SPECIAL ISSUE: JAPANESE LEGAL REFORM

Proposal for Judicial Reform in Japan: An Overview

Hon. Sabrina Shizue McKenna

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William S. Richardson School of Law
Proposal for Judicial Reform in Japan: An Overview

Sabrina Shizue McKenna *

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I. Introduction

Japan has been undergoing a major initiative toward fundamental reforms of its justice system. On June 9, 1999, the Japanese Cabinet promulgated legislation forming the Judicial Reform Council (“JRC”) to
review the existing justice system and propose changes. According to its enabling legislation, the mandate of the JRC is

[to clarify the appropriate role of the justice system in the twenty-first century, and to investigate and consider fundamental measures necessarily related to the realization of a justice system that is more user-friendly to citizens, allows for participation of citizens in the justice system, considers, improves, and strengthens ideals for the legal profession, as well as other related reforms and foundational requirements of the justice system.]

The JRC is required to report back to the Cabinet with its final recommendations in July 2001, and has indicated that it will be issuing its Final Report to the Prime Minister of Japan on June 12, 2001.

The Japanese Government translates the initiative as one for “judicial” reform. “Judicial” is generally defined as “[b]elonging to the office of a judge,” but also includes “[o]f or pertaining or appropriate to the administration of justice.” In the United States, “judicial” is more commonly used to refer to the court system. “Juridical,” which is defined as “[r]elating to administration of justice, or office of a judge[,]” may be a more appropriate term to describe the sweeping nature of the proposed changes described below.

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2 Id. Some translations from Japanese to English, including this one, are those of the author. The author has attempted to accurately translate the intent and meaning of the Japanese language originals—as such, not all translations are fully literal. The author takes full responsibility for any inaccuracies.

3 See Jud. Reform Council, The Points at Issue in the Judicial Reform (Dec. 21, 1999), at http://www1.kantei.go.jp/foreign/judiciary/0620reform.html (last visited June 28, 2001) (published in English, from the official Web site of the Prime Minister and Cabinet of Japan). The author was informed of the June 12, 2001, date by Japanese attorney Satoru Shinomiya, who was a member of the Japan Federation of Bar Associations (“JFBA”) State of Hawai`i Judicial System Research Committee, is actively involved with the JFBA’s reform efforts, and is closely following the Judicial Reform Council’s (“JRC”) activities.

4 Id.

5 BLACK’S LAW DICTIONARY 759 (5th ed. 1979). “Judicature,” defined as “[t]he state or profession of those officers who are employed in administering justice[,]” id., has the broader meaning which appears to be intended here, e.g., American Judicature Society.

6 Id. at 765.
Although the mandate and resultant proposals relate to a wide spectrum of the Japanese justice system, as a practical matter, the main issues in controversy, (1) whether to adopt a *housouichigen* system, in which judges are selected from practicing members of the bar rather than from career assistant judges, and (2) whether to adopt a system allowing for citizen participation in judicial decision making, such as the jury or lay judge systems, are directly related to court or judicial reforms. Having noted the scope of the JRC’s mandate and proposals, the author will continue to refer to the initiative as one for “judicial” reform.

This article will first provide, in Part II, background information necessary to more fully understand the current judicial reform initiative. Part III will describe the work of the JRC, its interim proposal, and the controversial issues. Part IV will conclude with possibilities for the future.

**II. BACKGROUND**

**A. The Legal Profession in Japan**

To more fully understand the issues discussed below, it is first important to understand the Japanese system for becoming a member of the three branches of the legal profession: attorneys, public prosecutors, and judges. At present, a person must pass the rigorous National Bar Examination\(^7\) for entry into the Legal Training and Research Institute (*Shihou Kenshuu Sho*) (“Training Institute”), which is under the jurisdiction of the Supreme Court of Japan.\(^8\) The National Bar Examination is extremely competitive, and, until 1991, only about 500 persons out of 20,000 examinees per year were admitted into the Training Institute.\(^9\) Recent reform efforts have included attempts to increase the number of admittees; as such, the number of admittees is now 1,000 per year.\(^10\) This is still a very low number, and the current judicial reform

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\(^7\) Almost all persons who pass the National Bar Examination are graduates of undergraduate law faculties of prestigious universities, such as Tokyo, Keio, and Waseda. It is not necessary, however, to be a college graduate, and, on occasion, widespread media attention has been placed on non-traditional persons passing the examination, such as housewives with no college education.


