

## Transforming Legal Education in Japan and Korea

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Looking back to the 1980s, the image of Japan, Korea and the other Asian “Tigers” was very different than it is today. The Japanese economy was soon going to surpass that of the United States, and Japanese companies were buying Pebble Beach, Rockefeller Center and other trophy properties. Popular books warned of the Japanese threat and counseled Americans on how to cope with *Japan as Number One*.<sup>1</sup> Other Asian countries were close behind.<sup>2</sup> East Asia was viewed as having developed an alternative model of capitalism, based on an activist “developmental state” rather than the free market orthodoxy of Anglo-American capitalism.<sup>3</sup> This model was deemed to be exportable, perhaps even to the United States.

One key feature of this model was that it seemed to be a system of capitalism without lawyers. Bar passage in Northeast Asia was notoriously low, and practicing lawyers did not play the same prominent role in business and government as in the United States. Prominent commentators, including Derek Bok, then-President of Harvard University, focused on the fact that there were about one twentieth the number of legal professionals in Japan per capita as in the United States and called for us to become “more like them.”<sup>4</sup> If only our best graduates, Bok suggested, became engineers like the

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<sup>1</sup> EZRA F. VOGEL, *JAPAN AS NUMBER ONE* (1979).

<sup>2</sup> See, e.g., ALICE AMSDEN, *ASIA’S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989).

<sup>3</sup> CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982).

<sup>4</sup> Derek Bok, *The President's Report to the Board of Overseers of Harvard University for 1981-1982*,

Japanese rather than lawyers, we would be better off.<sup>5</sup>

What a difference a decade makes. The Japanese economy spent the 1990s bouncing in and out of recession. Professor Ezra Vogel, whose 1979 book *Japan as Number One?* heralded the earlier era of Japanophilia, authored a new book entitled *Is Japan Still Number One?* and answered in the negative.<sup>6</sup> Meanwhile, the Korean economy weathered a sudden and severe economic crisis in the mid-1990s, and had to be rescued by the International Monetary Fund. Both countries' economic models have been criticized as stagnant and corrupt, as analysts excoriate many of the very features they had celebrated a few years earlier.<sup>7</sup>

As politicians and bureaucrats in Northeast Asia attempt to resolve their economic malaise, one of the most surprising elements is the idea that law is part of the solution for Japan and Korea. Rather than focusing on the United States having too many lawyers, the issue today is how the countries of Northeast Asia can produce *more* lawyers. Legal education is at the center of the debate over the role of law in ordering society and the need to revitalize economic institutions. In both Japan and Korea, for the first time, there have been proposals to develop three-year graduate, legal education programs. Sometimes called A-American@-style legal education, the new, controversial model has made inroads in both countries, a rare development in any country outside the Anglo-American tradition.

This story of the introduction of the graduate legal educational apparatus into

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reprinted in 33 J. LEGAL EDUC. 570 (1983).

<sup>5</sup> Id. at 574 (stating that "Engineers make the pie grow larger; lawyers only decide how to carve it up.").

<sup>6</sup> EZRA VOGEL, *IS JAPAN STILL NUMBER ONE?* (2001).

<sup>7</sup> Id.

Northeast Asia is an example of importing legal institutions from outside and provides a comparative context to understand the conditions under which such transplants will not only survive, but thrive. This comment will first address the status quo ante by describing the traditional system of legal education in Japan and Korea; it will then discuss the new proposals for reform; and, finally, it will speculate as to where recent developments might lead.

### I. Status Quo Ante

The status quo ante was, of course, more complex than the simple imagery of “capitalism without lawyers” suggested. Although Japanese and Korean capitalism may have functioned with a relatively small number of lawyers, legal education was absolutely central to the systems of governance. As in virtually the entire world, legal education was primarily an undergraduate phenomenon and followed the German concept that legal education serves as a pathway to bureaucracy, and to big business, as well as to distinctively legal professions. Legal education was high status, generalist training, rather than specialized graduate, professional, legal education designed to produce practicing lawyers. At the center of the Japanese system was the undergraduate law faculty at Tokyo University, which produced the majority of elite bureaucrats as well as leaders in law, finance and business.<sup>8</sup> Seoul National University played a similar role in Korea.

In both countries, the bar exam was treated as a separate goal for a very small proportion of those who completed undergraduate legal education. Relatively few legal graduates tried to pass the bar, and a very small proportion actually succeeded. The bar

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<sup>8</sup> JOHNSON, MITI, *supra* note 3, at 58-62 (detailing career choices of Tokyo law graduates and reporting that at one point 73% of officials at the level of department chief or higher were Tokyo graduates.)

pass rates fluctuated between two and three percent in Japan and Korea for most of the postwar period.<sup>9</sup> Most bar passers devoted additional years of study to the process beyond the undergraduate degree.

