

## EXCLUSIVITY AND THE JAPANESE BAR: ETHICS OR SELF-INTEREST?

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*Abstract:* The Japanese bar maintains that ethical considerations mandate a low admission rate. However, the bar's limit on the number of lawyers in Japan has socioeconomic effects that extend beyond the legal profession. Also, because there are too few Japanese lawyers, "quasi-lawyer" legal substitutes have emerged to satisfy pent-up demand for legal services. This comment suggests that the Japanese bar should expand its membership in order to address the shortage of legal services in Japan. An expanded bar could also address many of Japan's hidden socioeconomic ills.

### I. INTRODUCTION

Legal commentators have devoted much discussion to the exclusive posture of the Japanese Federation of Bar Associations (*Nichibenren*). The main issue internationally, and particularly in the United States, has been the inability of foreign lawyers to practice and form associations in Japan.<sup>1</sup> However, the prohibition against foreign lawyers working in Japan is just one aspect of the wider attempt by the state and the bar to limit entry into the Japanese legal market. Barriers to entry into the Japanese legal profession confront not only foreign lawyers, but also the many Japanese college graduates who attempt unsuccessfully to become lawyers.

The Legal Examination, the rite of passage into *Nichibenren*, is notoriously difficult. Only 500 of the over 20,000 candidates (approximately 2 percent) pass the annual exam (see Appendix).<sup>2</sup> This process has given Japan one of the lowest ratios of lawyers to population in the industrial world. There were 11,466 registered practicing attorneys in Japan in 1980. With a population of approximately 116 million, this gave Japan a ratio of one practicing attorney to 10,000 persons. This ratio is only

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<sup>1</sup> See, e.g., Abrahams, *Japan's Bar to US Lawyers*, NAT'L L.J., July 4, 1983, at 1; Fukuhara, *The Status of Foreign Lawyers in Japan*, 17 JAPANESE ANN. INT'L L. 21 (1973); Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678 (1979); Ohira & Stevens, *Alien Lawyers in the United States and Japan—A Comparative Study*, 39 WASH. L. REV. 412 (1964); Comment, *An American Lawyer in Tokyo: Problems of Establishing a Practice*, 2 U.C.L.A. PAC. BASIN L.J. 180 (1983).

<sup>2</sup> Kahei Rokumoto, *The Present State of Japanese Practicing Attorneys: On the Way to Full Professionalization?*, in 2 LAW. IN SOC'Y 160, 165 (Richard L. Abel & Philip S.C. Lewis eds., 1988); Peter Landers, *The Mother of All Bar Exams: Japanese Spend Years on Test; About 2 Percent Pass*, L.A. DAILY J., July 29, 1991, at B1.

one-sixth of that found in England and West Germany in the same year,<sup>3</sup> and is in stark contrast to that of the United States; in 1980, 542,205 licensed attorneys gave the US a ratio of one attorney to every 403 persons.<sup>4</sup>

The small number of candidates from which to draw attorneys, judges and procurators contributes to the non-litigious nature of Japanese society. Some see this lack of “institutional capacity” as the main reason Japanese are not more willing to avail themselves of the legal system.<sup>5</sup> Other commentators would offer a cultural explanation which describes the Japanese citizen as a reluctant litigant.<sup>6</sup> Whichever emphasis one adopts, it is clear that limited access to a small legal market has some impact on the rate of litigation in Japan.

Yet the small size of the Japanese bar affects more than just the rate of litigation. The exclusive nature of *Nichibenren* may impact its members’ ethics, as well as reduce the ability of Japanese lawyers to perform their function as protectors of human and civil rights.<sup>7</sup> In order to analyze the net effect of the size of *Nichibenren*, one must first look at the largely historical reasons for the Japanese bar’s exclusivity.

## II. HISTORY OF THE JAPANESE LEGAL PROFESSION

The Japanese lawyer has a history of vulnerability, low prestige, limited function, and subservience to the state.<sup>8</sup> The Japanese lawyer did not play an important role in the Meiji restoration period (1868-1912).<sup>9</sup> “[T]he lawyer was not a figure of importance either as a participant in the molding of the new order or as an upholder of the traditional order.”<sup>10</sup> Professor Rabinowitz further stated that, as the Japanese legal profession is a relatively new institution, it is “impossible for the lawyer to ‘borrow’

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<sup>3</sup> Rokumoto, *supra* note 2, at 163.

<sup>4</sup> *The Lawyer Explosion*, 81 A.B.A. J. 37 (Mar. 1995).

<sup>5</sup> John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. OF JAPANESE STUD. 359, 378 (1978).

<sup>6</sup> See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995) (discussing the contribution of societal trust towards harmony in Japan); Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41, 43 (Arthur von Mehren ed., 1963).

<sup>7</sup> Article 1 of the Attorney Code of Ethics places upon the Japanese attorney the responsibility for Japanese human and civil rights. Setsuo Miyazawa, lecture at U. of Washington, Feb. 20, 1996.

<sup>8</sup> Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61, 64 (1956).

<sup>9</sup> Sherill A. Leonard, *Attorney Ethics and the Size of the Japanese Bar*, 39 JAPAN Q. 86, 87 (1992).