\(^10\) Id.
initiative also addresses the need to increase the number of members of the legal profession.

In any event, a person passing the National Bar Examination completes eighteen months to two years of training and must pass a relatively ministerial final examination before choosing one of three possible career paths: attorney, public prosecutor, or assistant judge.\(^{11}\)

In the United States, whether or not a state has a “unified bar,” as does Hawai’i,\(^{12}\) movement between attorney, prosecutor, and judge is not unusual. Both attorneys and prosecutors are considered members of the “bar,” and, in Hawai’i, are members of the same Hawai’i State Bar Association. Judges in Hawai’i are also members of this organization. In the United States, attorneys, prosecutors, and judges, overall, consider themselves to be part of the same profession.

In comparison, in Japan, once a person chooses one of the three career paths upon graduation from the Training Institute, movement among them, although possible, is rare. Japan has a unified “bar,” but this consists only of attorneys.\(^{13}\) Public prosecutors are employed by the national Ministry of Justice and are under the direction of the Prosecutor-General (Kenji Souchou).\(^{14}\) The careers of judges, as discussed below, are generally separate and apart from those of the other two branches of the legal profession.

A historical perspective is important to further understand this division in the legal profession. Until 1923, there were two sets of bar exams: one for judges and public prosecutors, and the other for practicing attorneys.\(^{15}\) Those seeking to become judges or public prosecutors were required to complete a common, organized apprenticeship, but no organized apprenticeship was offered for attorneys until 1936.\(^ {16}\) In fact, until the formation of the Training Institute in 1947, which mandated a uniform apprenticeship program for all three branches of the profession, prospective attorneys were required to complete a different apprenticeship program than judges and public prosecutors.\(^ {17}\) In addition, until 1923, although judges and public prosecutors were qualified for admission to the

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13 Japan Federation of Bar Ass’ns, Japan Federation of Bar Ass’ns 9 (1997) [hereinafter JFBA Pamphlet] (on file with author).
14 Tanaka, supra note 11, at 556-57.
15 See id. at 550.
16 Id.
17 Id. at 550, 552.
bar, the opposite was not true; attorneys were not qualified to become public prosecutors or judges.  

Thus, in comparison to the United States, historically, in Japan, judges, public prosecutors, and practicing attorneys were not necessarily seen as three branches of a uniform legal profession. Rather, there was a historical separation between judges and public prosecutors on the one hand, and practicing attorneys on the other.

B. **Judicial Administration in Japan**

To more fully understand the issues discussed below, it is also necessary to have a general understanding of judicial administration in Japan. Whereas the United States has different court systems, such as federal, state, and local, with different administrations, Japan has a centralized judiciary under the national government.

Before 1947, Japan’s Ministry of Justice handled administration of the judiciary, including administration of the public prosecutor’s office. In an effort to promote judicial independence, this structure was changed in 1947, to give the Supreme Court of Japan control over personnel issues involving judges and judicial staff. A large General Secretariat, currently with nine bureaus and divisions and staffed by judges, attorneys, and others, was attached to the Supreme Court to manage and administer the judiciary.

In the United States, although selection methods differ between the federal judiciary and from state to state, judges are uniformly selected from experienced, practicing attorneys, including prosecutors, either through election or through appointment by a designated appointing authority. In Japan, the system of selecting judges solely from experienced, practicing attorneys, is termed *housoichigen*, or “unitary legal profession.” In comparison to the American system, Japanese judges are almost exclusively “career judges,” appointed from assistant judges.

