with the

---

prosecutors before returning to the judiciary, and a number of prosecutors were seconded to the judiciary, where they served as judges before returning to MOJ. This practice is discussed more fully at *infra*, note 258. For a more charitable assessment of Yaguchi's role, see KOBAYASHI, *supra* note 107, at 68–69 (view that, throughout his career, Yaguchi sought to preserve the independence of the judiciary and raise the judiciary's status).

<sup>130</sup> KANEKO & TAKESHITA, *supra* note 22, at 233.

<sup>131</sup> *Id.*

<sup>132</sup> Shimomura, *supra* note 129, at 6.

<sup>133</sup> See, e.g., *Intabyū: Bengoshi Ninkan Seido ni tsuite* (インタビュー：弁護士任官制度について) [Interview: Regarding the System for Appointment of Attorneys as Judges], 44 JIYŪ TO SEIGI, no. 4, at 42, 44 (1993) [hereinafter *Interview*] (comment by Suganuma Takashi).

<sup>134</sup> Ōkawa Shinrō (大川真郎), *Bengoshi Ninkan Suishin no Torikumi Keika* (弁護士任官推進の取組み経過) [The Progress of Efforts to Promote Bengoshi Ninkan], 44 JIYŪ TO SEIGI, no. 4, at 20 (1993).

<sup>135</sup> *Id.* at 20.

Supreme Court and the MOJ, which in turn led to a three-party agreement in 1992, as well as separate documents setting out the “main points for hiring of attorneys” as judges and as prosecutors.<sup>136</sup>

For judges, in line with requests from JFBA, the criteria of those eligible for appointment was expanded from those with fifteen or more years of experience to those with at least five years. Additionally, new candidates’ location preferences would be taken into account, and attorneys with at least fifteen years of experience would be posted in or near the place of their residence if they so desired.<sup>137</sup> In the early 1990s, JFBA also raised the possibility of establishing a part-time judge system, based in part on an English model, in which attorneys would serve as judges for a fixed number of days each year (twenty to fifty, perhaps).<sup>138</sup> About half the attorneys surveyed in Osaka and Tokyo expressed interest in serving as part-time judges.<sup>139</sup> However, given the wide range of logistical factors that would need to be addressed and the difficulty of incorporating a part-time system into the traditional career judiciary, that system was not introduced.<sup>140</sup>

JFBA devoted great effort to promoting the appointment system. So by the early 1990s the system clearly had entered the *implementation* stage—the stage for “translating abstract goals into practical policies.”<sup>141</sup> Initially, those efforts appeared to have an impact. In 1992, a total of eight attorneys joined the judiciary (four judges and four assistant judges); the following year, eight more joined, all as judges.<sup>142</sup> In a joint interview in early 1993, Nakabō and Suganuma Takashi, who served as vice chair of JFBA headquarters for promoting justice reform, acknowledged the numbers were not as high as they

---

<sup>136</sup> These are reproduced as Materials 2 and 3 in *Shiryō: Bengoshi Ninkan* (資料：弁護士任官) [*Materials: Bengoshi Ninkan*], 44 JIYŪ TO SEIGI, no. 4, at 91, 100, 101 (1993).

<sup>137</sup> *Id.*, Material 2, at 100. In addition, a stipulation was included that those appointed should be willing to spend at least five years in the judiciary, thus explicitly leaving the door open for appointees to return to law practice thereafter. *Id.*

<sup>138</sup> See Aoki Masayoshi (青木正芳), *Hijōkin Saibankan Seido no Ichizuke* (非常勤裁判官制度の位置づけ) [*The Position of the Part-Time Judge System*], 44 JIYŪ TO SEIGI, no. 4, at 35.

<sup>139</sup> *Id.* at 41.

<sup>140</sup> *Interview*, *supra* note 133, at 51 (comment of Suganuma).

<sup>141</sup> FEELEY, *supra* note 7, at 37. Among those efforts, the JFBA requested the thirteen local bar associations with at least 200 members to establish special bodies to promote *bengoshi ninkan*. By 1993, ten of those local associations had complied. See *Interview*, *supra* note 133, at 44 (comment of Suganuma). The JFBA also continued to promote *bengoshi ninkan* with special issues and feature stories in *Jiyū to Seigi*. See, e.g., *Tokushū: Bengoshi Ninkan* (特集：弁護士任官) [*Special Topic: Bengoshi Ninkan*], 44 JIYŪ TO SEIGI, no. 4, at 26–34 (articles on the efforts by No. 1 Tokyo Bar Association, Osaka Bar Association, and Nagoya Bar Association), 61–90 (panel discussion).

<sup>142</sup> KANEKO & TAKESHITA, *supra* note 22, at 234–35.

might have wished.<sup>143</sup> They identified many challenges facing efforts to increase those numbers. With respect to the attitude of the judiciary, Nakabō said he felt those he had dealt with, at least at the Supreme Court level, were actively seeking to promote hiring of attorneys, and not simply espousing their support as a smokescreen to hide the real aim of remedying a shortage of judges.<sup>144</sup> He cautioned, however, that he was not so sure rank-and-file judges shared those views. He had heard some lower court judges question whether appointing attorneys was a good thing, and he witnessed considerable resentment among attorneys that experienced lawyers were being given preferable treatment with regard to the location of their postings.<sup>145</sup>

Nakabō and Suganuma also identified numerous challenges on the lawyer side, including: attachment to practice and doubts about whether becoming a judge is truly an appealing option, difficulty in making arrangements for clients and staff, and concerns about the appointment process.<sup>146</sup> Nakabō had been hopeful attorneys from the larger firms would apply to enter the judiciary. It would be much easier for them to arrange for others to take over their clients than for sole practitioners or those in small firms.<sup>147</sup> Additionally, in the event they chose to return to practice, it would be easier to do so. But after the first two years of the new system, by which point sixteen attorneys already had entered the judiciary, not one attorney from any of the large firms had applied. The attitude at those firms, as Nakabō saw it, was that they were extremely busy and successful, and they couldn't bear to let go of those who were responsible for "laying the golden egg."<sup>148</sup> Nakabō's comment was based on a meeting he had with leaders of large firms in the Osaka area, who said they had too much work and too few associates to meet the demand. Presumably, senior associates and junior partners at those firms also would have been reluctant to leave their successful practices, due to a sense of obligation to their clients and their firm. The challenges mentioned above closely parallel concerns raised in the Investigation Committee's deliberations nearly thirty years earlier. In modest signs of hope, however, based on the initial two years under the new system, it did not appear that salary disparity,<sup>149</sup> concerns over pension or retirement benefits,<sup>150</sup> nor concerns over the location of postings or transfers were major barriers.<sup>151</sup>

---

<sup>143</sup> *Interview, supra* note 133, at 48.

<sup>144</sup> *Id.* at 45–46.

<sup>145</sup> *Id.* at 46.

<sup>146</sup> *Id.* at 46–49.

<sup>147</sup> *Id.* at 49–50.

<sup>148</sup> *Id.* at 50.

<sup>149</sup> *Interview, supra* note 133, at 49.



Despite the challenges, Nakabō and Suganuma expressed hope more attorneys would choose to enter the judiciary in future years. Suganuma likened the initial efforts to dew falling from leaves, which in time might collect into a small stream and then grow to a large river.<sup>152</sup> From that perspective, the results of the third year might have provided a bit of hope. In 1994 nine attorneys joined the judiciary.<sup>153</sup> While only one more than in each of the prior two years, the trend was upward. The momentum, however, did not continue. In 1995 only three attorneys made the move, followed by six and seven, respectively, the next two years, and dropping to just three again in 1998.<sup>154</sup>

In sum, the Supreme Court's 1988 initiative, followed by the joint efforts of JFBA and the Supreme Court, represent yet another instance of *diagnosis or conception*, together with the second full-fledged instance of *initiation* and *implementation* of efforts to diversify the judiciary. One might even view this period as having reached the *routinization* stage, since the framework for recruiting attorneys to the judiciary continued in operation through the 1990s. In any event, before the flow could even coalesce into a small stream, it turned back into a mere trickle.

## VI. THE JUSTICE SYSTEM REFORM COUNCIL AND RECENT REFORMS

### A. *Overview of the JSRC and the Reform Proposals*

We at last come to the most recent set of reforms. The direct impetus came from a government advisory council, the JSRC, which undertook its deliberations in 1999. As with the Investigation Committee of the early 1960s, the JSRC was established by an act of the Diet.<sup>155</sup> In a significant shift, whereas nine of the Investigation Committee's twenty members came from the legal profession, only three of the thirteen JSRC members came from the

---

<sup>150</sup> *Id.* at 50 (the interviewer, Sakaguchi Shigekazu (坂口繁和), noted pension benefits for judges were typically higher than for attorneys, and attorneys did not receive retirement allowances).

<sup>151</sup> *Id.* at 49.

<sup>152</sup> *Id.* at 52.

<sup>153</sup> KANEKO & TAKESHITA, *supra* note 22, at 234.

<sup>154</sup> *Id.* Figures compiled by the JFBA are even lower. See White Paper, JFBA, *Bengoshi Hakusho 2016 nenban* (弁護士白書 2016 年版) [*White Paper on Attorneys, 2016 Edition*] 142 (2016) [hereinafter *White Paper*].

<sup>155</sup> Shihō Seido Kaikaku Shingikai Setchihō (司法制度改革審議会設置法) [Justice System Reform Council Establishment Act], Act No. 68 of 1999 [hereinafter JSRC Establishment Act].

legal profession, one from each of the “three branches.”<sup>156</sup> This relatively limited representation reflected the view that decisions over the size of the bar and other matters related to the justice system were so important they could no longer be left to the legal profession.

Although the JSRC Establishment Act did not specifically refer to *hōsō ichigen* or the judicial appointment system,<sup>157</sup> those topics clearly were within the Council’s broad mandate.<sup>158</sup> The bar viewed the deliberations as an opportunity to renew the push for *hōsō ichigen*. Indeed, in the run-up to establishment of the JSRC, JFBA had again begun to campaign for *hōsō ichigen*. That campaign reportedly was triggered by then-former Chief Justice Yaguchi’s statement in a major newspaper in late December 1996, that “to achieve the people’s trust, the [*hōsō*] *ichigen* system is the most desirable system.”<sup>159</sup> JFBA members again took up the call, undertaking a wide range of activities, including a major symposium in November 1998, which in turn resulted in a 450-page book on *hōsō ichigen*.<sup>160</sup> Those involved in the campaign also undertook outreach activities to the mass media and politicians.<sup>161</sup>

<sup>156</sup> See JSRC RECOMMENDATIONS, *supra* note 2, Appendix (list of members) (the other members were three legal academics, two non-law academics, two business leaders, a labor union leader, a consumer organization leader, and a novelist).

<sup>157</sup> While not expressly included in the JSRC Establishment Act, resolutions attached to that Act in both the House of Representatives and the House of Councilors did include explicit references to *hōsō ichigen*. See (SHŪGIIN HŌMU IINKAI) SHIHŌ SEIDO KAIKAKU SHINGIKAI SETCHIHŌAN NI TAISURU FUTAI KETSUGI ((衆議院法務委員会) 司法制度改革審議会設置法案に対する附帯決議) [(HOUSE OF REPRESENTATIVES COMMITTEE ON JUDICIAL AFFAIRS) SUPPLEMENTARY RESOLUTION REGARDING THE BILL FOR THE JSRC ESTABLISHMENT ACT] (1999), <http://www.kantei.go.jp/jp/sihouseido/990803syugiin.html>; see also (SANGIIN HŌMU IINKAI) SHIHŌ SEIDO KAIKAKU SHINGIKAI SETCHIHŌAN NI TAISURU FUTAI KETSUGI ((参議院法務委員会) 司法制度改革審議会設置法案に対する附帯決議) [(HOUSE OF COUNCILLORS COMMITTEE ON JUDICIAL AFFAIRS) SUPPLEMENTARY RESOLUTION REGARDING THE BILL FOR THE JSRC ESTABLISHMENT ACT] (1999), <http://www.kantei.go.jp/jp/sihouseido/990803sangiin.html>.

<sup>158</sup> JSRC Establishment Act, art. 2 (the JSRC was established for the following purposes: “to clarify the role to be played by justice in Japanese society in the 21st century; and to examine and deliberate fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, measures necessary for participation by the people in the justice system, measures necessary for . . . strengthening the functions of the legal profession, and other reforms of the justice system, as well as improvements in the infrastructure of that system”).

<sup>159</sup> KOBAYASHI, *supra* note 107, at 161; see also Yaguchi Kōichi (谷口洪一), “*Hōso Ichigen*” no *Seido to Kokoro* (「法曹一元」の制度と心) [*The System and Spirit of “Hōsō Ichigen”*], 49 *Jiyū to Seigi*, no. 7, at 14 (1998) (Yaguchi’s comment appeared in the *Mainichi Shinbun* on December 23, 1996. Yaguchi expanded on those views in a speech at the Osaka Bar Association on March 9, 1998, which was published as the lead-in to a special feature on *hōsō ichigen* in the July 1998 issue of *Jiyū to Seigi*).

<sup>160</sup> See KOBAYASHI, *supra* note 107, at 161–62.