<sup>10</sup> Rabinowitz, *supra* note 8, at 79.

prestige from a traditional role model of high status."<sup>11</sup> Generally, the Japanese attorney has not been an effective or important advocate of the Japanese people's rights and freedoms.<sup>12</sup>

Traditional Japanese jurisprudence allowed legal representation only in exceptional circumstances, such as cases in which infancy, advanced age or illness were an issue.<sup>13</sup> In 1854, the function of the lawyer was viewed as accompanying people to court and writing documents for them.<sup>14</sup> Under Japanese law at the time, some form of relationship was required between legal representative and litigant.<sup>15</sup> Innkeepers (*kujishi*) could provide such a relationship. They were the first class of legal representatives in Japan, although they had no legal training.<sup>16</sup> While they had no official recognition, they were allowed to act as counselor for clients who had traveled to the Tokyo court and were staying in their inn.<sup>17</sup> Court officials viewed the *kujishi* with suspicion, and their reputations were generally very poor.<sup>18</sup>

The *daigennin* appeared in the period from 1872 to 1893. They were officially recognized legal representatives at civil trials.<sup>19</sup> Initially, there were no qualifications for acting as a *daigennin*; anyone was free to do so.<sup>20</sup> The *daigennin* also had no formal training, and until 1876, they did not even have to pass a legal examination.<sup>21</sup> The *daigennin* were held in low esteem, a perception which continues to impact the public image of the Japanese lawyer to the present day.<sup>22</sup>

Two sets of legislation gave the status of the legal profession a boost in 1880. The first was an amendment to the Criminal Code which

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<sup>11</sup> Rabinowitz, *supra* note 8, at 79.

<sup>12</sup> Gino Dal Pont, *The Social Status of the Legal Professions in Japan and the United States: A Structural and Cultural Analysis*, 72 U. DET. MERCY L. REV. 291, 293 (1995).

<sup>13</sup> Rabinowitz, *supra* note 8, at 62.

<sup>14</sup> Rabinowitz, *supra* note 8, at 62.

<sup>15</sup> Rabinowitz, *supra* note 8, at 62.

<sup>16</sup> Rabinowitz, *supra* note 8, at 62-64.

<sup>17</sup> In the Genroku Period (1688-1703), the Administrative and Tax Office for the Kanto area was located in a part of Tokyo which also housed a number of temples. The temples attracted many tourists, and several inns opened in the area to service both tourists and litigants. Over time, the *kujishi* developed familiarity with the procedures of the Tokyo court, allowing them to advise their guests on legal matters. Rabinowitz, *supra* note 8, at 62-63; Setsuo Miyazawa, lecture at U. of Washington (Feb. 16, 1996).

<sup>18</sup> The public perceived the *kujishi* as an intermediary through which government officials could be bribed. Also, the public thought that the *kujishi* would pad their client's bill at the inn by prolonging the trial unnecessarily. Rabinowitz, *supra* note 8, at 62-64.

<sup>19</sup> Rabinowitz, *supra* note 8, at 64.

<sup>20</sup> Rabinowitz, *supra* note 8, at 64.

<sup>21</sup> Rabinowitz, *supra* note 8, at 65.

<sup>22</sup> Leonard, *supra* note 9, at 87.

recognized the right of the defendant to representation at a criminal trial.<sup>23</sup> The procurator, the state's representative at trial, had the prestige of being a governmental official. By participating in criminal trials along side the procurators, the *daigennin* received a modicum of that official status by association.<sup>24</sup>

Second, the government took control of the examination system and required that a formal bar association be established at each district court. These ties between the *daigennin* and the government lent further credibility to the nascent lawyer class.<sup>25</sup>

The next important piece of legislation, the Lawyer's Law, came in 1893.<sup>26</sup> The *bengoshi* (as lawyer were then called) were further legitimized by governmental regulation of the legal profession; these regulations established examination rules and admission standards, and defined acceptable behavior.<sup>27</sup> However, in the same legislation the government made clear who had power: the Lawyer's Law placed each local bar under the control of the chief procurator of the district.<sup>28</sup> Thus, while officially enjoying a parallel status to that of the procurators in court, the *bengoshi* remained in a subservient position. However, the newly found legitimacy of the *bengoshi* was soon threatened by their subsequent actions.

An oversupply of lawyers brought about intense competition in the legal profession in the 1920s. Many *bengoshi* were in dire straits financially, and some resorted to misdeeds in order to compete.<sup>29</sup> Their public image threatened, a consensus developed among Japanese attorneys that the size of the bar should be reduced in order to eliminate the unethical lawyers as well as the competition among lawyers which was seen as the basis of the ethical problems.<sup>30</sup> Facing domestic opposition from the government, the Japanese bar would not achieve their goal of limiting the number of lawyers until an outside force—the occupying American Army—took control.

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<sup>23</sup> Ministry of Justice, Order No. 1 (1880), cited in Rabinowitz, *supra* note 8, at 67.

<sup>24</sup> Leonard, *supra* note 9, at 88.

<sup>25</sup> Leonard, *supra* note 9, at 87.

<sup>26</sup> Rabinowitz, *supra* note 8, at 69-71.

<sup>27</sup> Rabinowitz, *supra* note 8, at 69-71.

<sup>28</sup> Leonard, *supra* note 9, at 88.

<sup>29</sup> Rabinowitz, *supra* note 8, at 74 n. 17 (citing conduct such as fraudulent appropriation of funds and even criminal acts).

<sup>30</sup> The reputation of the nascent lawyer class was so threatened that lawyers themselves began to call for investigations into unethical or illegal acts by lawyers. The solution most often suggested was to reduce the number of bar members. Rabinowitz, *supra* note 8, at 73-74.