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18 *Id.* at 550.
19 *Id.* at 52.
20 *Id.*
21 *Id.*
22 Secretary and Public Information Divisions, General Affairs, Personnel Affairs, Financial, Civil Affairs, Criminal Affairs, Administrative Affairs, and Family Bureaus. See *SUP. CT. OF JAPAN*, supra note 8, at 25.
23 *Id.*
24 For a background of judicial selection in the United States, see the various articles under the topic “judicial selection” in the official Web site of the American Judicature Society, at http://www.ajs.org/select1.html.
(hanjiho), who became assistant judges immediately upon graduation from the Training Institute. Thus, the Japanese system for judicial selection can be characterized as a “career system.”

Countries other than Japan utilizing the career system for judges include France, Germany, Italy, Austria, Sweden, and Korea. Countries other than the United States with judges in a unified bar system include England, Canada, Australia, New Zealand, and Singapore. This differentiation suggests that a career system for judges is standard among civil law nations, while the system of selecting judges from practicing attorneys is standard among common law nations.

In Japan, there have been recent amendments to the career system. From 1988 until 1991, it became possible for attorneys with fifteen years of experience and who were less than fifty-five years old to become eligible for appointment to full judgeships. From 1992, it has become possible for persons with five years of experience as an attorney and five years of experience as an assistant judge to be appointed as full judges. Since 1988, and as of November 28, 2000, however, only thirty-nine judges and seven assistant judges, for a total of forty-six judges, have been so appointed.

Having laid the general framework for the selection of judges in Japan, the topic now turns to the judges of specific courts. The Supreme Court of Japan consists of the Chief Justice and fourteen Justices. By law, at least ten Justices must be selected from distinguished judges, public prosecutors, attorneys, and law professors, and the remaining five need not be jurists. In practice, five Justices are chosen from career judges, another five from among practicing attorneys, and the third five from among other professions, including law professors. Although the Cabinet has the power to appoint the Chief Justice and other Justices of the Supreme Court, it is a customary practice for the Chief Justice to be consulted on the selection of other Justices, as well as his own successor.

25 TANAKA, supra note 11, at 554-56.
26 SUP. CT. OF JAPAN, supra note 8.
27 Id.
28 Id. at app. 23 (Number of Judicial Appointments Based on the Attorneys’ Appointment System (from 1988)).
29 Id.
30 Id.
31 SUP. CT. OF JAPAN, supra note 8, at 37.
32 TANAKA, supra note 11, at 555.
33 SUP. CT. OF JAPAN, supra note 8, at 25.
With respect to appointment and placement of judges of the High Courts, District Courts, and other inferior courts, although the Cabinet technically has appointment power, in actuality, the Cabinet rubber-stamps the Supreme Court’s recommendations.\footnote{34}{TANAKA, supra note 11, at 555.}

Assistant judges are employed by the national judiciary and are eligible to appointment as full judges after ten years.\footnote{35}{SUP. CT. OF JAPAN, supra note 8, at 37.} During their tenure as assistant judges, they study to become judges and eventually serve on five-judge or three-judge panels.\footnote{36}{There are apparently desirable career tracks in the judiciary, leading to the possibility of eventual greater success, such as appointment to the High Courts or the Supreme Court.} Although almost all assistant judges are appointed as full judges after their ten year apprenticeship, on occasion, the Supreme Court has declined to submit names of assistant judges to the Cabinet.\footnote{37}{TANAKA, supra note 11, at 558.} As of 1999, in addition to the fifteen Justices of the Supreme Court, there were 1,385 judges, 735 assistant judges, and 806 summary court judges in Japan.\footnote{38}{The Secretariat of the Judicial Reform Council, The Japanese Judicial System (July 1999), at http://www.kantei.go.jp/foreign/judiciary/0620system.html (published in English, from the official Web site of the Prime Minister and Cabinet of Japan) (last visited June 28, 2001). Graduation from the Training Institute and experience as an assistant judge, public prosecutor, or practicing attorney are not prerequisites for appointment as a summary court judge, although three years of experience in one of these three branches of the legal profession does qualify one for such an appointment. Persons otherwise deemed knowledgeable and qualified can be appointed as summary court judges, and a significant number of former court clerks have and continue to serve as summary court judges. Id.; TANAKA, supra note 11, at 556.}