<sup>161</sup> See *id.*

Many proponents sought to tie expansion in the size of the legal profession to *hōsō ichigen*. As we have seen, calls for a substantial rise in the number of bar exam passers dated back at least as far as the Investigation Committee's recommendations in 1964.<sup>162</sup> The bar initially refused to engage in discussions of the issue. As pressure rose over the years, the bar continued to resist, and then engaged in a series of grudging concessions. Indeed, it was that recalcitrant attitude, above all, that led to the decision to limit the legal profession's representation on the JSRC.<sup>163</sup> When the pressure continued to intensify in the 1990s, members of the bar sought to treat agreement to *hōsō ichigen* as a *quid pro quo* for concessions to increases in the number of bar exam passers.<sup>164</sup>

The lawyer representative on the JSRC was Nakabō. He sought to link debates over the size of the legal profession and reforms to the legal training system with *hōsō ichigen*.<sup>165</sup> Other Council members expressed skepticism about the feasibility and desirability of moving to a system in which judges would come only from among experienced lawyers.<sup>166</sup> Then, when it appeared the deliberations might become deadlocked, during an all-day session in August 2000, Nakabō stated in essence that the term *hōsō ichigen* was just a slogan. He also posited that use of the phrase easily could lead to the misapprehension that all lawyers would become judges or that lawyers would choose all the judges, and that it would be better if some new word could be devised that would not have the baggage associated with *hōsō ichigen*.<sup>167</sup>

Some members of the bar seem to regard Nakabō as a traitor for having made that concession. In subsequent years some of the attacks on the increase in the size of the legal profession have cited *hōsō ichigen*, implying that the bar was misled into supporting the increased number of passers by the false expectation of achieving *hōsō ichigen* in return.<sup>168</sup> However, in the context of the JSRC, Nakabō's concession cleared the way forward. Previously,

---

<sup>162</sup> See *supra* notes 87, 96–97 and accompanying text.

<sup>163</sup> See KOBAYASHI, *supra* note 107 at 80–118 (providing a detailed examination of the debates within the bar and the impact of the bar's recalcitrance on outside opinions).

<sup>164</sup> See *id.* at 162, 167–70, 200–12.

<sup>165</sup> See *id.* at 200–12.

<sup>166</sup> See *id.*

<sup>167</sup> See JSRC, Minutes for the 3rd Day of Concentrated Deliberations (2000), <http://www.kantei.go.jp/jp/sihouseido/natu/natu3gijiroku.html>.

<sup>168</sup> See, e.g., Kuboi Kazumasa (久保井一匡), *Chokusetsushugi/Kōtōshugi o Kōtai Saseru na* (直接主義・口頭主義を後退させるな) [*Do Not Let The Principles of Directness and Orality Regress*], RONKYŪ JURISUTO NO. 2 at 99 (2012); KOBAYASHI, *supra* note 107, at 214, 220.

members had undertaken discussion of qualities desired for judges;<sup>169</sup> after Nakabo's statement, the Council proceeded to discuss how best to achieve its vision for the judiciary, given the realities of the Japanese situation.<sup>170</sup> In the words of Takeshita Morio, a former judge who served as Vice Chair of the JSRC and also was co-author of the leading treatise on the judiciary:<sup>171</sup>

In our Council, from the start of discussions on reforms to the judge system, nearly all of us were in agreement that the focus of our deliberations should be on how to appoint and train high quality judges who will be the bearers of the Japanese justice system in the 21st century, and that the old way of framing the question as simply a debate over whether or not to adopt *hōsō ichigen* was not appropriate.<sup>172</sup>

The JSRC did not call for abolition of the assistant judge system or a wholesale move to appointment only of experienced lawyers. To the contrary, the Council expressly recognized that appointment of assistant judges directly upon completion of the LTRI would continue to constitute a major route for entry into the judiciary. Nonetheless, the Council's final report strongly endorsed the goal of diversification through its use of phrases such as "form[ing] and nurtur[ing] a justice system that can genuinely meet the public's expectations and trust"<sup>173</sup> and references to the importance of securing judges "with abundant, diversified knowledge and experience."<sup>174</sup>

To achieve these ends, the JSRC set forth two major recommendations. Notably, the first reform, was *not* increased appointment of practicing lawyers to the bench. To the contrary, the first reform proposed a mechanism to ensure career judges gained broader exposure outside of the judiciary. This proposal paralleled and expanded on the efforts spearheaded by Yaguchi in the 1970s and 1980s to have judges spend periods of time outside the judiciary,

---

<sup>169</sup> See JSRC, Minutes for the 2<sup>nd</sup> Day of Concentrated Deliberations (2000), <http://www.kantei.go.jp/jp/sihouseido/natu/natu2gijiroku.html>.

<sup>170</sup> By being designated as an aide to a JSRC member, I had the opportunity to attend the all-day meeting where Nakabō made that statement. Even though at that time I was not fully steeped in the history of the *hōsō ichigen* debate, I could sense a hush and a collective sense of relief among other members of the Council when he did so.

<sup>171</sup> KANEKO & TAKESHITA, *supra* note 22.

<sup>172</sup> SATŌ KŌJI (佐藤幸治), TAKESHITA MORIO (竹下守夫) & INOUE MASAHITO (井上正仁), SHIHŌ SEIDO KAIKAKU (司法制度改革) [JUSTICE SYSTEM REFORM] 293–94 (2002) [hereinafter JUSTICE SYSTEM REFORM].

<sup>173</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III.

<sup>174</sup> *Id.* at Ch. III, pt. 5, § 1.

experiencing other settings. The fact that the Council listed this reform first presumably reflected its view that the existing career system has many strengths, and that the system for appointing practicing lawyers as judges would not expand rapidly. In concrete terms, the JSRC called for the establishment of a system “to ensure . . . that, in principle, all assistant judges” would “leave their status as judges . . . for a reasonably long period suited to obtaining meaningful experience” and “gather diversified experience as legal professionals in positions other than the judiciary . . . , such as lawyer, public prosecutor, etc.” before returning to the judiciary.<sup>175</sup>

There was a difference of opinion as to how long the “reasonably long period” should last. According to one view, about five years would be appropriate. While that clearly was a minority view, there was strong support for the view that six months or one year would be too short.<sup>176</sup> If the period were that short, the JSRC members agreed, the assistant judges would end up just being treated as “guests.”<sup>177</sup> Opinions also differed on what should qualify as appropriate experience outside the judiciary. As noted above, the JSRC recommendations called for “diversified experience as legal professionals,” with specific reference to positions “such as lawyer, public prosecutor, etc.” The same paragraph went on to say: “In addition, experience of other types that is considered equally beneficial, in elevating the quality of judges, to the types of experiences described above may also be included, but further consideration must be given to the specific contents of such other types of experiences.”<sup>178</sup> As an example of one of the other types of experiences that might be considered, Takeshita expressed the view that, especially given the rise in internationalization, study at an overseas university should count as appropriate “diversified experience.”<sup>179</sup>

One other aspect of the recommendation that bears note is the JSRC’s call for the judiciary to “systematically ensure” assistant judges gather diversified experience outside the judiciary. The Council stated, “such steps might be considered as reexamining the criteria for appointment of judges or placing weight on these types of experience in selecting judges . . . In any event, effective measures shall be established.”<sup>180</sup>

---

<sup>175</sup> *Id.* at Ch. III, pt. 5, § 1(1)a(a).

<sup>176</sup> JUSTICE SYSTEM REFORM, *supra* note 172, at 300 (comment by Satō).

<sup>177</sup> *Id.* at 299.

<sup>178</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 1(1)a(a).

<sup>179</sup> JUSTICE SYSTEM REFORM, *supra* note 172, at 301 (comment by Takeshita).

<sup>180</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 1(1)a(a).

The second reform proposal listed was invigoration of the system for appointing judges from among experienced attorneys. In this regard, the Council stated:

In order to realize the import of Article 42 of the Courts Act, which anticipates that judges will be drawn from a variety of sources, and to respond to the substantial increases in the number of judges needed . . . it is necessary to promote strongly the appointment of lawyers as judges, which has long been overdue. For this it is indispensable that the Supreme Court and JFBA build a constant and close cooperative framework.<sup>181</sup>

The Council made clear that its concept of diversification of appointments extended broadly, adding: “[I]t goes without saying that, based upon the spirit of diversification of the sources of supply for judges in Article 42 of the Courts Act, it is desirable that appointment not be limited to assistant judges and lawyers but include vigorous appointment of public prosecutors and legal scholars, who also are legal professionals.”<sup>182</sup>

From a United States perspective, it is intriguing to see that the Council suggested a third category of reform that might have helped diversify the judiciary: institution of a “research clerk system” at the High Court and District Court levels, along the lines of the United States judicial clerk system.<sup>183</sup> This suggestion did not go totally unnoticed,<sup>184</sup> but it never was implemented and appears to have disappeared from view.

In contrast, the Supreme Court and JFBA both expressed support for the other two major reform proposals. As to the proposal for diversifying the experiences of assistant judges, the Supreme Court noted the need to overcome hurdles such as securing appropriate placement locations to receive the assistant judges, handling the additional workload created by their absence, and working out details on such matters as compensation and

---

<sup>181</sup> *Id.* at Ch. III, pt. 5, § 1(2).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at Ch. III, pt. 5, § 1(3) (“[F]rom the standpoint of building courts with firm foundations and at the same time providing one mechanism by which those from outside the courts can obtain experience within the judiciary, consideration should be given to . . . appointing qualified legal professionals and others with learning and experience as a sort of law clerk attached to a judge (or judges) . . .”).

<sup>184</sup> See, e.g., Saitō Hiroshi (斎藤浩), Myōga Hideki (明賀英樹), Ogawa Tatsuo (小川達雄) & Aikawa Yutaka (相川裕), *Saibankan Seido no Kaikaku* (裁判官制度の改革) [*Reform of the Judge System*], 52 JIYŪ TO SEIGI, no. 8, at 74, 78 (2001).

benefits. In early 2003, however, the Supreme Court announced that, once these hurdles were overcome, following an initial implementation stage all assistant judges would have the opportunity to spend two years gaining experience outside the judiciary.<sup>185</sup> The Diet passed enabling legislation in 2004.<sup>186</sup> Shortly thereafter, the Supreme Court and JFBA entered into an agreement to cooperate in arranging appropriate placements, as well as on other aspects of the new system;<sup>187</sup> the first placements in law firms began in April 2005.<sup>188</sup>

The bench and the bar also both publicly embraced the calls for invigoration of the system for appointing experienced lawyers as judges. Even before the JSRC issued its final recommendations, the Supreme Court and JFBA released a joint declaration confirming their agreement that “it is very important to greatly increase the number of attorneys appointed to the judiciary” and pledging to discuss and cooperate on efforts to promote that goal, setting forth a long list of concrete measures to be discussed.<sup>189</sup>

---

<sup>185</sup> Memorandum, Saikō Saibansho Jimu Sōkyoku (最高裁判所事務総局) [Supreme Court General Secretariat], Hanjiho no Keiken no Tayōka ni tsuite (判事補の経験の多様化について) [Regarding Diversification of Experience for Assistant Judges] (March 18, 2003), [http://www.courts.go.jp/saikosai/vcms\\_lf/80614006.pdf](http://www.courts.go.jp/saikosai/vcms_lf/80614006.pdf).

<sup>186</sup> Hanjiho oyobi Kenji no Bengoshi Shokumu Keiken ni kansuru Hōritsu (判事補及び検事の弁護士職務経験に関する法律) [Act Concerning Experience as Attorneys for Assistant Judges and Prosecutors], Act No. 121 of 2004 [hereinafter Act Concerning Experience as Attorneys].

<sup>187</sup> Memorandum, Saikō Saibansho, Nihon Bengoshi Rengōkai (最高裁判所、日本弁護士連合会) [Supreme Court, JFBA], Hanjiho no Bengoshi Shokumu Keiken Seido ni kansuru Torimatome (判事補の弁護士職務経験制度に関する取りまとめ) [Arrangement of Matters Relating to the System for Experience in Work as Attorneys for Assistant Judges] (June 23, 2004), [http://www.nichibenren.or.jp/library/ja/judicial\\_reform/data/hanji\\_torimatome.pdf](http://www.nichibenren.or.jp/library/ja/judicial_reform/data/hanji_torimatome.pdf) [hereinafter Arrangement of Matters].

<sup>188</sup> See *Tokushū 1: Saibankan/Kensatsukan no Bengoshi Shokumu Keiken* (特集1: 裁判官・検察官の弁護士職務) [Special Feature 1: Work Experience as Attorneys for Judges and Prosecutors], 59 JIYŪ TO SEIGI, no. 12, at 9 (2008) (examining the system for placement of assistant judges in law firms). See also Hamada Hiromichi (濱田広道), *Bengoshi Shokumu Keiken Seido no Genjō to Kadai* (弁護士職務経験制度の現状と課題) [Current Circumstances of and Challenges for the Attorney Work Experience System], 59 JIYŪ TO SEIGI, no. 12, at 9 (2008).

<sup>189</sup> Memorandum, Saikō Saibansho Jimu Sōkyoku, Nihon Bengoshi Rengōkai (最高裁判所事務総局、日本弁護士連合会) [Supreme Court General Secretariat, JFBA], Bengoshi Ninkan o Suishin Suru tame no Gutaiteki Sochi no Teian ni tsuite (弁護士任官を推進するための具体的措置の提案について) [Regarding the Proposal for Concrete Steps to Promote the Appointment of Lawyers as Judges] (2001), [http://www.kantei.go.jp/jp/sihouseido/kentoukai/seido/dai2/2siryou\\_sa-be1.html](http://www.kantei.go.jp/jp/sihouseido/kentoukai/seido/dai2/2siryou_sa-be1.html).

*B. Potential Facilitating and Impeding Factors: The Feeley Framework*

As we have seen, prior to this recent set of reforms, Japan had gone through at least five prior instances of *diagnosis or conception* of the value of diversification of the judiciary, including at least two prior instances of *initiation* and *implementation* of reforms. Yet each of the past efforts had stalled. Was there any reason to think this time around might be more successful?