For those lucky and talented few who passed, the bar exam was the gateway to, rather than the end-point of, professional legal training. Special institutions run by the Supreme Courts in both countries, called the Judicial Research and Training Institute (JRTI) in Korea, and the Legal Research and Training Institute (LRTI) in Japan, would accept bar passers and train them together for a two-year period.<sup>10</sup> Prosecutors, judges, and practicing lawyers would be trained together, socialized together, and then disseminated into the work force in their respective fields. In sum, legal education was really divided into three different components: undergraduate legal education, a series of cram schools which would prepare one to pass the bar, and, finally, a special professionalized legal education, which came after bar passage and served as the only real practical training one would receive before entry into the various legal professions.

In Japan, the bar exam was administered by a committee consisting of a Justice Ministry official, Secretary General of the Supreme Court, and a practicing attorney recommended by the federation of bar associations (Nichibenren). In Korea, the exam was similarly controlled by the Supreme Court. Exam passage was kept at 500 persons a year in Japan and 300 in Korea. In Japan, the nominal reason was limitation on the capacity of the LRTI building. In fact, the number was kept very small intentionally, through a consensus among the government, courts and, of course, the practicing bar,

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<sup>9</sup> See, e.g., JOHN HALEY, *AUTHORITY WITHOUT POWER* 107 (1991) (Japan); Jae Won Kim, *American Law Schools in Japan and Korea: A Reform or Mockery?* Paper presented at Law and Society Association Annual Meeting, Vancouver, May 27-31, 2002 (on file with author) at 5.

<sup>10</sup> Subsequently reduced to 18 months in Japan.

which preferred to collect monopoly profits from a restricted profession. Once admitted to the Training Institutes, prospective lawyers undertake a combination of classroom and practical training, during which time an individual might work in all three “branches” of the legal profession: the bar, the court and the prosecutors’ office. This tends to facilitate a corporate identity among the three sub-professions.<sup>11</sup>

There are many **implications** of this model of restricted access to the legal profession. It is fairly difficult to obtain legal services in both countries, and much of the supposed non-litigiousness of people in each society can be attributed to the lack of the ability to find a lawyer if one is needed.<sup>12</sup> Furthermore, most lawyers are concentrated in the big cities of Seoul, Tokyo and Osaka. Many people also criticized the quality of legal professionals. Beginning in the late 1980s and accelerating in the 1990s, pressure to change this system developed. The pressure came from several sources. The Ministry of Justice and Supreme Court in Japan wanted to increase the number of prosecutors and judges. Big business began to complain about the lack of capacity in the legal system. As the economy declined, more disputes emerged at the same time that deregulation was decreasing government control over the economy. When business is embedded in a network of dense relationships with its workforce, buyers, suppliers and creditors, disputes can be suppressed or dealt with informally. The shrinking pie (or at least less

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<sup>11</sup> Actual movement from one profession to another is rare in Japan but a bit more common in Korea, where judges and prosecutors frequently retire into the private bar.

<sup>12</sup> For variants of the culturalist thesis that Japanese and Koreans preferred to avoid litigation, see Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (ARTHUR TAYLOR VON MEHREN ED., 1963) and PYONG-CHOON HAHM, *KOREAN JURISPRUDENCE, POLITICS AND CULTURE* (1986); compare John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978); Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC'Y REV. 219 (1987); Kun Yang, *Law and Society Studies in Korea: Beyond the Hahm Thesis*, 23 L. Soc. Rev. 891 (1989).

rapidly expanding pie) may have frayed such “social” ties and led to more disputes. In Korea, democratization beginning in 1987 also contributed to the explosion of civil and administrative litigation.<sup>13</sup> All of these developments reflected a sense that the institutions that had promoted high growth were no longer able to function in the era of economic decline, and trust in the government as a kind of steward of the economy disappeared.

## II. Proposals for Reform

The first step in meeting new demands was an expansion in the number of bar passers. Beginning in the early 1990s, both countries gradually expanded the number of passers to the current levels of over 1000 bar passers a year. Nevertheless, the approach is still a quota system, allowing only a certain number of the top exam takers to pass. Passage is not a matter of setting a standard that anyone can meet.

The first Korean proposal suggesting the adoption of an American style, three-year graduate law school emerged in 1995 in the Report of the Presidential Commission on the Promotion of Globalization. The proposal was embedded in a broader program of judicial reform, but it was the law school element that emerged as the most controversial.<sup>14</sup> Opponents seized on the “American-style” nature of the institution and sought to block the proposal.

In Japan, the proposal emerged later but gained momentum rather quickly. A consensus on the need to expand the capacity of the legal system to handle civil litigation had been gradually developing in the 1990s. A key juncture for legal education was the convening of a Justice System Reform Council (Council) by legislation in June 1999,

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<sup>13</sup> Jeong-Oh Kim, *The Changing Landscape of Civil Litigation*, in RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 321 (2000).