In an attempt to modernize Japanese law, two important legal institutions were established in the post-World War II period: *Nichibenren*, a legally autonomous national bar; and the Legal Training and Research Institute ("LTRI"). *Nichibenren* was given the task of overseeing the local bar associations. The LTRI, under the control of the Supreme Court, provided training to judges, procurators and—for the first time—lawyers. While provision of formal government legal training for private lawyers completed the legitimization of the *bengoshi*, it also solidified governmental control over the legal profession.<sup>31</sup>

Until the 1960s, the Japanese lawyer had no cause to fear that governmental control; the societal views of lawyer and bureaucrat were largely analogous. However, the attitude of some lawyers changed from simple conformity to civil disobedience during the socially tumultuous days of the 1960s.<sup>32</sup> As criminal trials followed the Japan-US Mutual Security Treaty riots, attorneys began to engage in what were correctly perceived as acts of civil disobedience.<sup>33</sup> To combat what they perceived as judicial bias in favor of the government, defense lawyers "adopted delaying tactics, defied court instructions, and even resigned from their cases in displays of utter contempt for the treatment of their clients."<sup>34</sup> This "unlawyerly" behavior left the government with at least two possibilities: subject *Nichibenren* to stringent government regulation, or bypass *Nichibenren* altogether. The government opted to attempt legislation allowing criminal trials to proceed without defense counsel.<sup>35</sup> The message from the government was clear—trials would proceed and justice would be achieved with or without the help of the bar.<sup>36</sup>

Faced with the potential loss of its autonomy, the bar capitulated. It issued a public apology for the unruly behavior that some of its members had exhibited.<sup>37</sup> It also pledged to control more closely the future conduct of its members and to tighten the ethical rules governing when a lawyer may quit his or her defense of a client. Following two decades of internal disagreement as to the substance of the ethical revisions, in 1990 the bar

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<sup>31</sup> Leonard, *supra* note 9, at 88.

<sup>32</sup> Leonard, *supra* note 9, at 88-89.

<sup>33</sup> Leonard, *supra* note 9, at 89.

<sup>34</sup> Leonard, *supra* note 9, at 89.

<sup>35</sup> Leonard, *supra* note 9, at 89.

<sup>36</sup> Leonard, *supra* note 9, at 89.

<sup>37</sup> Leonard, *supra* note 9, at 89.

finally adopted modest changes.<sup>38</sup> However, the revisions serve as a reminder to the bar that it can remain autonomous only so long as lawyers act in ways not offensive to the government. *Nichibenren* continues to operate in this context today.

### III. NEGOTIATIONS CONCERNING THE SIZE OF *NICHIBENREN*

In 1987, *Nichibenren*, the Ministry of Justice, and the Supreme Court (the "Legal Three") entered into negotiations concerning the expansion of the size of the bar.<sup>39</sup> The negotiations resulted in an agreement last year which will increase the annual class of LTRI students. To accomplish this, the number of candidates who pass the annual Legal Examination will be increased by changing the cut off point for passage.<sup>40</sup> While all parties to the negotiation appear to accept that some increase is needed, they differ as to what the annual increase should be. The Justice Ministry and the Supreme Court had proposed that the annual number of those passing the examination be increased to 1,500, up from its current level of 700.<sup>41</sup> *Nichibenren*, following long internal debate, ultimately compromised with the Ministry of Justice and Supreme Court at the level of 1,000 successful candidates per year.<sup>42</sup>

The size of the bar became a political issue at the instigation of the Japanese government. While lawyers are in short supply in Japan, judges are in even greater demand. There is one judge for every 60,000 people in Japan.<sup>43</sup> Currently, because judges in Japan have huge caseloads, the Ministry of Justice desires to increase the number of judges in coming years.<sup>44</sup> To achieve this goal, the Ministry must expand the pool of potential judges and thus the size of the bar. As *Nichibenren* is an autonomous entity, the Ministry of Justice must convince it to expand the bar in order to expand the judiciary or increase the number of procurators. However, should *Nichibenren* refuse to adopt changes to the satisfaction of

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<sup>38</sup> The new rules define under what circumstances a lawyer may resign a case. Leonard, *supra* note 9, at 89.

<sup>39</sup> Landers, *supra* note 2, at B1.

<sup>40</sup> Landers, *supra* note 2, at B1.

<sup>41</sup> Haruo Shimada, *Nation's Legal System Doesn't Provide Equal Justice for All: Greater Protection Needed for Indigents, Social Outcasts*, NIKKEI WKLY., Dec. 18, 1995, available in NEXIS, Asiapc Library, JAPAN file.

<sup>42</sup> *Id.*

<sup>43</sup> Compare this with the ratios in Germany (1 per 4,000 people), the United States (1 per 8,000), France (1 per 12,000), and the United Kingdom (1 per 30,000). *Id.*

<sup>44</sup> Setsuo Miyazawa, *supra* note 17.

the Ministry of Justice, there is a real possibility that the government might simply take control of the bar.<sup>45</sup> Thus, in order to ward off any loss of autonomy, the incentive for *Nichibenren* is to accede, at least to some degree, to the Ministry of Justice's wishes. Of interest are *Nichibenren's* justifications for a small bar.

### A. *Maintain Quality*

A common rationale of *Nichibenren* for limiting bar size is to protect the consumer from low quality services.<sup>46</sup> Consumers are easily deceived, the argument goes, and they must be protected from information asymmetries. However, the ban on advertising adopted by *Nichibenren* seems counter-intuitive in this instance. If asymmetry of information is the problem, the way to solve the problem is to provide more, not less, information to the consumer. That would seem to entail allowing lawyers to advertise.<sup>47</sup>

Today lawyers are understandably reluctant to endorse any change which might once again lead to the problems of over-competition experienced in the 1920s.<sup>48</sup> Concerns over maintaining economic well-being and elite status are often couched in ethical terms. The concepts of a small bar size, high ethical standards, and high-quality lawyers are synonymous in the minds of many Japanese lawyers. "Too many lawyers," says one Tokyo attorney, "would lead to a lowering of the quality of service. Both competence and character would suffer. What people expect of lawyers would decline, and so lawyer's standards would decline, too."<sup>49</sup> Explains a Nagasaki attorney, "The great threat to the ethical character of the profession is excessive competition."<sup>50</sup>

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<sup>45</sup> Setsuo Miyazawa, *supra* note 17.