To answer, let us begin by returning to Feeley's framework. In his Introduction, he identified numerous factors as potentially aiding reform efforts. With reference to prior research, he posited that:

[P]lanned change is most likely to succeed in institutions where:

- highly trained professionals perform complex tasks
- authority is diffused and flexible rather than centralized
- duties are left ambiguous rather than formally codified in detail
- roles and mobility are flexible rather than rigidly stratified.<sup>190</sup>

These features presumably might facilitate reform by allowing experimentation and innovation by highly trained and committed professionals, with successful innovations then expanded. As Feeley noted, in the United States “courts are not bound by rigid centralized authority, [a] condition that facilitates initiative and fosters innovation.”<sup>191</sup> He cautioned, though, “courts are enmeshed in a web of rules that can be and often are inimical to change. Those comfortable with current practices selectively invoke these rules to impede change.”<sup>192</sup> Furthermore, “because courts are rigidly segmented, broad perspectives and system-wide thinking are discouraged and innovation is stifled.”<sup>193</sup>

---

<sup>190</sup> FEELEY, *supra* note 7, at 38; *see also* JSRC RECOMMENDATIONS, *supra* note 2 (referencing the perspective developed by Jerald Hage & Michael Aiken in SOCIAL CHANGE IN COMPLEX ORGANIZATIONS (1970)).

<sup>191</sup> FEELEY, *supra* note 7, at 38.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*



As noted earlier, after undertaking a thorough review of several concrete criminal court reform efforts in the United States in Chapter 6 of his book, on *Assessment*, Feeley set forth an even longer list of impediments to change. Feeley began by highlighting several impediments to even thinking about change. He noted that reform efforts often arise out of a sense of crisis, without a sense of historical perspective. He observed, “A historical perspective shows that many problems have long histories and stem from deep-seated and insoluble tensions, and that the typical stance of others is to resist and adapt, not to embrace reforms.”<sup>194</sup> In contrast, he stated, in criminal courts in the United States “bold crusades are undertaken against little-understood enemies, often fanned by an atmosphere of crisis.” In this “crisis thinking” context, “[i]n order to mobilize public support, reformers must offer dramatic plans that are both vague and simple. But these very strategies that facilitate innovation undercut implementation.”<sup>195</sup>

Feeley next turned to another set of impediments: the role of outsiders in the efforts at reform. Given the parallels *and* contrasts to the Japanese situation, a somewhat extended set of quotes is warranted:

Given the lack of incentives for system-wide changes within the courts, it is not surprising that innovations should often occur from outsiders. Thus, another dilemma: those who are in the best position to assess the needs of the courts have the least incentive to innovate, while those who have the incentive do not have the detailed knowledge.

If change is initiated from within one part of the court, it is likely to affect the internal operations of that agency and only indirectly the whole system. . . . Such changes are likely to have only marginal effect on other court operations. But if a single agency unilaterally implements a new policy that has system-wide impact, then it is likely to be greeted with resistance and adaptation.

In the long run, two factors reinforce each other and contribute to the lack of innovation in the . . . courts. First is the need for the various officials—even though nominal adversaries—to cooperate . . . . Second—because the courts possess hydraulic

---

<sup>194</sup> *Id.* at 192–93.

<sup>195</sup> *Id.* at 192.

qualities in which each component can effectively thwart changes – is the lack of incentive to try to change.

If . . . justice officials have few incentives to initiate system-wide innovations, then who does? People and agencies outside the . . . courts . . . .

While outsiders may be able to transcend the limited perspectives and incentives of those who work daily in the . . . courts, their remoteness from the courts prevents them from understanding the byzantine realities of the . . . justice process, and, as a result, their efforts are often misdirected. Furthermore, they rarely have a continuing concern with the problems . . . . Indeed, success to many outsiders means adoption, like passing a new law or announcing a new ruling. Continuing interest and the authority to deal with the many factors that can subvert new policies are needed.<sup>196</sup>

Feeley next considered impediments to implementation of reforms. Here, he highlighted three key problems: fragmentation, newness, and premature judgment. He explains those problems as follows: “First, the fragmentation of the criminal justice system facilitates judgments of success even as reform efforts fail. Second, many reforms have sought to circumvent the sluggish institutions by creating new programs, but these quickly become part of the problem. Third, success of programs has often been declared prematurely.”<sup>197</sup>

On top of all these problems, Feeley identified additional clusters of issues relating both to the stages of routinizing the reforms and evaluating them. As to the former, he stated: “It is rare to find an innovation that is carefully initiated and even rarer to see one successfully implemented. But it is rarer still to find a workable new idea well institutionalized.”<sup>198</sup> He observed: “While innovations may be adhered to at the outset, once financial reality has set in and the glare of publicity has declined, there is great incentive to revert to old practices.”<sup>199</sup> He added:

---

<sup>196</sup> *Id.* at 196–97.

<sup>197</sup> *Id.* at 198.

<sup>198</sup> *Id.* at 200.

<sup>199</sup> *Id.* at 201.

Successful innovators are rarely successful administrators. New programs experience a rapid loss of moral fervor: charismatic spokespeople are replaced by bureaucrats . . . young and enthusiastic staffs age . . . co-optation and adaptation become necessary for survival. Concern for original goals gives way to concern for organizational maintenance and the program objectives of the new generation of administrators.<sup>200</sup>

Finally, as to problems with respect to evaluation, Feeley first pointed to “lack of incentive.” He commented, “Proponents of reform have little incentive to evaluate; they *know* their ideas are good . . . Administrators fear evaluation, a process that, if pursued honestly, must either hold programs to their promises or reveal unpleasant realities.”<sup>201</sup> He noted another similar issue: “The more rigorous an evaluation is, the more likely it is to sound inconclusive . . . what is sound practice for the researcher is seen as obfuscation by the policy maker, who wants simple yes or no answers.”<sup>202</sup> He further observed that, “New programs are subject to unanticipated obstacles that can retard or derail them. Both programs and evaluations must be flexible; but this flexibility in turn facilitates manipulation and distortion.”<sup>203</sup>

For all these reasons, Feeley reached a rather pessimistic conclusion, stating:

Scholars are finding that many innovative programs fail in their implementation. This book suggests that the picture is bleaker: the causes of failure are found at every stage of planned change. Often, failure is rooted in conception, in a fundamental misunderstanding of the nature of the problem, the dynamics of the system, the nature of the change process, and attention to detail at the service delivery level.<sup>204</sup>

Feeley continued:

The central and continuing obstacles to change in the . . . justice system are fragmentation and adaptation, and there are two

---

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 202 (emphasis in original).

<sup>202</sup> FEELEY, *supra* note 7, at 203.

<sup>203</sup> *Id.* at 204.

<sup>204</sup> *Id.* at 205.

approaches to coping with them. We can seek increased coordination, or we can devise a strategy that takes these conditions into account . . . . The dominant approach taken in reforms examined in this book has been the former, to seek improvements through greater coordination and better management. This approach can be called *administrative*. Administrative changes try to impose a bureaucratic form on an inherently antagonistic adversarial system . . . .

Perhaps the greatest danger in the administrative strategy is that it will work, that it will transform a contentious and embattled group of professionals into cooperative bureaucrats . . . .

In the short run, administrative reforms may appear successful, but once institutionalized, they can easily become part of the fragmentation that is the source of so many problems.<sup>205</sup>

*C. Potential Facilitating and Impeding Factors: The Case of Japan*

How might these observations apply to Japan? To arrange suitable placements for assistant judges to ensure they gain broader exposure outside the judiciary requires cooperation by a broad range of other entities. That said, the reforms aimed at diversifying the Japanese judiciary primarily involve two major institutions: the judiciary and the bar.

Looking first at the facilitating factors identified by Feeley, both the bench and the bar are composed of highly trained and committed professionals. For the bar, other features of what Feeley described as “institutions” where “planned change is most likely to succeed” also apply. While the task of coordinating with the Supreme Court inevitably would fall to the national body, JFBA, even that body is far from monolithic. The JFBA presidency changes every two years and vice presidents, drawn from local bar associations across Japan, change every year. Moreover, local bar associations might (and did) develop their own systems and strategies for encouraging attorneys to apply for the judiciary and for screening the candidates. So, on the bar side, the potential for experimentation and innovation exists; and, through symposia presentations and publications about the various efforts, other local bar associations could learn from the successful initiatives.

---

<sup>205</sup> *Id.* at 205–06.

In the case of the judiciary, however, the other features of “institutions” where “planned change is most likely to succeed” do not apply. Chief Justice Yaguchi provides a striking example that individual initiative can play an important role, even within the highly bureaucratized Japanese judiciary. Although Yaguchi’s long and distinguished career and well-earned reputation as “Mr. Judicial Administration,” not to mention his positions as head of the Personnel Bureau, Secretary General, and Chief Justice, allowed him to take such decisive action, he is far from representative of the judiciary as a whole.

In prior works, I have characterized Japan’s judiciary as a “nameless, faceless” judiciary.<sup>206</sup> Japanese judges operate in near anonymity. Their names may be a matter of public record, but their backgrounds and personalities are almost completely unknown to the general public. This relative anonymity, I have argued, is consistent with the dominant ethos of the Japanese judiciary, an ethos of uniformity. Within the judiciary, great weight is placed on respect for precedent, thereby helping ensure uniformity in outcomes. Efforts also are made to standardize matters ranging from size of awards and length of prison sentences, to opinion format, writing style, and courtroom design. In accordance with the view (or myth) that the identity of the judge does not matter, it is even accepted that judges may change midway through trials.

Thus, within the Japanese judiciary, authority is not diffused and flexible; rather, it is highly centralized. Formal codification of duties may not be announced publicly, but one can be sure that within the judiciary there are clear sets of norms judges are expected to observe. Failure to conform to those norms may affect a judge’s future advancement and postings.<sup>207</sup> Finally, roles and mobility are not flexible. They change over time, as judges are assigned to new positions, but the career system is stratified and roles for each position are quite clearly defined. Given these features, one would not expect the Japanese judiciary to be a hotbed for individual initiative.

---

<sup>206</sup> This is the central thesis of a book in Japanese, DANIEL H. FOOTE, *NAMO NAI KAO MO NAI SHIHŌ: NIHON NO SAIBAN WA KAWARU NO KA* (名もない顔もない司法：日本の裁判は変わるのか) [NAMELESS FACELESS JUSTICE: WILL JAPAN’S COURTS CHANGE?] (Tamaruya Masayuki (溜箭将之) trans., 2007). Aspects of the thesis are discussed in Daniel H. Foote, *Restrictions on Political Activity by Judges in Japan and the United States: The Cases of Judge Teranishi and Justice Sanders*, 8 WASH. U. GLOB. STUD. L. REV. 285 (2009); Foote, *Transparency*, *supra* note 6; Foote, *Recent Reforms*, *supra* note 6.

<sup>207</sup> See, e.g., Haley, *supra* note 22; J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003); J. MARK RAMSEYER, *SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW* 206–21 (2015).

Accordingly, most of the key features Feeley identified as factors facilitating reform decidedly do not apply to the Japanese judiciary. Nonetheless, in other respects, the structure and fundamental mindset of the judiciary hold great potential for achieving meaningful reform, provided the requisite will exists. This is a theme to which I will return below.

Before elaborating on that point, however, let us consider how Feeley's long list of factors *impeding* change apply in the case of efforts to diversify the Japanese judiciary. On at least two prior occasions when the topic of *hōsō ichigen* arose, in the immediate postwar era and the early 1960s, the judiciary faced a serious shortage of judges, so in that sense an "atmosphere of crisis" may have existed. And, as with Wagatsuma, over the years, many observers have felt the bar's advocacy for a full-fledged *hōsō ichigen* system was offering the sort of "dramatic plans that are both vague and simple" that Feeley referred to as characteristic of efforts by reformers to mobilize public support, without sufficient attention to the difficulties in implementation. Even in earlier cycles of the debate, however, considerable weight was given to historical perspective. Historical perspective played a strong role in the deliberations of the JSRC and the resulting recommendations. After all, among the members of the Council, Nakabō himself had played a central role in the bar's efforts to promote *hōsō ichigen/bengoshi ninkan* in the 1990s, and Takeshita was co-author of the leading treatise on the judiciary, which included a detailed examination of prior reform efforts. One of the other members, moreover, was a recently retired career judge (Fujita Kōzō (藤田耕三)), and the Council assembled a great deal of information about and received testimony from many representatives of the judiciary.

As to Feeley's observations regarding premature judgment, the Japanese bar had witnessed so many prior efforts to promote the appointment of attorneys to the bench that it was scarcely inclined to declare success prematurely, to be satisfied only with unilateral pledges by the judiciary, or even bilateral agreements between the Supreme Court and JFBA announcing the adoption of a new policy or renewed commitment to reform. At the same time, prior history had shown many examples bearing out Feeley's observations that "[n]ew programs experience a rapid loss of moral fervor: charismatic spokespeople are replaced by bureaucrats . . . young and enthusiastic staffs age . . . ." The bar and other observers, undoubtedly, were well aware of the need to monitor progress and maintain momentum over the long term.