<sup>14</sup> Jae Won Kim, *supra* note 9, at 8.

constituted under the Cabinet a month later. After two years of deliberations, the Council was released on June 12, 2001.<sup>15</sup> The declared aim of the Council is nothing less than an overhaul of the justice system and the increased resort to law as a means of social ordering in Japan. Specific goals include: (1) the establishment of new systems to process certain cases, such as labor, IP and family cases; (2) expanding civil execution; (3) lower fees; (4) adoption of a “loser-pays” rule; (5) revision of the Administrative Case Litigation Law, whose narrow approach to standing and justiciability restricts effective judicial control of administration; (6) establishment of a public defender system and other systems to improve pretrial detention; and (7) development of victims’ rights. As part of a transition towards a “law-governed society,” the report includes calls for an expansion in the number of judges and prosecutors. The report also explicitly seeks to loosen political and administrative control and move from “ex ante/planning” toward what the report characterizes as an “ex post review/remedy” society.

Especially noteworthy for our purposes is reform of the legal training system, with a call for the creation of “law schools” to better train legal professionals.<sup>16</sup> Even before the final report called for graduate law schools, law faculties had begun to develop plans, and momentum developed rapidly for inclusion of the plan in the final report of the Council. A general concept of a new law school quickly steamrolled into a massive effort by private actors, virtually forcing the Council to push for realization of the plan. Legislation passed the Diet<sup>17</sup> in December 2002, existing law faculties submitted plans

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<sup>15</sup> *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21<sup>st</sup> Century* (June 12, 2001).

<sup>16</sup> For details on the proposals, see Setsuo Miyazawa, *Education and Training of Lawyers in Japan: A Critical Analysis*, 43 S. TEX. L. REV. 491 (2002).

<sup>17</sup> The Diet is the Japanese national legislature.

for the new law schools to the Ministry of Education in July 2003, and charters were granted to 66 out of 72 applicant schools in November 2003.<sup>18</sup> The law schools are expected to open their doors in April 2004.

Interestingly, although Korea was the source of the idea for having graduate legal education, the plans ran into political difficulty in Korea. The primary reason was that the Korean bar was better situated than the Japanese bar to fight the proposal. In particular, Lee Hoi Chang, the head of the main opposition party, was a former Supreme Court justice who vigorously opposed the proposal. Judges were also opposed to it because, unlike the Japanese judiciary, the Korean judiciary has traditionally been seen as a point of entry into the private bar in Korea. Japanese judges saw an expanded bar as an opportunity to increase the number of judges, whereas, Korean judges saw expansion as a threat to their ability to retire into lucrative private sector positions. Because the current system of legal training in Korea is controlled by judges, their assent to the new plan would be crucial for passage. In short, the constituency for creating new law schools did not coalesce in Korea as it did in Japan.

While the initial proposal was stillborn in Korea, the idea of graduate law schools remains in play. Under President Kim Dae Jung, the proposal resurfaced as part of an overhaul of the education system, but official standards for the schools have not yet been adopted. At least one Korean university has set up, on its own, a three-year graduate legal education program with substantial English language instruction, even though it is not completely clear how this will interface with the bar and what the graduates will do.<sup>19</sup> According to some involved in the process, the goal is to establish Korean lawyers as

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<sup>18</sup> 4 of the 72 applications were rejected and two others are pending further review.

<sup>19</sup> Handong Global University in Pohang. See [www.han.ac.kr/n\\_english](http://www.han.ac.kr/n_english) [last checked October 30, 2003].



legal professionals who can serve clients all over Asia; it really is an effort at globalization by Korean educators despite the fact that the government has been slow to approve their plans.

### III. Where Recent Developments Might Lead

While it is still unclear exactly what form graduate legal education will take in Korea and Japan, the debate over legal education reflects the perceived need by the legal professions in both countries to globalize, to expand, and to upgrade their professional skills for a new, more competitive, economy. Whether or not the new systems will be effective in meeting those goals is unclear. In my view, as long as there is a quota system or a quota approach for admission to the legal profession, there will be great pressure on legal education, of whatever form, to serve primarily as a kind of bar preparation course, rather than as a truly professional education emphasizing skills. The quota system acts as an artificial source of scarcity in the market for legal services, and even the most talented applicants have an incentive to focus on passing the exam rather than acquiring skills. Interestingly, the continued presence of the post-bar legal training institutes, no doubt necessary as a political compromise to ensure the passage of law school reform proposals, means that the law school will not be the primary site for skills acquisition.

The mid-1990s reform proposals in Japan and Korea called for nothing less than a complete overhaul of the systems of legal education and training. Nominally “American” in style, the proposals were indigenously produced and reflected borrowing rather than imposition. They should be understood as reflecting local politics, as demonstrated by the different fates of law school proposals in Japan and Korea. Japan is moving headlong into an ill-defined transformation, while the Korean proposal remains in limbo. The

shifting focus of legal education in Japan toward training professionals rather than generalists for the bureaucracy and business, heralds a broader social transformation in which lawyers are likely to be leading figures.<sup>20</sup> This transformation bears close watching in years ahead.

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<sup>20</sup> Curtis J. Milhaupt and Mark D. West, *Law's Dominion and the Market for Legal Elites in Japan*, paper available at [www.ssrn.com](http://www.ssrn.com), June 18, 2002.

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