<sup>46</sup> J. Mark Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan*, 27 HARV. INT. L.J. 499, 512. (1986).

<sup>47</sup> Information asymmetries result when one party to a potential bargain has greater access to or control over relevant information than another party to that bargain. The information-deficient party may be unable to discern the actual costs of the bargain, or may have to spend more to determine those costs. See, e.g., THRAINN EGGERTSON, *ECONOMIC BEHAVIOR OF INSTITUTIONS* 62-64 (1990) (demonstrating information asymmetry costs in a hypothetical market example). Information asymmetries are thus a form of transaction costs. *Id.*, at 15 (describing a transaction cost as "[t]he search for information about . . . price and quality . . .").

<sup>48</sup> See *supra*, notes 29-30 and accompanying text.

<sup>49</sup> Leonard, *supra* note 9, at 90.

<sup>50</sup> Leonard, *supra* note 9, at 90.

In becoming a lawyer, candidates must navigate a very challenging course. On average, candidates spend seven years after college preparing for the legal examination through "cram" courses.<sup>51</sup> Then, a candidate must score in the top few percent of the thousands of annual applicants. The average age of successful candidates is 29.<sup>52</sup> Thus, argue the supporters of the status quo, those candidates who lack the intellectual and moral conviction to complete this arduous path will be weeded out.<sup>53</sup> Lowering the standard in order to accept more candidates compromises the process, leading to lower quality and ethical standards for the legal profession overall.

### B. *Maintain Elite Status*

The real impetus for the Japanese lawyer to support a smaller bar size may be a desire to protect their position in society as an educational elite. Michitaka Goto stated that, "[t]raditionally, the legal system has a great deal of pride that it is the cream of the crop. If there were too many lawyers, this elite consciousness would be lost."<sup>54</sup> While they are occasionally haunted by the ghosts of their low-status predecessors (the *kujishi* and *daigennin*), today's Japanese lawyers enjoy a level of education and professional freedom that is unparalleled in Japanese society.<sup>55</sup>

### C. *Maintain Confidence*

Competition, in the minds of Japanese attorneys, leads also to a loss of public confidence.<sup>56</sup> Proponents of maintaining the present bar size point to scandals which have rocked the legal profession over the past few years as indicators of what would be the likely result should examination standards be lowered.<sup>57</sup> Japan has had several well-publicized cases of attorney corruption, dishonesty and general misconduct, such as the Toyoda

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<sup>51</sup> Leonard, *supra* note 9, at 89-93.

<sup>52</sup> Ramseyer, *supra* note 46, at 524.

<sup>53</sup> Leonard, *supra* note 9, at 90.

<sup>54</sup> Landers, *supra* note 2.

<sup>55</sup> The legal profession provides the Japanese attorney much more autonomy than is found in more traditional forms of Japanese employment. The desire to avoid the hierarchical structure of the Japanese corporation is a major factor contributing to the desirability of the legal profession in Japan. Interview with John O. Haley, Professor of Law, U. of Washington, in Seattle, WA. (Apr. 23, 1996).

<sup>56</sup> Leonard, *supra* note 9, at 91.

<sup>57</sup> Leonard, *supra* note 9, at 91.

Shoji scandal of the mid-1980s.<sup>58</sup> Yet, the absolute level of reported attorney misconduct is surprisingly low. From 1979 to 1990, *Nichibenren* received and acted on only 2,291 complaints of attorney misconduct.<sup>59</sup> Thus, while overall levels of reported attorney misconduct in Japan are very low in relation to the levels in other developed nations, the Japanese public still perceives the Japanese legal profession as less than pristine.

*Nichibenren* furthered this perception of the Japanese legal profession by not releasing the details of an attorney's misconduct when he or she was disciplined by the bar.<sup>60</sup> In 1991, *Nichibenren* took a positive step towards improving its public image and abandoned this policy: the bar now releases the name, ethical violation and punishment of any disciplined member.<sup>61</sup> By making the disciplinary process more transparent, the bar has increased its legitimacy in the eyes of the public.

#### D. *Maintain Ethics*

Another commonly cited reason for *Nichibenren* opposition to an increased bar size is attorney ethics. They argue that within a small, close-knit community, attorneys are able to keep a watchful eye on each other for possible ethical violations.<sup>62</sup> Any increase in the size of the bar would, according to this view, diminish the oversight capabilities of the bar.

This method of enforcement works well in the rural areas of Japan, where there is a clear sense of community among the practicing attorneys, judges and procurators.<sup>63</sup> A Nagasaki attorney echoed this view. "Most ethical problems are in the major cities. In smaller cities, we have a sense of community . . . We see each other's faces, we know each other's names and we know each other's cases and how we will handle them. There is a lot of mutual supervision."<sup>64</sup>

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<sup>58</sup> The scandal involved the 1985 bankruptcy of the Toyoda Shoji trading firm, which had made over 100 billion yen worth of fraudulent gold sales to 28,000 people. Investors recovered only ten percent of their investments. Several Japanese attorneys were implicated and later disciplined by the bar. Many criminal prosecutions befell the officials of Toyoda Shoji. *Jottings*, THE DAILY YOMIURI, June 13, 1992, at 3.