However, it is in connection with Feeley's observations about fragmentation that one finds the greatest differences between the situations in the United States and Japan. As alluded to above, Japan's judiciary is *not* highly fragmented. To the contrary, it is highly centralized, with a very strong administrative apparatus contained in the Supreme Court General Secretariat. In many respects, relations between the bench and the bar are "inherently antagonistic" and "adversarial." Yet when it comes to the judiciary itself, there is a firmly embedded bureaucratic system with deep historical roots. As Miyazawa Setsuo has observed, "the [Japanese] judiciary, given its long-standing tradition of a highly stable judicial administrative body centered on personnel management, possesses very strong capacity to effectuate policy,"<sup>208</sup> provided the policy accords with the internal views of the judiciary.

Thus, the fundamental structure already exists for the Japanese judiciary to undertake what Feeley labels as an "administrative" approach, "seek[ing] improvements through greater coordination and better management." The well-established administrative apparatus enables the judiciary to undertake careful investigation of matters from a system-wide perspective. Once the decision is made to proceed with a new initiative, the judiciary can implement that initiative on a coordinated, nationwide basis.<sup>209</sup> Furthermore, in the event the Supreme Court General Secretariat has put its weight behind a certain initiative, there is relatively little fear that a rogue element within the judiciary would "effectively thwart" the change. Accordingly, while in a different form from the factors likely to facilitate reform highlighted in the United States context by Feeley, the Japanese judiciary's capacity to implement new measures on a system-wide basis constitutes one possible reason for optimism about prospects for meaningful reform.

#### D. *Concrete Facilitating Factors and Challenges for the Recent Reforms*

---

<sup>208</sup> Miyazawa Setsuo (宮澤節生), *Seisakushikōteki Gendaigata Soshō no Genjō to Shihō Seido Kaikaku Keizoku no Hitsuyōsei* (政策志向的現代型訴訟の現状と司法制度改革継続の必要性) [*The Current State of Policy-Oriented Contemporary Litigation and the Necessity for Continued Justice System Reform*], 63 HŌSHAKAIGAKU 46, 64 (2005).

<sup>209</sup> At the risk of conflicting with Matthew Wilson's assessment in his article in this symposium issue, I would offer the lay judge system as an example of a reform in which the Japanese judiciary's extensive planning efforts facilitated smooth implementation. In this connection, see, e.g., Daniel H. Foote, *Citizen Participation: Appraising the Saiban'in System*, 22 MICH. ST. INT'L L. REV. 756 (2014); WILSON, FUKURAI & MARUTA, *supra* note 1, at 38–58.

With that examination of the potential facilitating and impeding factors in Japan as a general matter, let us now turn to a concrete examination of factors affecting the recent reforms. In considering these matters, I will focus initially on the second reform proposal, aimed at invigorating the system for appointment of practicing lawyers (and other legal professionals) to the bench. Under the rubric of *hōsō ichigen* or *bengoshi ninkan*, that had been the primary focus of diversification efforts since at least the 1930s. The efforts to invigorate such appointments have continued to receive the bulk of attention by the bar and other observers since the JSRC issued its recommendations. After examining that set of reforms, I will turn to the efforts aimed at ensuring assistant judges gain experience outside the judiciary.

### 1. Appointment of Attorneys to the Judiciary

Looking back to 2001, at the outset of the *initiation* and *implementation* phases, one can identify various reasons for hoping that the latest reform efforts might be more successful than earlier attempts to promote the appointment of experienced attorneys to the judiciary. The first such factor is the perceived strength of the commitment. As noted above, in May 2001, even before the JSRC issued its final report, the Supreme Court and JFBA announced their agreement to undertake discussions of concrete measures to promote such appointments. After a series of meetings, in December 2001 they issued a joint statement setting forth concrete steps to be taken on both sides.<sup>210</sup> Thereafter, JFBA and the local bar undertook a wide range of activities to promote so-called *bengoshi ninkan*.<sup>211</sup> Major bar associations sought to recruit attorneys willing to serve as judges and established committees to review candidates. In November 2002, JFBA held a major symposium, at which organizers proudly announced that arrangements had been made for twenty attorneys to join the judiciary in 2003. They also set forth projections that the annual numbers would rise steadily to 100 new appointees by 2011, along with a simulation that, by continuing at that level thereafter, by the year 2030 attorney appointees would constitute over 40% of

---

<sup>210</sup> Compilation, Saikō Saibansho, Nihon Bengoshi Rengōkai (最高裁判所、日本弁護士連合会) [Supreme Court, JFBA], *Bengoshi Ninkan tō ni kansuru Kyōgi no Torimatome* (弁護士任官等に関する協議の取りまとめ) [Compilation of Discussions Regarding Appointment of Attorneys as Judges, etc.] (Dec. 7, 2001), [http://www.nichibenren.or.jp/library/ja/judicial\\_reform/data/kyougi.pdf](http://www.nichibenren.or.jp/library/ja/judicial_reform/data/kyougi.pdf) [hereinafter *Torimatome*].

<sup>211</sup> The promotional activities included many symposia and other gatherings to promote *bengoshi ninkan* and the publication of numerous personal accounts by attorneys who had entered the judiciary. The JFBA even produced a promotional video extolling the virtues of becoming a judge, entitled *Shimin wa Anata no Saibankan Ninkan o Mattemasu* (市民はあなたの裁判官任官をまっています) [*The People Are Waiting for You to Become a Judge*] (shown at 7th meeting of JFBA Citizens' Council, July 26, 2005).



all judges, well on the way to true *hōsō ichigen*.<sup>212</sup> The bar has continued to undertake efforts to promote *bengoshi ninkan* ever since.<sup>213</sup>

There are several structural matters that point to potential factors in expanding appointments of practicing lawyers to the bench. The first is a great expansion in the size of the bar. Even though the JSRC's vision of 3000 bar exam passers per year, which was to have been achieved by about 2010, has never been reached, the overall number of attorneys has more than doubled since 2001.<sup>214</sup> Accordingly, the potential supply of attorneys is much greater than in the past.

The past two decades have also witnessed a great increase in large and medium-sized law firms.<sup>215</sup> As noted earlier, in the 1990s Nakabō and others involved in efforts to promote *bengoshi ninkan* expressed hope that lawyers from large firms would join the judiciary, since they would find it easier to arrange others to take over their clients and staff and would have a smoother path to returning to practice later. In their discussions in 2001, the Supreme Court and JFBA also identified the rise in large firms as an important structural factor for the same reasons.<sup>216</sup>

In terms of numerical factors, perhaps the most promising basis for hope in the increased hiring of attorneys was the JSRC call for a “great increase” in the number of judges. The Council concluded that the “insufficient number of judges” was already a “serious problem.” Given the likelihood that litigation would rise in the future, it observed, further increases probably would be needed.<sup>217</sup> Furthermore, it called for the phased elimination of the so-called *tokurei hanjiho* (special assistant judge) system. Under this system, if “specially designated” by the Supreme Court, assistant judges with over five years of experience are empowered to exercise the same authority as judges. This includes handling cases on their own, rather than just as a junior member of a three-judge panel.<sup>218</sup> The system was authorized by law in 1948,<sup>219</sup>

<sup>212</sup> See Ōshima Hisaaki (大島久明), *Bengoshi Ninkan no Gendankai to Kadai* (弁護士任官の現段階と課題) [*The Current Stage of Bengoshi Ninkan and Issues*], 61 JIYŪ TO SEIGI, no. 8, at 10–11 (2010).

<sup>213</sup> As one of many examples, in January 2008 JIYŪ TO SEIGI began a monthly series of reflections by attorneys who had entered the judiciary entitled *Bengoshi Ninkan no Mado* (弁護士任官の窓) [*Window on Bengoshi Ninkan*], which continues to run to this day, having now reached over 140 installments.

<sup>214</sup> *White Paper*, *supra* note 154, at 30 (37,680 registered attorneys as of March 31, 2016).

<sup>215</sup> See, e.g., Yasuharu Nagashima & E. Anthony Zaloom, *The Rise of the Large Japanese Business Law Firm and Its Prospects for the Future*, in A TURNING POINT, *supra* note 3, at 136.

<sup>216</sup> See *Torimatome*, *supra* note 210.

<sup>217</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 1, § 2(1).

<sup>218</sup> *Id.* at Ch. III, pt. 5, § 1(b).

originally as a “temporary” measure to respond to the shortage of judges. The system soon became entrenched. Nearly all assistant judges with over five years of experience have been “specially designated.”<sup>220</sup> As the Council observed, eliminating this system would necessitate hiring more judges, explicitly adding, “to accomplish this, appointment of lawyers and others as judges should be promoted.”<sup>221</sup>

Apart from these numerical factors, several concrete measures identified in the joint discussions of JFBA and the Supreme Court might have appeared as facilitating factors.<sup>222</sup> For example, the bar agreed to establish one or more law firms that could assume responsibility for matters being handled by lawyers who entered the judiciary and that could provide initial employment for those returning to practice after serving on the bench. On the bench side, the Supreme Court agreed to promote a variety of options for attorneys entering the judiciary, including short-term judgeships;<sup>223</sup> judgeships for specialized fields, such as bankruptcy, intellectual property, commercial matters, and family law matters (including the possibility of short-term specialized positions);<sup>224</sup> and part-time judgeships. As to the part-time judgeships, the Supreme Court felt constitutional concerns would be raised by allowing practicing lawyers to handle actual trials on a part-time basis. However, “given the expectation that the part-time system would promote the system for appointment of attorneys as full-time judges,” the Supreme Court pledged to investigate introduction of a system in which attorneys would handle civil and family *conciliation* matters on a part-time basis.<sup>225</sup>

In the 1990s, one of the concerns raised by the bar was that the appointment process was handled entirely by the judiciary, with no third-party

---

<sup>219</sup> Hanjiho no Shokken no Tokurei tō ni kansuru Hōritsu (判事補の職権の特例等に関する法律) [Act Regarding Special Exceptions, etc., for Authority of Assistant Judges], Act No. 146 of 1948.

<sup>220</sup> See, e.g., JUSTICE SYSTEM REFORM, *supra* note 172, at 304 (comment of Satō).

<sup>221</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 1(b).

<sup>222</sup> The measures discussed in this paragraph were contained in *Torimatome*, *supra* note 210.

<sup>223</sup> While using the expression “short term,” the Supreme Court insisted on a term of at least five years. The JFBA pushed for three years, but the Supreme Court felt that would be insufficient, since it would normally take at least two years to adjust. See Ōkawa Shinrō (大川真郎), *Saibankan no Kyūgen no Tayōka · Tagenka* (裁判官の給源の多様化・多元化) [*Diversification of Sources of Supply for Judges*], 53 JIYŪ TO SEIGI, no. 2, at 30, 36 (2002).

<sup>224</sup> *Id.* Presumably reflecting the sense that matters in these fields were becoming increasingly complex, for the fields listed the Supreme Court seemed especially eager to recruit attorneys with specialized expertise and seemed willing to accept short-term appointments of less than five years.

<sup>225</sup> *Torimatome*, *supra* note 210.

involvement to ensure a neutral check. At that time, members of the bar expressed the desire for representation by outsiders, including attorneys, on the screening body for attorneys seeking appointment.<sup>226</sup> From that perspective, the bar might have taken hope from another set of reforms recommended by JSRC, reforms aimed at “reflect[ing] the views of the public in appointment of judges.”<sup>227</sup> That set of recommendations led to the establishment in 2003 of the Lower Court Judge Designation Consultation Commission (“Judge Designation Commission”), which is charged with reviewing candidates for appointment to the judiciary, based on lists of candidates prepared by the Supreme Court General Secretariat. The Commission, which lies under the aegis of the Supreme Court, contains eleven members: two judges, two lawyers, one prosecutor, and six other “persons of learning and experience.”<sup>228</sup>

Even at the initial stage, one could point to a far longer list of challenges to the efforts to increase appointment of attorneys to the judiciary. On the part of the bar, no matter how firmly committed the leaders nor how vigorous the promotional efforts, success in expanding numbers of applicants ultimately depended on decisions by individual attorneys. For its part, the judiciary, even if truly committed to the goal of recruiting more attorneys, was unlikely to appoint candidates it regards as unqualified or questionable. Thus, success in expanding the number of attorneys joining the judiciary depended on ensuring a sufficient number of highly qualified candidates applied.

In that respect, despite the pledges of commitment by the leadership on both sides, nearly all the earlier challenges persisted, including attachment of attorneys to practice, doubts about whether a judicial career is truly appealing, unease over allowing others to handle clients and pending matters, and misgivings over the burdens and uncertainty of the appointment process. Indeed, one concern that had largely been redressed in the 1990s came back into play: the concern over the location of postings and the frequent transfers. As noted earlier, to promote *bengoshi ninkan*, in the 1990s the Supreme Court provided assurances that attorneys with over fifteen years of experience could, if they so wished, insist on being posted to courts in or near the area where they reside (to the evident displeasure of career judges, who regarded this as unjustified preferential treatment).<sup>229</sup> This was discontinued under the 2001

---

<sup>226</sup> See Ōkawa, *supra* note 223, at 21, 23–24.

<sup>227</sup> JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 2.

<sup>228</sup> These reforms are discussed more fully in Foote, *Transparency*, *supra* note 6.

<sup>229</sup> *Materials: Bengoshi Ninkan*, *supra* note 136.

agreement. As the Supreme Court explained, given the much larger numbers of attorneys who would be joining the judiciary, many of whom would likely come from the Tokyo and Osaka areas, if the preference was continued, most career judges would effectively be shut out of positions in those locations.<sup>230</sup>

## 2. Experiences Outside the Judiciary for Assistant Judges

The other set of reforms, aimed at ensuring all assistant judges spent substantial periods of time in positions outside the judiciary, faced its own set of challenges. As mentioned above, these included arranging sufficient appropriate placements and working out details on compensation and benefits. While not voiced publicly, it seems likely that another concern on the side of the judiciary was the fear that, once assistant judges had experienced life in a law firm, they might never come back.<sup>231</sup> Yet another possible concern was that the assistant judges themselves might resent being seconded to other bodies. If so, their dissatisfaction might lead to resistance or reduce the attractiveness of judicial careers.

Yet at the time this set of reforms was instituted, there were several reasons for hope. First, the judiciary already had undertaken efforts along similar lines, pursuant to Yaguchi's initiative in the 1980s. Despite Yaguchi's initial fears, companies and other governmental ministries and agencies had proven willing to accept judges.<sup>232</sup> Another reason for hope was that, apart from securing placements and working out details on compensation and benefits, this reform lay almost entirely under the purview of the judiciary's strong centralized administrative organization. Ever since the Meiji Era the Japanese judiciary has had a tradition of regular re-assignments and transfers of judges. In the postwar era, transfers and other personnel matters have been handled by the Personnel Bureau within the Supreme Court General Secretariat. While in principle judges may object, in practice they routinely

---

<sup>230</sup> See Ōkawa, *supra* note 223, at 37.

<sup>231</sup> Relatively soon after the new system had gone into effect, I raised this possibility with a judge who had been involved in the implementation efforts. He conceded there had been such a concern and said the judiciary had been relieved when the two-year term of the first cohort sent to law firms ended and all of the assistant judges returned. When I raised the same question recently with someone else, he said he was sure the judiciary would never send an assistant judge to a law firm in the first place if there was any thought he or she was the type who might be tempted to stay. Yet another informant, a partner at a prestigious law firm that has received several assistant judges, suggested the need to monitor career choices for a few years after the secondments ended. He had the clear sense some of the assistant judges enjoyed the law firm practice and he raised the possibility that, while all the assistant judges likely would return to the judiciary immediately after their secondments ended, some might elect to move to law firms within a few years thereafter.

<sup>232</sup> See *supra* notes 123–24 and accompanying text.

accept the determinations of the Personnel Bureau.<sup>233</sup> Thus, even if assistant judges resented being seconded to positions outside the judiciary, they almost certainly would abide by the decision.

One might think that assistant judges, rather than resenting the secondments as an unwanted imposition, instead might welcome the opportunity to experience a different environment. An additional reason for guarded optimism lay in the JSRC's admonition to the judiciary to establish "effective measures" to "systematically ensure" assistant judges gather diversified experience outside the judiciary. They suggested that this experience be taken into account in personnel evaluations to determine suitability for appointment as judges at the end of their ten-year terms as assistant judges.<sup>234</sup> The success, of course, depended on whether the judiciary actually followed through in doing so. For this set of reforms, assuming the judiciary was truly committed, it seemed likely realization would be considerably easier than for appointment of attorneys: a two-year stint in another position for an assistant judge early in her career, with a guaranteed return to the judiciary at the end of that term, is far less momentous than the decision to give up an established career as a lawyer to enter a long-term commitment to the judiciary. And the Japanese judiciary, with its strong centralized administrative structure, would be well positioned to institutionalize the reforms.

### *E. Routinization: Results of the Reforms*

Now, nearly sixteen years after the Supreme Court/JFBA pledge for cooperation, the new system is well into its *routinization* phase. The following section will examine results for three separate aspects of the reforms: the "part-time judge" system, appointment of attorneys to the judiciary (*bengoshi ninkan*), and the system for ensuring assistant judges attain diversified experience outside the judiciary.

#### 1. Part-Time Judges

The judiciary followed through on its pledge to establish a "part-time judge" system. In 2003, the Diet enacted amendments to the Civil Conciliation Act<sup>235</sup> and the Domestic Relations Trial Act,<sup>236</sup> authorizing

---

<sup>233</sup> See, e.g., RAMSEYER & RASMUSEN, *supra* note 207, at 10.

<sup>234</sup> See JSRC RECOMMENDATIONS, *supra* note 2, Ch. III, pt. 5, § 1(1)a.

<sup>235</sup> Minji Chōtei Hō (民事調停法) [Civil Conciliation Act], Act No. 222 of 1951, art. 23-2 (amended by

attorneys to conduct conciliation proceedings (court-annexed conciliation). The judiciary commenced the system in January 2004.<sup>237</sup> Through this system, attorneys, while retaining their law practice, serve one day per week presiding over conciliation matters at district, summary, or family courts, along with two lay members. The attorneys thereby occupy the same role normally performed by full-time judges. The appointments are for two-year terms, and may be renewed once. In addition to district courts in Tokyo and Osaka, posts are available in sixteen summary courts and twelve family courts.<sup>238</sup> The key rationales for establishing the system were to strengthen conciliation and to promote the appointment of attorneys to the judiciary.<sup>239</sup> Through this experience, attorneys would be able to experience judicial life, and it was hoped that a substantial number of part-time judges would elect to pursue appointment thereafter as full-time judges.

As a whole, this system has been a success. The judiciary sought thirty appointees for the first cycle in 2004, and it was fully subscribed, with twenty-eight more appointed later that year, and all available positions have been filled since.<sup>240</sup> The judiciary initially envisioned that the number of part-time judges would rise to about 100 within a few years.<sup>241</sup> Currently, approximately 120 part-time judges are serving and, as of October 2016, a total of 484 attorneys had served as part-time judges.<sup>242</sup>

---

Act No. 128 of 2003).

<sup>236</sup> Kaji Shinpan Hō (家事審判法) [Domestic Relations Trial Act], Act No. 152 of 1947 (amended by Family Case Proceeding Act, Act No. 52 of 2011, art. 250) (which came into effect in 2013).

<sup>237</sup> See, e.g., Kitano Kōichi (北野幸一), *Hijōkin Saibankan Seido no Genjō to Kadai* (非常勤裁判官制度の現状と課題) [*Current Circumstances and Challenges for the Part-Time Judge System*], 56 JIYŪ TO SEIGI, no. 4, at 11, 12 (2005).

<sup>238</sup> See Booklet, Nihon Bengoshi Rengōkai (日本弁護士連合会) [JFBA], Bengoshi Ninkan Q&A – Hijōkin – (弁護士任官 Q&A—非常勤—) [Q&A re Appointment of Attorneys to the Judiciary – Part-Time –] (Sept. 2017), [https://www.nichibenren.or.jp/library/ja/publication/booklet/data/ninkan\\_qa\\_parttime.pdf](https://www.nichibenren.or.jp/library/ja/publication/booklet/data/ninkan_qa_parttime.pdf) [hereinafter Q&A].

<sup>239</sup> See Memorandum, Saikō Saibansho, Nihon Bengoshi Rengōkai (最高裁判所、日本弁護士連合会) [Supreme Court, JFBA], Iwayuru Hijōkin Saibankan Seido no Sōsetsu ni tsuite (Bengoshi Ninkan tō ni kansuru Kyōgikai no Kyōgi no Torimatome (いわゆる非常勤裁判官制度の創設について (弁護士任官等に関する協議会の協議の取りまとめ)) [Regarding the Establishment of the So-Called Part-Time Judge System (Arrangement of Deliberations of the Deliberation Council on Appointment of Attorneys to the Judiciary, etc.)] (2002), [https://www.nichibenren.or.jp/library/ja/judicial\\_reform/data/sousetsu.pdf](https://www.nichibenren.or.jp/library/ja/judicial_reform/data/sousetsu.pdf).

<sup>240</sup> For these and other figures in this paragraph, see *White Paper*, *supra* note 154, at 143. As a personal reflection, on a number of occasions during the twelve years I served on the screening committee for the No. 2 Tokyo Bar Association, there were more qualified applicants than positions available.

<sup>241</sup> See Myōga Hideki (明賀英樹), *Hōsō Seido Kentōkai (Saibankan sono ta)* (法曹制度検討会 (裁判官その他)) [*Expert Consultation Committee on the Legal System (Judges and Other Matters)*], 54 JIYŪ TO SEIGI, no. 8, at 18, 20 (2003).

<sup>242</sup> *White Paper*, *supra* note 154, at 143.

How successful the system has been in serving as a stepping stone to full-time judicial positions, however, is a matter of interpretation. Over a quarter of the attorneys appointed as full-time judges between 2005 and 2014 had first served as part-time judges. Yet that percentage is more a reflection of how few attorneys have been appointed as full-time judges, rather than how many part-time judges have gone on to full-time positions. During the first ten years of the part-time judge system, only thirteen of the 350 that served went on to become full-time judges.<sup>243</sup>

## 2. Full-Time Judges

As the preceding paragraph suggests, the efforts to invigorate the appointment of attorneys to full-time positions in the judiciary have languished. Despite JFBA's confident prediction that twenty attorneys would join the judiciary in 2003, the first year after the renewed commitment took effect only ten were appointed.<sup>244</sup> Further, the projections that the numbers would rise steadily from there, reaching 100 by 2011 and continuing at that level each year thereafter, look ludicrous in retrospect. In 2004 only eight attorneys joined nationwide, and that is higher than any year since.<sup>245</sup> In 2010, and again in 2015, only one attorney was appointed to the full-time judiciary; cumulatively only sixty-seven attorneys joined the judiciary from 2003 through 2016, an average of fewer than five per year.<sup>246</sup> During that fourteen-year period over 1400 assistant judges were appointed directly after completion of their LTRI training.<sup>247</sup> The career judiciary remains firmly intact.

## 3. Diversified Experience for Assistant Judges

What of the JSRC's call for "in principle, all assistant judges" to "leave their status as judges . . . for a reasonably long period suited to obtaining meaningful experience" and "gather diversified experience as legal

---

<sup>243</sup> See Q&A, *supra* note 238, at 4 (25% figure calculated on the basis of 45 attorneys appointed as judges between 2005 and 2014).

<sup>244</sup> For these and other figures in this paragraph, see *White Paper*, *supra* note 154, at 142.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Figures calculated by the author. See Lower Court Judge Designation Consultation Commission, <http://www.courts.go.jp/saikosai/iinkai/kakyusaibansyo/>.

professionals in positions other than the judiciary . . . , such as lawyer or public prosecutor”)? Has that reform been achieved?

According to a summary set forth on the Home Page of the Cabinet Secretariat, by 2002 slightly over fifty assistant judges each year commenced experiences of one to two years outside the judiciary. This included about twenty-five who were seconded to government ministries or agencies, about twenty undertaking study abroad, about five undertaking training programs in businesses, and two or three headed to diplomatic offices abroad.<sup>248</sup> At the time, assistant judges were not allowed to work in law firms. As mentioned earlier, however, in 2004 the Diet passed the necessary legislation authorizing assistant judges (and prosecutors) to work in law firms.<sup>249</sup> Just five days later, the Supreme Court Judicial Conference, comprised of all fifteen justices on the Court, issued the following resolution:

The Supreme Court recognizes that, in order to secure broad-minded judges endowed with diverse and rich knowledge and experience, it is exceedingly meaningful for assistant judges to attain diversified experience outside the judiciary . . . Based on that recognition, up until now we have sought to bolster the programs for seconding assistant judges to government bodies, dispatching them to private enterprises, sending them abroad for study, having them work in overseas diplomatic offices, etc. With the recent passage of the [above act], a system has been established for assistant judges to . . . experience work as attorneys. Now that the necessary conditions have been met . . . we set forth the following fundamental policy with regard to diversifying the experiences of assistant judges:

Upon ensuring arrangements to handle the caseload, securing sufficient appropriate settings to receive the assistant judges, and working out the circumstances and conditions, we pledge to provide opportunities, in principle to all assistant judges, to gather diverse experience in such ways as through work as attorneys, in government bodies, and in overseas diplomatic offices, through dispatching to private enterprise, and through

---

<sup>248</sup> (*Heisei 14 nendo*) *Gaibu ni Dete iru Hanjiho no Genjō* ((平成14年度) 外部に出ている判事補の現状) [*Current Circumstances of Assistant Judges Who Are Outside (The Judiciary)*] (2002), [http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai17/17siryou\\_sai2.pdf](http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai17/17siryou_sai2.pdf).

<sup>249</sup> Act Concerning Experience as Attorneys.



study abroad.<sup>250</sup>

As mentioned earlier, on the same day the Judicial Conference issued this resolution, the Supreme Court entered into its agreement with JFBA to cooperate in arranging appropriate placements.<sup>251</sup> The first such placements began in April 2005.<sup>252</sup>

If one were to focus only on the numbers of assistant judges who have spent substantial periods of time in law firms, one would likely conclude this reform also has languished. Between 2005 and 2016, the number of assistant judges who entered law firms under this program has hovered at about exactly ten per year.<sup>253</sup> With an average of some 100 new assistant judges per year during that same period, the number of postings to law firms seems far from the JSRC aspiration for “all assistant judges” to experience positions “such as lawyer or public prosecutor.”

On further investigation, however, the judiciary deserves far greater credit in this regard. During the deliberations of one of the Expert Consultation Committees established to help turn the JSRC recommendations into concrete form, the Supreme Court proposed that other types of experience, such as study abroad programs and work in companies, should be regarded in the same way as work as lawyers or public prosecutors; and the Committee accepted that approach.<sup>254</sup> When viewed in that light, it appears the judiciary has come much closer to achieving diversified experiences for all assistant judges than the figures for law firm placements suggest.

While the judiciary itself has not publicized detailed records of the placements, an attorney based in Osaka has compiled extensive data on a wide range of judicial personnel matters,<sup>255</sup> including the program to provide diversified experiences for assistant judges.<sup>256</sup> Among the materials available

---

<sup>250</sup> See Judicial Conference Resolution, Supreme Court of Japan, *Hanjiho no Keiken Tayōka ni kansuru Kihon Hōshin* (判事補の経験多様化に関する基本方針) [Fundamental Policy Regarding Diversification of Experiences for Assistant Judges] (June 23, 2004), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai25/sonota1.pdf>.