<sup>59</sup> Leonard, *supra* note 9, at 91-92.

<sup>60</sup> Leonard, *supra* note 9, at 91.

<sup>61</sup> Leonard, *supra* note 9, at 91.

<sup>62</sup> Leonard, *supra* note 9, at 90 (discussing the dynamics in rural and urban legal communities).

<sup>63</sup> Leonard, *supra* note 9, at 90.

<sup>64</sup> Leonard, *supra* note 9, at 90; see generally Kazuhiro Yonemoto, *Shimane bengoshi-kai—tadaima kaiin nijuichime* [The Shimane Bar Association: All Twenty-One Members Strong], translated in 25 LAW

However, there is much more need for attorney oversight in precisely those areas where such a small legal community does not exist, such as in the larger urban areas. To quote a Tokyo attorney involved in the revising of the Code of Ethics:

The Tokyo area is where a great amount of misconduct is found. So the merit of a small bar, which allows attorneys to criticize and oversee one another and to keep standards high, no longer exists in Tokyo. In rural areas, with 100 or so attorneys, there is a great fear of embarrassment in front of one's colleagues. Attorneys know each other too well to overlook wrongdoing. There is a watchful eye.<sup>65</sup>

Part of the theoretical appeal of this romantic notion of attorney self-oversight may derive from the time attorneys spend at the LTRI. Nakabo Kohei, former president of *Nichibenren*, described the need for a "herd" mentality among the students at the Institute. "I've been saying to lawyers throughout the country since I've come to *Nichibenren* that we should all be in herds. If you're in a herd, you'll see this person on your right and another on your left and eventually you will learn to see what your own location is by experience."<sup>66</sup> The problem attorney, in Kohei's mind, is the loner. "If you look at a lawyer who's ended up in trouble, you'll see that he's been by himself. The common feature of this kind of lawyer is that they are solitary and never listen to others' opinions. In short, they are like a lost child. They do not know where they are."<sup>67</sup> The assumption which underlies such comments is that the competent lawyer will also be an ethical lawyer. Thus, the argument goes, if the standard for passage of the legal examination is watered down, less qualified—and thus less ethical—candidates will become lawyers.

As an alternative to resisting expansion of its membership, one step the bar could take to strengthen its commitment to high ethical standards would be to adopt a detailed code of ethics. Yet because the Japanese legal profession relies on the fiction of community oversight to assure adherence to ethical standards, any detailed ethical standards seem redundant. As one

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IN JAPAN 115 (Daniel H. Foote trans., 1995) (describing the daily interactions of lawyers in the small bar of Shimane).

<sup>65</sup> Leonard, *supra* note 9, at 90.

<sup>66</sup> *Sunday Mainichi*, Oct. 28, 1990, 174, *quoted in* Leonard, *supra* note 9, at 94.

<sup>67</sup> *Sunday Mainichi*, Oct. 28, 1990, 174, *quoted in* Leonard, *supra* note 9, at 94.

student at the LTRI commented, "Most Japanese lawyers are not interested in the subject of legal ethics. Internal values, not written rules, are important."<sup>68</sup> This view was echoed by a district court judge:

As for career judges, who have passed the national exam and received training, they understand what a judge is through personal contact in the classroom, at social gatherings, and in discussions with other judges. They receive "character," and get in touch with their own character. Through experiencing life, we understand how judges should behave. We don't need lectures.<sup>69</sup>

Many attorneys view the code of ethics as entirely irrelevant. One attorney observed, "[t]he content of the code, written or not, is common knowledge in the lawyer's world, just as the Criminal Code has nothing to do with common people's lives, yet they behave without knowing the details of the law."<sup>70</sup> An attorney involved in the revision of the code of ethics stated, "I'm not really sure what role the code has been playing. Maybe it has had no function at all."<sup>71</sup> One Tokyo attorney who prides herself on her public service record said, "I've never consulted the Code of Ethics. It's so general. It's too broad. It's almost like nothing."<sup>72</sup> It is surprising to find that, in a legal system which has had relatively few instances of ethical violations, lawyers are either so unconcerned or unfamiliar with formal ethical rules.

However, some Japanese lawyers are critical of the informal way in which lawyers are instructed about ethical questions. A former legal lecturer commented that ethical instruction "is not done well enough. Legal ethics education means little if you only give students the written code and commentary. It should go hand in hand with practical work . . . . A two-hour lecture is not enough."<sup>73</sup> A student at the LTRI commented that ethical instruction was "too much by chance," depending more upon the nature of the lawyer's employment than any organized educational curriculum.<sup>74</sup>

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<sup>68</sup> Leonard, *supra* note 9, at 94.

<sup>69</sup> Leonard, *supra* note 9, at 94-95.

<sup>70</sup> Leonard, *supra* note 9, at 95.

<sup>71</sup> Leonard, *supra* note 9, at 95.

<sup>72</sup> Leonard, *supra* note 9, at 95.

<sup>73</sup> Leonard, *supra* note 9, at 95.

<sup>74</sup> Leonard, *supra* note 9, at 95.