<sup>251</sup> Arrangement of Matters, *supra* note 187.

<sup>252</sup> See *supra* notes 187–88 and accompanying text.

<sup>253</sup> See *White Paper*, *supra* note 154, at 143.

<sup>254</sup> See *Myōga*, *supra* note 241, at 21.

<sup>255</sup> See BENGOSHI YAMANAKA MASASHI (ŌSAKA BENGOSHIKAI SHOZOKU) NO HP (弁護士山中理司 (大阪弁護士会所属) のHP) [HOME PAGE OF ATTORNEY YAMANAKA MASASHI (MEMBER OF OSAKA BAR ASSOCIATION)], <http://www.yamanaka-law.jp/cont11/main.html> [hereinafter YAMANAKA HP].

<sup>256</sup> See *id.*; *Hanjiho no Gaibu Keiken* (判事補の外部経験) [*Outside Experience of Assistant Judges*],

through his voluminous blog is a document prepared in 2014 by the Personnel Bureau of the Supreme Court General Secretariat, summarizing the placements outside the judiciary for assistant judges that were scheduled to commence in the following year.<sup>257</sup> According to that summary, eighty or more assistant judges were scheduled to commence experiences of one to three years outside the judiciary. The numbers included about twenty judges serving two to three year terms in the Ministry of Justice, of whom about ten were in administrative positions and about ten more were serving as *shōmu kenji* (prosecutors representing the government in civil and administrative litigation).<sup>258</sup> In addition, about ten were headed to two-year terms at law firms, about ten to one-year terms at companies, about thirty to one- or two-year study abroad programs (typically as visiting scholars), and several each to other government ministries and agencies, overseas diplomatic offices, legal assistance projects, and other bodies.<sup>259</sup> In testimony before the Legal Affairs Committee of the House of Councilors in May 2015, the head of the Supreme Court Personnel Bureau reported even higher numbers, with about fifteen assistant judges experiencing one-year terms at companies, ten in two-year terms at law firms, and about thirty-five each in two-year terms in

---

<http://www.yamanaka-law.jp/cont4/98.html> [hereinafter *Outside Experience*].

<sup>257</sup> Memorandum of the Personnel Bureau, Supreme Court General Secretariat, *Hanjiho no Gaibu Keiken no Gaiyō* (判事補の外部経験の概要) [Summary of Outside Experience by Assistant Judges] (April 11, 2014), <http://media.toriatez.jp/m0530/991339578643.pdf>.

<sup>258</sup> An explanation is in order with regard to the roles played by the judges seconded to MOJ. In terms of formal title, judges seconded to MOJ (and, for that matter, most other government ministries and agencies) are designated as “prosecutors” (*kenji*, 検事). In the postwar era, although the judiciary and procuracy were separated (with the procuracy under the MOJ and judiciary under the independent Supreme Court), a pattern soon developed in which every year some judges were seconded to the procuracy and some prosecutors to the judiciary. That practice came to be known as *hanken kōryū* (判検交流, exchange of judges and prosecutors). See Kisa Shigeo (木佐茂男), *Saibankan no Senmonsei to Dokuritsusei (Ichi) – Nishi Doitsu no Jitsumu to Hikaku Shite* (裁判官の専門性と独立性(一) – 西ドイツの実務と比較して – ) [*Expertise and Independence of Judges (I) – By Comparison to West German Practice –*], 40 HOKUDAI HŌGAKU RONSHŪ (北大法学論集) 301, 302–14 (1990). Initially, only a few moved in each direction each year, but by the 1980s the numbers on both sides had reached double digits. *Id.* at 307–10. While most of the judges seconded to the MOJ served in administrative roles or as *shōmu kenji* representing the government in civil and administrative litigation, some handled criminal prosecutions. For their part, most of the prosecutors seconded to the judiciary handled trials. *Id.* The bar had long been highly critical of this practice, and in 2012, the practices of seconding judges to MOJ to handle criminal matters and seconding prosecutors to the judiciary were abolished. See YAMANAKA HP, *supra* note 255. Criticism of allowing judges to serve as *shōmu kenji* has continued to mount; but, while an effort is underway to reduce the numbers, that pattern still exists. See *Shukkō Saibankan no Meibo oyobi Hanken Kōryū* (出向裁判官の名簿及び判検交流) [*Name List of Seconded Judges and Exchanges of Judges and Prosecutors*], Dai3no1 Hanken Kōryū ni kansuru Naikaku tō no Tōben (第3の1判検交流に関する内閣等の答弁) [No. 3-1 Testimony of the Cabinet, etc., regarding Exchanges of Judges and Prosecutors], available at <http://www.yamanaka-law.jp/cont10/128.html> (quoting explanation by Cabinet, submitted to the House of Representatives on Feb. 12, 2016).

<sup>259</sup> *Outside Experience*, *supra* note 256.

other government bodies and in one- or two-year study abroad programs, for a total of about ninety-five per year. They added that the judiciary was continuing to seek to expand the number of placements available.<sup>260</sup>

Turning our attention back to the 2014 summary of placements outside the judiciary, that document quite clearly was prepared and intended for internal use. A member of the judiciary has assured me, however, that it is not highly confidential. Rather, he reports, a document of the same type is prepared each year and distributed to all assistant judges. As part of the personnel process, every judge and assistant judge is required to fill out and submit a “card” each year, containing a brief summary of such matters as health condition, family circumstances, and desires, if any, regarding location of placement for the coming year. In the case of assistant judges, the card includes a section asking preferences regarding experience outside the judiciary, with eight types of experiences listed plus a catchall “other,” and with three choices for each: “desire,” “would not mind experiencing” (経験しても良い), and “do not desire.”<sup>261</sup> The summary of placements scheduled to commence in the coming year is prepared and distributed to assistant judges annually, to provide them with information on the options available. As this shows, the program for ensuring assistant judges attain experience outside the judiciary has become a firmly established element of the judiciary’s personnel policy.

This personnel system represents an important aspect of the judiciary’s efforts to “systematically ensure” assistant judges gather diversified experience outside the judiciary, as demanded by the JSRC. As mentioned earlier, the JSRC suggested outside experience should be taken into account in personnel evaluations to determine suitability for appointment as judges at the end of the ten-year terms of assistant judges. The Supreme Court acted on that recommendation as well. In deliberations at one of the Expert Consultation Committees formed to place the JSRC recommendations into more concrete form, the Supreme Court pledged to issue guidance on the value of this experience and to instruct the Lower Court Judge Designation Consultation Commission to regard this as an important factor in its consideration of the

---

<sup>260</sup> *Id.* Labeled within as Dai3 Hanjiho no Gaibu Keiken ni kansuru Kokkai Tōben (第3 判事補の外部経験に関する国会答弁) [No. 3: Diet Testimony Regarding Outside Experience for Assistant Judges].

<sup>261</sup> See *Saibankan ni kansuru Jinji Jimu no Shiryō no Sakusei tō ni tsuite* (裁判官に関する人事事務の資料の作成等について) [*Regarding the Preparation, etc., of Personnel Affairs Materials for Judges*] (March 1, 2012), <http://media.toriatez.jp/m0567/833614436808.pdf>. For the assistant judge card, see *id.* at Besshi Yōshiki Dai2-2 (別紙様式第2-2) [Attached Form No. 2-2].

suitability of assistant judges for appointment as judges.<sup>262</sup> References in minutes of the Judge Designation Commission reveal that at least someone on that Commission has been keeping tabs. In 2012, that member reported running a calculation that showed over twenty-five percent of the tenth-year assistant judges up for appointment as judges that year had not attained outside experience.<sup>263</sup> At the following meeting, a representative from the Personnel Bureau explained that a variety of personal factors had affected members of that cohort of assistant judges, and provided assurances that the percentages of those who had attained outside experience were much higher for the following year.<sup>264</sup> Even allowing for the fact that some assistant judges experience both study abroad and a second outside experience, one can infer that, with eighty to ninety-five placements each year, the judiciary is coming close to ensuring all assistant judges have at least one such experience.

#### F. Evaluation

##### 1. *Bengoshi Ninkan*: Appointment of Attorneys to the Judiciary

In retrospect, one may wonder why the proponents of *bengoshi ninkan* felt the efforts this time around would be so much more successful than earlier efforts. Here, let us briefly reconsider a number of the potential facilitating factors identified earlier.

*Level of Commitment*: On the bar side, those deeply involved in promoting *bengoshi ninkan*, of whom there were many, likely felt the level of commitment was far greater than in the past. Yet looking back at the extensive efforts spearheaded by Nakabō in the 1990s, the similarities are striking. So too, I would submit, is the “rapid loss of moral fervor” in both eras— one of the many challenges Feeley identified. On the bench side, while the judiciary developed appointment procedures and undertook other activities to help smooth the way for appointees, one does not get the sense that the judiciary as a whole shared Yaguchi’s view that *hōsō ichigen* was the “most desirable”

---

<sup>262</sup> See Myōga Hideki, *supra* note 241 at 21.

<sup>263</sup> See Meeting Minutes, Supreme Court General Secretariat, Minutes of the 52nd Meeting of the Lower Court Judge Designation Consultation Commission (Feb. 20, 2012), at 4–5, [http://www.courts.go.jp/saikosai/vcms\\_lf/806040.pdf](http://www.courts.go.jp/saikosai/vcms_lf/806040.pdf).

<sup>264</sup> See Meeting Minutes, Supreme Court General Secretariat, Minutes of the 53rd Meeting of the Lower Court Judge Designation Consultation Commission (July 5, 2012), at 4, [http://www.courts.go.jp/saikosai/vcms\\_lf/806041.pdf](http://www.courts.go.jp/saikosai/vcms_lf/806041.pdf).

system.<sup>265</sup> As of the late 1990s and early 2000s, there was a perception that top LTRI trainees increasingly were opting for the large law firms, and the judiciary presumably viewed *bengoshi ninkan* as a potential means for attracting top candidates back to the judicial ranks. The major objective was to improve the existing career system, not replace it. Given those circumstances, it should not come as a great surprise to find limited “incentive to innovate” on the part of the judiciary.

*Size of the Bar:* The great rise in the size of the bar has increased the pool of potential candidates to enter the judiciary from legal practice. Given widespread accounts of heightened competition among lawyers, one may assume that a fair number of attorneys—especially struggling ones—would welcome the opportunity to gain a stable position in the Japanese judiciary, where salary levels are respectable.<sup>266</sup> Needless to say, the judiciary has no interest in hiring struggling lawyers, or even average lawyers. On the other hand, the increase in the number of bar exam passers, together with the perception of strong competition among lawyers, has made it easier for the judiciary to recruit enough assistant judges from among high-ranking LTRI trainees.

*Rise in Large and Medium-Sized Law Firms:* The number of large and medium-sized firms has increased greatly. Even at those firms, however, arranging for others to take over one’s clients and pending matters is not easy. Outstanding mid-career attorneys, of the sort the judiciary would like to recruit, are likely to have heavy responsibilities. For those attorneys, moreover, there would likely be a significant salary differential if they were to enter the judiciary.<sup>267</sup> Just as in the 1990s, the anticipated rise in applicants from large firms has not materialized.<sup>268</sup>

---

<sup>265</sup> A more conspiratorial view of Yaguchi’s goal in espousing *bengoshi ninkan* is that he realized that in order to attract significant numbers of attorneys, the pay level and prestige of the judiciary would have to be increased greatly. KOBAYASHI, *supra* note 107, at 217–18. Viewed in that light, others in the judiciary presumably would have agreed.

<sup>266</sup> According to an estimate as of December 2015, judges at the age of 40 receive annual compensation of somewhat over 10,000,000 yen (approx. \$100,000 at current exchange rates), not including location bonuses. For high-ranking lower court judges, annual compensation, including location bonuses, rises to over 20,000,000 yen. See BENGOSHI YAMANAKA MASASHI NO HP (弁護士山中理司の HP) [HOME PAGE OF ATTORNEY YAMANAKA MASASHI], *Saibankan no Nenshū oyobi Taishoku Teate (Suitei Keisan)* (裁判官の年収及び退職手当(推定計算)) [*Annual Compensation and Retirement Allowances for Judges (Estimate)*], <http://www.yamanaka-law.jp/cont8/56.html>.

<sup>267</sup> See, e.g., Komaya Takao (駒谷孝雄), *Bengoshi Ninkan to Kyaria Saibankan to no Kyōzon* (弁護士任官とキャリア裁判官との共存) [*Coexistence of Attorneys Appointed to Judiciary and Career Judges*], 52 JIYŪ TO SEIGI, no. 3, at 90, 91 (2001) (judge, writing as of time of reforms, concluding that judicial salaries

*Number of Judges:* The number of judges rose gradually from 2001 through 2014, before dropping again in 2016. As of 2001, there were 2243 judges (excluding summary court judges). In 2016, the number stood at 2755—an increase of just over 500.<sup>269</sup> This is considerably less than the JSRC projections. And, as the bar is quick to point out, the rate of increase for the judiciary is far lower than that for the bar, which doubled over the same period. That said, there has been only a relatively modest increase in the average time required for processing cases.<sup>270</sup> In a related matter, JSRC's calls for phased elimination of the *tokurei hanjiho* system have not been implemented. This stands as a clear example in which the judiciary reverted to—or, more accurately, stuck to—old practices once the immediate pressure for change had passed.

*New Measures to Be Taken by the Bar:* The bar did not follow through on its pledge to establish one or more law firms to serve as a transition point for attorneys entering the judiciary and then returning to practice after serving on the bench.<sup>271</sup> In nearly all cases, attorneys entering the judiciary have had to make arrangements for clients, staff, and office-related matters by themselves.<sup>272</sup> In this respect, the fragmentation of the bar served as a barrier to undertaking the coordination needed to establish such firms.<sup>273</sup>

---

are stable and quite respectable, but income is likely to be lower than for outstanding attorneys). For estimates of lawyer income, see Minoru Nakazato, J. Mark Ramseyer & Eric B. Rasmusen, *The Industrial Organization of the Japanese Bar*, 7 J. EMPIRICAL L. STUD. 460 (2010).

<sup>268</sup> One might contrast that with the situation for fixed-term appointments of attorneys to government ministries and agencies, which were authorized by new legislation in 2000, also in line with suggestions by the JSRC. As discussed further below, *see infra* at note 291, those positions are proving popular among attorneys in large law firms. Among the noteworthy differences with judicial appointments, the terms are shorter, typically ranging from one to three years; the government posts typically are located in Tokyo, so, at least for attorneys at Tokyo firms, they entail no change in location; and, by enabling greater specialization with exposure to cutting-edge issues, the future career benefits are much more readily apparent.

<sup>269</sup> Figures from *White Paper*, *supra* note 154, at 48. The number of judges had reached 2944 in both 2014 and 2015, before declining again in 2016.

<sup>270</sup> The average time for processing district court first-instance ordinary civil cases (excluding consumer loan cases, which have become highly routine) rose from 8.5 months in 2001 to 9.2 months in 2014. *See* Saibansho (裁判所) [Courts of Japan] July 10, 2015, Saiban no Jinsokuka ni kakawaru Keshō ni kansuru Hōkokusho (Daiōkai) (裁判の迅速化に係る検証に関する報告書(第6回)) [Report Regarding Investigation Concerning Efforts to Speed Up Trials (6th report)], at 4, [http://www.courts.go.jp/about/siryō/hokoku\\_06/index.html](http://www.courts.go.jp/about/siryō/hokoku_06/index.html).

<sup>271</sup> *See* Ōshima, *supra* note 212, at 11.

<sup>272</sup> *See id.*

<sup>273</sup> In later years, JFBA did help organize a network of law firms to serve as transition points for attorneys entering fixed-term positions in local government bodies. *See* Memorandum, Nihon Bengoshi Rengōkai (日本弁護士連合会) [JFBA], Jichitainai bengoshi tō nin'yō shien jimusho Q&A (自治体内弁護士等任用支援事務所 Q&A) [Q&A Regarding the Office to Assist for Employment of In-House Lawyers at Local Government Bodies], [http://www.nichibenren.or.jp/library/ja/recruit/data/jichitainai\\_qa.pdf](http://www.nichibenren.or.jp/library/ja/recruit/data/jichitainai_qa.pdf). The

*New Measures to Be Taken by the Judiciary:* For its part, the judiciary did not follow through on its pledge to establish new short-term judgeships or specialized judgeships.<sup>274</sup> As a practical matter, one wonders how much difference this would have made. It seems unlikely that specialists in high-demand fields would have leapt at the chance to give up practice and enter the judiciary.<sup>275</sup> And, even without an express “short-term” judgeship, if attorneys truly wish to return to practice after just two or three years on the bench, there seems little way the judiciary could prevent them from doing so. As discussed earlier, the judiciary did establish the “part-time judge” system. Implications of that system are considered further below.

Let us turn now to a brief look at some of the major challenges.

*Location of Postings/Transfers:* As noted earlier, the bar’s confident assertion that many attorneys would seek appointment provided the judiciary with a convenient justification for ending the system allowing experienced attorneys to request to be posted within commuting distance of their residences. Thus the judiciary, with the consent of the bar, *reverted* to prior practices. While the bar may have been so sure of its cause that it did not view this as a major worry, it likely represented an important concern for many potential candidates. For attorneys who have already established homes, the prospect of having to move, potentially every three years, represents a substantial barrier.<sup>276</sup>

*Attachment to Practice and Doubts about Judicial Careers:* Perhaps the greatest challenge is simply that most successful attorneys enjoy their work and/or do not regard judicial careers as especially appealing.<sup>277</sup> Much of the reason for this, I would submit, lies in the basic ethos of uniformity and anonymity in Japan’s nameless, faceless judiciary. Japan’s judiciary is a large,

---

reason for the difference is not readily apparent. It may simply be a product of a special sense of mission and fervor on the part of those involved in the efforts to promote in-house lawyers in local government bodies.

<sup>274</sup> See Ōshima, *supra* note 212, at 11.

<sup>275</sup> Instead, to meet the perceived need for judges with specialized expertise in fields such as bankruptcy and intellectual property, the judiciary appears to have sought to develop that expertise internally.

<sup>276</sup> As in the prewar system, art. 48 of the Courts Act provides that judges may not be moved to other positions or courts against their will. Yet evidently based on concerns that asserting this right might adversely affect future career prospects, judges routinely accept the transfers. See, e.g., Komaya, *supra* note 267, at 92.

<sup>277</sup> See, e.g., Meeting Minutes, Supreme Court General Secretariat, Minutes of the 10th Meeting of the Lower Court Judge Designation Consultation Commission (Sept. 9, 2004), at 11, [http://www.courts.go.jp/saikosai/vcms\\_lf/806007.pdf](http://www.courts.go.jp/saikosai/vcms_lf/806007.pdf) [hereinafter Minutes of the 10th Meeting] (in response to a suggestion that the judiciary try head-hunting to attract qualified attorneys, a member of the Commission secretariat (from the Supreme Court General Secretariat) replied that the high-achieving attorneys the judiciary would like to attract are the least likely to come).

centralized bureaucracy, in which judges are expected to conform to established norms.<sup>278</sup> While it would be an overstatement to say that Japanese attorneys all enjoy high levels of autonomy, successful attorneys of the sort the judiciary would welcome are likely to have considerable independence. This is a major reason JFBA has felt the need to conduct extensive PR campaigns to promote the virtues of judicial service.

*Burdens and Uncertainty of Appointment Process:* One set of concerns raised by the bar in the 1990s was the lack of transparency regarding the standards by which candidates would be evaluated and the appointment process. These were coupled with the concern that the appointment process lay entirely within the Supreme Court General Secretariat, with no check by neutral outsiders.

In fact, while highly abstract, in the 1990s the judiciary had set forth a list of the criteria it regarded as important in evaluating attorneys seeking appointment. Ironically, in 1998, shortly before the recent reforms, the Supreme Court announced it was abrogating that list on the ground that appropriate consideration involved a “comprehensive assessment of the entire person,” which no list of factors could capture properly.<sup>279</sup> In accordance with another recommendation by the JSRC, though, in 2003 the Supreme Court did establish the Judge Designation Commission. As mentioned earlier, that Commission is charged with reviewing candidates based on lists prepared by the Supreme Court General Secretariat. It considers candidates for initial appointment as assistant judges, fresh after completion of LTRI training; for appointment of assistant judges to full judge status; for the successive reappointments of judges every ten years; and for appointment of attorneys to the judiciary.

Under the current system, the process for appointment of attorneys to the judiciary begins with review by a screening committee in the respective local bar association. If that screening committee deems a candidate suitable,

---

<sup>278</sup> Along these lines, see, e.g., Ogawa Tatsuo (小川達雄), “*Nijūseiki no Shukudai*” *Hōsō Ichigen Seido no Jitsugen e* (「20世紀の宿題」法曹一元制度の実現へ) [“*Homework from the 20<sup>th</sup> Century*”: Realizing the *Hōsō Ichigen System*], 51 *JİYŪ TO SEIGI*, no. 1, at 50, 60 (2000) (from reactions during “caravans” to promote *hōsō ichigen*, even though a fair number of attorneys feel work of judges is appealing, they are resistant to the closed nature of the career system under bureaucratic control).

It bears note that it is not as though attorneys lack any sense of what life as a judge would be like. Apprenticeship training at the LTRI includes stints, ranging from two to four months (depending on when the training took place), in both a civil division and criminal division of a court.

<sup>279</sup> See Ōkawa, *supra* note 134, at 34.



it recommends the candidate to the Supreme Court. Authorities at the Supreme Court then conduct a further examination and send the names of candidates on to the Judge Designation Commission to have it assess for suitability.

As the bar had hoped, the Judge Designation Commission is composed primarily of outside members. There are only two judges among the eleven members, and the Commission also includes two attorneys. Yet the results of the Commission's evaluation of attorney candidates have led to consternation on the part of the bar. Over the fourteen years that the review process has been in effect it has considered a total of 103 attorney candidates.<sup>280</sup> Of those, the Commission has deemed forty-eight suitable for appointment, but forty-five unsuitable. Thus, it has rejected well over forty percent of the attorney candidates, all of whom had passed the screening process by their local bar associations. For purposes of comparison, over that same fourteen-year period, the Commission deemed more than ninety-six percent of the candidates fresh out of the LTRI suitable for initial appointment as assistant judges, and also deemed suitable more than ninety-eight of the candidates from within the career judiciary for appointment or reappointment as judges.

Needless to say, these results have further weakened attorney interest in applying for the judiciary. For candidates, the application process requires considerable time and energy, not to mention the burdens involved in explaining to clients, finding other lawyers to take over pending matters, and all the other steps for winding down one's practice. Naturally, it is a great disincentive to hear that, at the end of that long road, 40% of candidates are rejected and then have to go back through the process of reestablishing their practices—not to mention suffer the embarrassment of having clients and associates learn of the rejection.

What, one might ask, are the reasons for these high rejection rates? Here, we might refer back to Feeley's observations that reformers from outside the judiciary "rarely have a continuing concern with the problems . . . . Indeed, success to many outsiders means adoption . . . [S]uccess of programs has often been declared prematurely." Has that been the situation in Japan? Most decidedly not. The bar has continued to be actively involved in promoting the appointment of attorneys to the bench. The bar recognizes that

---

<sup>280</sup> The figures contained in this paragraph reflect calculations by the author, based on a review of the minutes of the Commission since its establishment in 2003. Based on the minutes, over the past fourteen years, seven more attorneys have withdrawn their applications. Further, there may well have been more withdrawals at an earlier stage before the application was treated as officially having been made.

the high rejection rates for attorney candidates have resulted in a vicious circle, in which fewer and fewer qualified candidates are willing to take the step of going through the application and review process only to meet with rejection in the end. Accordingly, the bar has sought to ascertain the reasons for rejection and clarify the standards candidates are expected to meet. Yet the bar has failed in those efforts. The judiciary and the Judge Designation Commission have steadfastly held to the position that assessment is made on a comprehensive evaluation of the entire person, and will not reveal concrete reasons for deeming candidates unsuitable. Indeed, when, a group of attorneys conducted its own investigation and compiled a list of factors that seemed to be reasons for determinations of unsuitability,<sup>281</sup> the Commission reacted with outrage. It condemned the article in question, saying the bar's efforts to identify and categorize reasons for rejection would "give rise to suspicions regarding breaches of confidentiality and . . . lead to a loss of faith in the Commission."<sup>282</sup>

As for the reasons identified in that article, the list is as follows:

- 1) Weak motivation/reasons for seeking to become judge: concrete, positive motivation/reasons not communicated; halfhearted choice, financial reasons;
- 2) Lack of capacity: lack of balance, cooperativeness; overly aggressive speech; lack of appreciation for judicial duties;
- 3) Bad grades at LTRI (applicable only to candidates at assistant judge level);
- 4) Others: Insufficient information (too few cases handled, etc.)<sup>283</sup>

*Part-Time Judge System as Precondition for Appointment?* Despite the Commission's expression of outrage at the effort to identify reasons for rejection, as early as its tenth meeting, in September 2004, the Commission itself highlighted the final item on the above list: the lack of sufficient

---

<sup>281</sup> Kimura Kiyoshi (木村清志), *Kakyūsaibansho Saibankan Shimei Shimon Inikai Seido no Genjō to Kongo no Tenbō* (下級裁判所裁判官指名諮問委員会制度の現状と今後の展望) [*The Current Status of the Lower Court Judge Designation Consultation Commission System and Prospects for the Future*], 60 JIYŪ TO SEIGI, no. 10, at 22 (2009).

<sup>282</sup> For a more detailed examination, see Foote, *Transparency*, *supra* note 6.

<sup>283</sup> Kimura, *supra* note 281, at 24.

information about attorney candidates to evaluate them properly. At that meeting, as one means for securing sufficient information, a representative of the Commission secretariat (from the Supreme Court General Secretariat) suggested service as a part-time judge for two or, with reappointment, four years. This, the representative explained, would give the judiciary and the candidate alike ample opportunity to learn about each other, and would also provide time for a smooth transition from practice to the bench.<sup>284</sup> Ever since, whenever the Commission has considered attorneys applying for the judiciary, it has highlighted insufficient information and noted its encouragement for serving as a part-time judge first.<sup>285</sup>

The part-time judge system is important in its own right. It has helped strengthen the conciliation system and, for attorneys with the desire to fulfill a sense of public service, it has provided the opportunity to serve in meaningful roles within the judiciary. In terms of its significance with respect to diversification of the judiciary, however, the part-time system, which ostensibly started as a device for promoting appointment of attorneys, rather rapidly transformed into a device for the judiciary to screen potential candidates to assure their “suitability” for appointment. Viewed cynically, one might suggest that what began as a tool to promote diversity soon became a tool to ensure, if not uniformity as such, at least that the candidates will fit into the career judiciary. Thus, one might view this as a classic example of “co-optation and adaptation,” in which “[c]oncern for original goals [has] give[n] way to concern for organizational maintenance.”