Furthermore, the lack of a detailed code of ethics hurts not only lawyers, but also their clients. Without clear guidelines, the Japanese public must rely on the bar to police itself. In any dispute which might arise between attorney and client, "ethereal" standards favor the former. One attorney's comments are insightful: "There is a fear among attorneys here that a stricter, more detailed code of ethics will increase the public's chance to complain."<sup>75</sup>

It is possible that the low number of reported instances of attorney misconduct may owe less to high ethical compliance and more to reluctance to report violations. As Sherill Leonard wrote,

[c]lients may rarely lodge complaints against their attorneys because they feel ill-equipped to pass judgment on the attorney's performance; because they suspect that the bar will close ranks to protect its own; or because they shrink away from the unpleasantness associated with conflict, particularly if the attorney was introduced by a friend, colleague, or boss.<sup>76</sup>

The issue of attorney ethics in Japan is one part of the larger debate surrounding the size of the bar. Successful handling of the former may rely upon the resolution of the latter.

#### IV. *NICHIBENREN'S* FAILED ATTEMPT TO CARTELIZE THE LEGAL INDUSTRY

The bar, the government, and the main consumers of legal services are pursuing their respective institutional self-interests through regulation of the Japanese legal sector.<sup>77</sup> In particular, the bar attempted to cartelize legal services but ultimately failed owing to the availability of legal substitutes.<sup>78</sup>

<sup>75</sup> Leonard, *supra* note 9, at 97.

<sup>76</sup> Leonard, *supra* note 9, at 97-98.

<sup>77</sup> Ramseyer, *supra* note 46, at 501.

<sup>78</sup> WILLIAM R. ANDERSEN & C. PAUL RODGERS III, ANTITRUST LAW: POLICY AND PRACTICE 198 (1992) define a cartel as an "arrangement among competitors, usually producers, which has the intention or effect of limiting competition." Cartels may be relatively more successful in industries with few firms, inelastic consumer demand, high entry barriers, and government support of industry arrangements. *Id.*, at 185-6.

As demonstrated in the text, *Nichibenren* is composed of relatively few attorneys; the extreme difficulty of the bar exam and the LTRI's small size constitute very high entry barriers; and the government not only supports, but promulgates the industry arrangements. Thus, but for the availability of substitutes for legal services and but for bar members who cheat on regulations (both discussed in the text), *Nichibenren* has laid the foundation for a cartel; in turn, a cartel could increase information asymmetries

In the end, only the interests of the state bureaucracy and the major corporations are served by the small size of the bar.<sup>79</sup>

In Japan, several parties have an incentive to increase the membership of the bar and liberalize the bar's regulations generally. As discussed above, the Ministry of Justice is the main proponent of increasing *Nichibenren* membership; this would allow the Ministry to increase the number of procurators.<sup>80</sup> International lawyers are effectively excluded from either practicing in Japan or forming associations with Japanese lawyers and law firms. Potentially, they could benefit from any liberalization of the bar's regulation. Members of the general public, whether they be disaffected consumers, injured workers, victims of sexual harassment or other forms of discrimination would benefit by an increase in the number of lawyers, which would do much to satisfy the pent-up public demand for legal services. With an expansion of the number of successful applicants for the legal examinations from 700 to 1,000, those extra 300 applicants per year are obviously well-served by the expanded bar membership. Finally, those who would like to see the power of the government challenged—opposition politicians, activist lawyers, and certain academicians—would be encouraged by an expanded bar membership so that the political status quo might be more readily challenged. The most familiar examples of activist lawyers challenging the state come from the field of environmental civil litigation.<sup>81</sup>

Perhaps more revealing is an analysis of which parties would *not* benefit from liberalization of legal regulation. The Ministry of Finance, which is responsible for the financing of the LTRI, would have to divert more governmental funds towards training those extra Institute students.<sup>82</sup> Furthermore, bureaucrats and politicians generally benefit from the relatively low rate of litigation in Japan. Few legal challenges mean greater

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through unilateral, secret agreements on price terms, output, and quality. Cf. ERNEST GELLHORN & WILLIAM E KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 157-60 (1994).

<sup>79</sup> See *infra* notes 82-86 and accompanying text.

<sup>80</sup> Haley, *supra* note 55.

<sup>81</sup> See, e.g., Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 *LAW & SOC'Y REV.* 579 (1976). Expanding bar membership might mean that Japan was becoming more of a *sosho shakai* (litigious society), though whether Japanese society is intrinsically less litigious than other societies remains a hotly contested issue. See, e.g., JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 110 (1991).

<sup>82</sup> Many in the public already ask why the government is in the business of paying for the training of an educational and professional elite, especially given the instances of lawyer misconduct. Leonard, *supra* note 9, at 91.

freedom of action for the government.<sup>83</sup> The best way for the Japanese government to limit the instances of potentially embarrassing litigation is to limit the number of individuals who can bring such suits, though bureaucrats are also immunized from the legal process by many doctrines, such as justiciability, standing, and administrative discretion.<sup>84</sup>

For the most part, large corporations obtain their legal services from their in-house legal departments, which are made up of non-lawyers.<sup>85</sup> These corporations thus appear to be largely insulated from changes in the regulation of the legal industry. Similarly, the insurance sector in Japan, by successfully lobbying the government to allow it to resolve many claims without resorting to the courts, has little incentive to see the present regime changed.<sup>86</sup> Other legal substitutes, such as judicial scriveners, administrative scriveners, patent agents, tax agents, and public accountants all benefit from the current regime. These substitutes satisfy much of the excess demand for legal services which the small number of Japanese lawyers are unable to provide the Japanese public.

*Nichibenren* members are also divided concerning the proper size of their organization. In what will surely remain a fluid debate, one side of *Nichibenren* desires to limit entry into the bar. This faction wants the bar to exercise a monopoly over legal services. They support the existing regulatory regime for the legal industry, which includes 1) barriers to entry, 2) a ban on advertising, and 3) mandatory fee schedules.<sup>87</sup> The first of the three is the most severe and easily enforceable. The government controls the formal barriers to entry.<sup>88</sup> As such, those who violate the barriers are

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<sup>83</sup> Ramseyer, *supra* note 46, at 525-27.