## 2. Diversified Experience for Assistant Judges

Turning to the reforms aimed at ensuring assistant judges attain experience outside the judiciary, given the JSRC’s call for “diversified experience *as legal professionals* in positions other than the judiciary, . . . *such as lawyer or public prosecutor*” (emphasis added), the subsequent acceptance of the Supreme Court proposal to classify work in companies and overseas study as “diversified experience” watered down the recommendation. Some members of the bar are undoubtedly concerned that only ten of the eighty or more assistant judges who undertake experience outside the judiciary each

---

<sup>284</sup> See Minutes of the 10th Meeting, *supra* note 277, at 8.

<sup>285</sup> See, e.g., Meeting Minutes, Supreme Court General Secretariat, Minutes of the 32nd Meeting of the Lower Court Judge Designation Consultation Commission (Feb. 8, 2008), at 2, [http://www.courts.go.jp/saikosai/vcms\\_lf/806024.pdf](http://www.courts.go.jp/saikosai/vcms_lf/806024.pdf); Meeting Minutes, Supreme Court General Secretariat, Minutes of the 52nd Meeting of the Lower Court Judge Designation Consultation Commission (Feb. 20, 2012), at 3, [http://www.courts.go.jp/saikosai/vcms\\_lf/806040.pdf](http://www.courts.go.jp/saikosai/vcms_lf/806040.pdf).

year work in law firms. This perceived imbalance is compounded by the fact that at least twice as many assistant judges serve in the Ministry of Justice as at law firms.

Yet, on the whole, the system for diversified experience appears to be functioning well. Rather than a drawback, the fact that assistant judges are experiencing a wide variety of placements, including companies and other government ministries and agencies, might be seen as a strength. Those who return to the judiciary following outside stints share their experiences with colleagues. Upon their return, I have been told, assistant judges make presentations about their experiences in a specially arranged meeting with the other judges at the court to which they are assigned. When two or more assistant judges assigned to the same court return at the same time, they give their presentations together. This provides an opportunity to compare and contrast their experiences. Presumably, many judges share their experiences with colleagues both before and long after these formal presentations, as well.<sup>286</sup> It bears note, moreover, that the rather low number of placements in law firms is primarily a reflection not of the wishes of the judiciary, but the low number of law firms willing to hire judges—and to pay their salaries, which is a condition of the system—for a fixed two-year term. The Supreme Court would like to send more assistant judges to law firms, but sufficient placements are not available.<sup>287</sup>

As this reflects, one of the ongoing challenges for this system is arranging appropriate placements. Despite the difficulties in expanding law firm placements, though, it is clear that the judiciary has succeeded in securing a wide range of placements in many different bodies. Apart from the study abroad opportunities (thirty-seven assistant judges as of 2016)<sup>288</sup>, the single largest receiving entity is MOJ, with approximately ten assistant judges posted to administrative positions, and ten more as *shōmu kenji* each year. The prior practice of seconding judges and assistant judges to handle criminal matters was terminated in 2012 after longstanding criticism, and pressure is increasing for termination of the *shōmu kenji* secondments, as well.<sup>289</sup> Some members of the Diet have also raised questions about the propriety of, and potential

---

<sup>286</sup> See, e.g., Hamada Hiromichi, *supra* note 188, at 13–14.

<sup>287</sup> *Id.* at 16.

<sup>288</sup> See *Gyōseikan Chōki Zaigai Kenkyūin no Meibo oyobi Hanjiho Kaigai Ryūgaku Kenkyūin no Meibo* (行政官長期在外研究員の名簿及び判事補海外留学研究員の名簿) [*List of Administrative Official Long-Term Foreign Researchers and List of Assistant Judge Study Abroad Researchers*] (2017), <http://media.toriaez.jp/m0574/709304320048.pdf>.

<sup>289</sup> See *supra* note 258; YAMANAKA HP, *supra* note 255.

conflicts of interest involved in, seconding or dispatching assistant judges to other governmental bodies and private enterprises.<sup>290</sup> In any event, despite these isolated doubts, the Supreme Court remains firmly committed to ensuring assistant judges attain meaningful experience outside the judiciary.

As another possible challenge, what do the assistant judges (and potential new entrants to the judiciary) think? Do they welcome the system or resent it?

At large Japanese law firms, the opportunity to go abroad for study, at law firm expense, has long been regarded as a desirable perk for top-notch associates. In recent years, moreover, associates at such firms increasingly have begun to spend periods of one to two years seconded to government ministries and agencies in their areas of specialization. I have collected information and conducted interviews with several attorneys who have undertaken such positions (through a fixed-term appointment system, which arose from another set of recommendations by the JSRC); I have found these positions are quite popular among elite young attorneys.<sup>291</sup> I have been told that this option has increased the attractiveness of law practice as a career choice for outstanding students trying to decide whether to pursue the bureaucracy or law.<sup>292</sup> From this research, my supposition was that the availability of similar opportunities, through the system for outside experience, might serve as a valuable tool for recruiting and retaining talented assistant judges.

Based on an in-depth interview with a member of the judiciary who is highly knowledgeable about the system for outside experience (and to whom I have pledged anonymity), I have come to wonder whether that is the case. For most assistant judges, as with elite young attorneys, the opportunity to undertake study abroad is highly regarded, as is the chance to serve in overseas diplomatic offices (although the latter opportunity is limited to just two or

---

<sup>290</sup> See, e.g., *Outside Experience*, *supra* note 256; *Dai3 Hanjiho no Gaibu Keiken ni kansuru Kokkai Tōben* (第3 判事補の外部経験に関する国会答弁) [No. 3 Diet Explanation Regarding Outside Experience for Assistant Judges] (May 14, 2015), <http://www.yamanaka-law.jp/cont4/98.html> (explanation by head of Supreme Court Personnel Bureau Hotta Maya before Legal Affairs Committee, House of Councilors).

<sup>291</sup> According to my calculations based on the lawyer profiles contained on the home pages of the law firms, as of July 2017 over twenty percent of the junior partners and nearly twenty percent of the senior associates at the so-called Big Five elite law firms in Tokyo had served or were currently serving in fixed-term appointments in government bodies.

<sup>292</sup> My article, *The Advent of Government Lawyers in Japan*, based on that research is scheduled for publication in 5 ASIAN J. OF L. & SOC. (forthcoming 2018).

three per year). As for the other placements, however, views differ widely among assistant judges. A considerable number of assistant judges, my source reports, are studious types who greatly value the autonomy and ability to work on one's own afforded by the judiciary. Assistant judges of that type are sometimes resistant to work as part of a team or to be subject to routine oversight by a supervisor, as is often the case with outside placements. Provided this report is accurate, to my mind it constitutes yet additional evidence of why diversified outside experience is valuable for the judiciary. In any event, while the opportunity for outside experience may have less significance for attracting and retaining strong assistant judges than I had previously supposed, it seems highly unlikely to deter candidates from entering the judiciary. For studious types who might not enjoy the outside placements, the alternatives of careers as either prosecutors (who, in the Japanese context, are constantly subject to careful oversight by supervisors) or attorneys would not seem to be very attractive options; and a two-year secondment, out of a judicial career of over thirty years, presumably would seem like a small price to pay.

In sum, the system for assistant judges to attain diversified experience outside the judiciary has taken firm root. The challenges it faces are modest, and it seems likely to remain a standard feature of the Japanese judiciary for the foreseeable future.

## VII. CONCLUSION

Fifteen years after the advent of the most recent set of reforms, the part-time judge system and the system for assistant judges to attain experience outside the judiciary both have taken firm root. Yet what the bar viewed as the centerpiece reform, the push for experienced attorneys to join the judiciary, has languished. Thus, as an initial question, one might ask: So what? What, after all, makes that reform so significant?

Over fifty years ago, attorney (and later Supreme Court justice) Ōno Masao raised that question. In reflecting on the deliberations and final report of the Investigation Committee, he observed that the attorneys on the Committee had not been able to persuade the other members that *hōsō ichigen* would be preferable to the career system. The argument, he noted, had proceeded down parallel tracks, with the attorneys saying “the current system is a bureaucratic system” and others saying, in effect, “what’s wrong with

that?”<sup>293</sup> Ōno himself offered a series of strong, concrete critiques of the shortcomings of the career system.<sup>294</sup> Yet for the most part, the debate has proceeded down parallel tracks ever since. At least as far back as the deliberations of the Investigation Committee, the concern has been raised that the appointment of large numbers of attorneys, with their “overly individualistic attitudes,”<sup>295</sup> might undermine the legal stability and high predictability of the Japanese legal system, which many observers regard as one of its great strengths.<sup>296</sup> On the other side, observers have raised exactly the same point to highlight the need for diversifying the judiciary, asserting that the over-emphasis on legal stability and certainty has led the judiciary to ignore or downplay other important matters.<sup>297</sup> Proponents on the bar side remain sure of the shortcomings of the career system, and many continue to believe in the virtues of a system in which all judges would be selected from among experienced lawyers. Outside the bar, however, many find the bar’s assertion that all judges should come from the attorney ranks self-serving,<sup>298</sup> and most remain unconvinced of the need for a wholesale change in the career system.

For its part, the JSRC adopted a middle-ground approach. Not only did it accept the career system as an unavoidable reality, it effectively endorsed the career system, recognizing that “assistant judges have become the primary source of supply for judges” and that that situation would almost certainly continue in the future. Yet the Reform Council took seriously the goal of diversifying the judiciary. Despite its expressions of support for appointment of attorneys to the bench, in view of the past history and the absence of any new effective measures, the Council did not voice great hope for substantial increases in such appointments. Given the realities, the Council adopted an alternative approach: it placed primary weight on its call for assistant judges to

---

<sup>293</sup> Ōno Masao, *supra* note 90, at 6, 7.

<sup>294</sup> *See id.* at 7–9.

<sup>295</sup> *See Investigation Committee Report, supra* note 81, at 36.

<sup>296</sup> In the Japanese law field, the theme of predictability is most closely associated with J. Mark Ramseyer. *See, e.g.,* RAMSEYER, *supra* note 207. Many others, John O. Haley and myself included, also have highlighted the theme of predictability.

<sup>297</sup> *See, e.g.,* Abe Masaki (阿部昌樹), “*Antei Shita Hō*” kara “*Seichō Suru Hō*” e: *Hōsō Ichigen no Hōchitsujo* (「安定した法」から「成長する法」へ: 法曹一元の法秩序) [*From “Stable Law” to “Law that Grows”*: *Legal Order in Hōsō Ichigen*], 51 JIYŪ TO SEIGI, no. 1, at 64 (2000). This theme also has deep roots. In his 1963 critique of the Investigation Committee, Ōno highlighted the role of the career system in “maintaining order” through its adherence to a “formalistic rationalistic” (in other words, highly predictable) approach, while expressing concern that this approach gives insufficient attention to a wide range of relevant factors. *See* Ōno Masao, *supra* note 90, at 8.

<sup>298</sup> *See* KOBAYASHI, *supra* note 107, at 177–79, and sources quoted and cited therein.

attain experience outside the judiciary, putting that proposal first in its list of recommendations. As we have seen, that alternative approach has taken firm root and is well on its way to becoming a fixed feature of the Japanese judiciary.

This leads us to a final question: What accounts for the difference in the success of the two sets of reforms? Returning to the Feeley framework, there was not a lack of historical perspective: the JSRC was aware of the history of prior reform efforts and took that history into account in crafting its reform proposals. With regard to efforts to invigorate the system for appointing attorneys to the bench, one could point to various facets of resistance and co-optation. One could also point to the lack of sufficient anticipation of the burdens involved in the application process and the high rate of rejections for attorney applicants. Yet, above all, the fact that reform has languished reflects overconfidence on the part of the reform proponents. To paraphrase Feeley, “They knew their ideas were good”; and they were so confident many attorneys either would want to join the judiciary or would feel a sense of obligation to do so to improve the justice system, they could not conceive of the fact that the flow of applicants would start off weak and then decline to a mere trickle.

In contrast, the success of the system for assistant judges to attain experience outside the judiciary lies in the distinct difference between the United States judicial system on which Feeley’s analysis was premised and the Japanese judicial system. As we have seen, Japan’s is not a fragmented system. Nor is it a system in which a “single agency” within the judiciary might undertake a reform unilaterally, especially one that might have system-wide impact. To the contrary, Japan has a highly centralized, bureaucratic judiciary, in which the Supreme Court General Secretariat plays the key coordination role. The approach Feeley labels as “administrative” is by no means unusual for the Japanese judiciary. Quite the opposite, it is standard operating procedure. Given these fundamental structural attributes, and provided the requisite will exists, the Japanese judiciary is well suited to undertake measures, such as the system for outside experience by assistant judges, that can be planned and implemented internally, with only limited need for coordination with receiving institutions and other outside bodies.

In closing, let me return to a final Feeley proposition: “Perhaps the greatest danger in the administrative strategy is that it will work, that it will transform a contentious and embattled group of professionals into cooperative



bureaucrats . . . .<sup>299</sup> In the case of the Japanese judiciary, contentious debates undoubtedly take place within the confines of the Supreme Court General Secretariat, but the overall framework constitutes a largely cooperative bureaucracy. Whether that constitutes a drawback or a virtue rests in the eye of the beholder.

---

<sup>299</sup> FEELEY, *supra* note 7, at 205.