<sup>84</sup> Ramseyer, *supra* note 46, at 525.

<sup>85</sup> Corporate counsel typically provides the strategic thinking and negotiation which goes into business deals in Japan. Only when the final product needs to be legally consummated is an attorney involved. Peter Landers, *Japan's Few 'Real' Lawyers Just Bit Players*, L.A. DAILY J., July 30, 1991, at B1.

<sup>86</sup> Insurance companies sought extra-legal means by which to settle suits arising from automobile accidents, far the largest source of litigation in Japan. For a discussion of the handling of traffic accidents in Japan, see Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990) (giving data on traffic litigation and describing how the resolution of these cases contributes to the non-litigious nature of Japanese society); Daniel H. Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 LAW IN JAPAN 19 (1995) (describing the way in which the system for handling traffic disputes has developed).

<sup>87</sup> Ramseyer, *supra* note 46, at 507.

<sup>88</sup> The Ministry of Justice investigates and prosecutes those who violate the ban on unauthorized legal practice. The Ministries of Finance and Justice together determine the size of the LTRI student body. The Ministry of Foreign Affairs controls the influx of foreign lawyers by limiting the number of available visas.

susceptible to criminal prosecution.<sup>89</sup> The latter two regulations are less readily enforceable and more routinely violated. While formally prohibited from doing so, some Japanese attorneys advertise.<sup>90</sup> Likewise, the mandatory fee schedule system can be very complicated, leading lawyers to apply, misapply, or ignore the schedule altogether.<sup>91</sup>

The bar's cartelization attempt effectively increased the price of legal services without increasing their quality.<sup>92</sup> Because the supply of legal services is restricted, existing services are bid up in price. Thus, maintaining high legal examination standards may increase the marginal quality of legal services, the overall quality of legal services is decreased: many consumers of legal services will use lower quality lawyer-substitutes, such as judicial scriveners or tax agents, rather than compete for the scarce attorney services.

Parties to a dispute can also litigate *pro se*. In only five percent of Summary Court cases and forty percent of all district court trials have both parties retained representation.<sup>93</sup> Those who do represent themselves in court often have the benefit of out of court advice from lawyer-substitutes.<sup>94</sup> Larger litigants, such as major corporations and insurance companies, which encounter the possibility of litigation more regularly than the average Japanese citizen, have institutionalized their lawyer-substitutes.<sup>95</sup> Corporations have their legal departments, and insurance companies have their "settlement policies," both of which came about over the vociferous opposition of the bar.<sup>96</sup>

Japanese society has adapted to the shortage of legal services with a variety of self help measures. The best example of this is rental deposits. In order to rent a commercial space, a tenant must often make a deposit of two to three years' rent; for residential arrangements, the deposit can climb as

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<sup>89</sup> *Bengoshi hō* [Attorneys Act], Law No. 205 of 1949, § 72.

<sup>90</sup> *Zadankai: Gendai no bengoshi katsudo (Roundtable: Current Attorney Activities)*, 611 JURISUTO 17, 21 (1976), cited in Ramseyer, *supra* note 46, at 510.

<sup>91</sup> Ramseyer, *supra* note 46, at 510.

<sup>92</sup> Thus, *Nichibenren* can be seen to have satisfied some, if not all, of the preconditions for cartelization. See ANDERSEN & RODGERS, *supra* note 78.

<sup>93</sup> 1 SHIHO TOKEI NEMPO: MINJI, GYOSEI HEN [Annual Report of Judicial Statistics: Civil and Administrative Cases] 155, 180-81 (*Saiko saibansho jimuso kyoku* ed. 1982), cited in Ramseyer, *supra* note 46, at 517.

<sup>94</sup> Ramseyer, *supra* note 46, at 517-519.

<sup>95</sup> See *supra* notes 85-86 and accompanying text.

<sup>96</sup> Ramseyer, *supra* note 46, at 518-19.

high as five years' rent.<sup>97</sup> Another example of self help measures is the use of introductions in many business and social settings. By pre-screening potential parties to a transaction, the business or individual is able to take advantage of a system of informal but very real social sanctions.

*Nichibenren's* self-aggrandizing regulation of the legal profession has important effects on the whole of Japanese society.<sup>98</sup> The Japanese bureaucracy operates on and promotes an image of public harmony and

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<sup>97</sup> Wayne Burns, *Recognizing that Land Is Too Precious to Squander*, FAR E. ECON. REV., Mar. 8, 1984, at 48, 49-50; Charles Smith, *Sitting On a Fortune in the World's Most Expensive Spot*, FAR E. ECON. REV., Feb. 28, 1985, at 55.

<sup>98</sup> Self-aggrandizing or collusive action of this type has been studied by Mancur Olson. The following tenets of Olson's general theory of collective action are highly applicable here:

1. There will be no countries that attain symmetrical organization of all groups with a common interest and thereby attain optimal outcomes through comprehensive bargaining.
2. Stable societies with unchanged boundaries tend to accumulate more collusions and organizations for collective action over time.
3. Members of "small" groups have disproportionate organizational power for collective action, and this disproportion diminishes but does not disappear over time in stable societies.
4. On balance, special-interest organizations and collusions reduce efficiency and aggregate income in the societies in which they operate and make political life more divisive.
5. Encompassing organizations have some incentive to make the society in which they operate more prosperous, and an incentive to redistribute income to their members with as little excess burden as possible, and to cease such redistribution unless the amount redistributed is substantial in relation to the social cost of the redistribution.
6. Distributional coalitions make decisions more slowly than the individuals and firms of which they are comprised, tend to have crowded agendas and bargaining tables, and more often fix prices than quantities.
7. Distributional coalitions slow down a society's capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth.
8. Distributional coalitions, once big enough to succeed, are exclusive, and seek to limit the diversity of incomes and values of their membership.
9. The accumulation of distributional coalitions increases the complexity of regulation, the role of government, and the complexity of understandings, and changes the direction of social evolution.

When considering what effect the regulation of the Japanese legal profession has on the Japanese society as a whole, the implications of Olson's tenets are fascinating and deserving of their own Comment. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 74 (1982).

consensus.<sup>99</sup> Any threat to these ideas, such as lawsuits against the government, are to be discouraged to the fullest extent possible. The discussion of harmony shifts attention away from the economic rationales for the attempted cartel and focuses it squarely on culture. Ramseyer criticizes this concept of harmony as rhetoric, stating that “[t]he myths of harmony and hierarchy transform a potential price-fixing cartel and private bureaucratic utility-maximizing strategy into a celebration of traditional Japanese values.”<sup>100</sup> Thus, by discussing the regulation of the legal industry in non-economic, normative terms, Japanese bureaucrats and lawyers are able to conceal what is essentially a transfer of wealth.<sup>101</sup>

## V. CONCLUSION

*Nichibenren* membership seems destined to increase. Rather than resist this change, Japanese lawyers should embrace it. By increasing its ranks, the bar can reclaim much of the work which it has lost to the host of legal substitutes available in contemporary Japan. By discarding the elitist idea that only a small bar can be ethical, Japanese attorneys can increase not only the size of their membership but also the visibility and transparency of their ethical oversight, further enhancing the confidence the public has for the legal profession.

Also, an expanded membership would allow the bar to fulfill its mandate of protector of human and civil rights. A Tokyo attorney stated that “[t]he size of the profession should be seen as an issue under Article 1 of the Code of Ethics because size prevents us from meeting our mission to serve human rights and social justice.”<sup>102</sup> The victims of many of Japan’s social problems are largely hidden from view. Wronged consumers, the handicapped,<sup>103</sup> those who experience long pre-trial detentions, and those who have suffered workplace injuries, sexual harassment or job

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<sup>99</sup> Ramseyer, *supra* note 46, at 526.

<sup>100</sup> Ramseyer, *supra* note 46, at 534.

<sup>101</sup> Ramseyer, *supra* note 46, at 538.

<sup>102</sup> Leonard, *supra* note 9, at 98.

<sup>103</sup> The plight of the disabled in Japan is a clear case of societal injustice which Japanese lawyers need to address. Japan has no law protecting its disabled citizens from discrimination. Japan lags far behind the United States in making buildings accessible to wheelchairs. The social ostracism of the disabled in Japan is comparable to racial discrimination. Extreme examples of isolation exist even in the context of the family. See, e.g., Nicholas D. Kristof, *Prejudice Deepens Pain for Japan's Disabled*, N.Y. TIMES, Apr. 7, 1996, at A1, A4.

discrimination all lack a voice in the Japanese legal system.<sup>104</sup> As defenders against injustice, Japanese lawyers constitute a group of highly educated, well organized professionals. Given their ability to access the legal system, and contrasted with the average citizen's inability to do so, the lawyer is uniquely positioned to promote justice in the Japanese society. To achieve this potential, the Japanese bar must increase its membership, thereby extending to all Japanese citizens the protection of the law.

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<sup>104</sup> Leonard, *supra* note 9, at 98; see also Leon Wolff, *Eastern Twists on Western Concepts: Equality Jurisprudence and Sexual Harrassment in Japan*, 5 PAC. RIM L. & POL'Y J. 509 (1996).

APPENDIX<sup>105</sup>

Year	Applicants	Number Passing	Percent Passing
1949	2,570	265	10.31
1950	2,806	269	9.59
1951	3,668	272	7.42
1952	4,761	253	5.31
1953	5,138	224	4.36
1954	5,250	250	4.76
1955	6,347	264	4.16
1956	6,737	297	4.41
1957	6,920	286	4.13
1958	7,109	346	4.87
1959	7,858	319	4.06
1960	8,363	345	4.13
1961	10,909	380	3.48
1962	10,762	459	4.27
1963	11,686	496	4.24
1964	12,698	508	4.00
1965	13,644	526	3.86
1966	14,867	554	3.73
1967	16,460	537	3.26
1968	17,727	525	2.96
1969	18,453	501	2.72
1970	20,160	507	2.51

<sup>105</sup> Landers, *supra* note 2, at B1; JOHN O. HALEY, LAW AND THE LEGAL PROCESS IN JAPAN 9 (1994).

## APPENDIX, CON'T.

Year	Applicants	Number Passing	Percent Passing
1971	22,336	533	2.39
1972	23,425	537	2.29
1973	25,339	537	2.12
1974	26,708	491	1.84
1975	27,791	472	1.70
1976	29,088	465	1.60
1977	29,214	465	1.59
1978	29,390	485	1.65
1979	28,622	503	1.76
1980	28,656	486	1.76
1981	27,810	446	1.60
1982	26,317	457	1.74
1983	25,138	448	1.78
1984	23,956	453	1.89
1985	23,855	486	2.04
1986	23,904	486	2.03
1987	24,690	489	1.98
1988	23,352	512	2.20
1989	23,202	506	2.18
1990	22,900	499	2.18
1991	22,596	605	2.67
1992	23,435	630	2.68