With respect to judicial administration, the Supreme Court exercises its administrative and rule-making authority through resolutions of the Judicial Conference, which consists of the fifteen Justices and is presided over by the Chief Justice.\footnote{39}{SUP. CT. OF JAPAN, supra note 8, at 25.} The Judicial Conference meets every Wednesday to discuss matters relating to judicial administration and rule-making.\footnote{40}{Id.}

All in all, the Supreme Court of Japan not only exercises supreme judicial authority and rule-making authority, it also enjoys, in its own words, “the highest authority of judicial administration.”\footnote{41}{Id.} Thus, it is important to recognize that the centralized nature and administrative
structure of the Japanese judiciary makes it possible for the Supreme Court of Japan and its General Secretariat to wield significant power over issues of judicial reform.

C. Background of Previous Judicial Reform Measures

The author will briefly address prior judicial reform measures from two perspectives. First, the Supreme Court of Japan has compiled and published its preliminary thoughts with respect to the current judicial reform initiative, which contains its summary of previous judicial reform measures. Second, other sources, referenced below, also contain information regarding previous judicial reforms.

There have been several prior judicial reform movements in Japan. According to the Supreme Court of Japan, these can first be divided into pre-World War II (“WWII”) and post-WWII reforms. The Supreme Court further divides post-WWII reforms into three phases: (1) from the passage of the 1946 Constitution until the formation of the Temporary Judicial System Review Committee (“Temporary Committee”) in late 1955; (2) from the Temporary Committee formation in late 1955 until late 1975; and (3) from late 1975 until the current JRC.

According to the Supreme Court, the pre-WWII “reform” corresponded with the formation of modern, post-Tokugawa Japan during the Meiji era, culminating in the promulgation of the Meiji Constitution in 1889. The Meiji Constitution called for establishment of a court system pursuant to law, and later legislation established a judicial system and legal system, incorporating French and German influences.

The Supreme Court’s brief summary does not refer to the 1923 Jury Act, which took effect in 1928. Although the Act granted a right to jury trial in criminal cases, most defendants waived this right, and from 1928 until the 1943 suspension of the Act, only 484 jury trials took place. Of these, there was apparently a conviction rate of about 84%.

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42 *Supreme Court’s Thoughts*, supra note 9.

43 *Id.*

44 For histories of the revisions leading to the 1946 Constitution, see *TANAKA*, supra note 11, at (642-85).

45 *Supreme Court’s Thoughts*, supra note 9.

46 *Id.; see also* *TANAKA*, supra note 11, at 621-41.

47 *Supreme Court’s Thoughts*, supra note 9; *TANAKA*, supra note 11, at 163-53.

48 Baishinho [Jury Act], Law No. 50 of 1923.

49 *TANAKA*, supra note 11, at 482.

50 *Id.*
which is significantly less than the near 100% conviction rate in recent judge-tried criminal cases in Japan.\textsuperscript{52}

According to the Supreme Court, the first phase of judicial reform occurred during the post-WWII period, from 1946 to late 1955. Resulting reforms included the passage of legislation governing courts, attorneys, the bar examination system, criminal procedure, and the formation of the system from which attorneys, prosecutors, and assistant judges receive their training through the Supreme Court’s Training Institute.\textsuperscript{53}

The second post-WWII phase of reforms, during the twenty-year period beginning in late 1955, was prompted by a perceived need to immediately increase the number of judges. Whether due to a reduction in the number of graduates from the Training Institute requesting entry into the judiciary\textsuperscript{54} or an increase in the number of case filings,\textsuperscript{55} a serious backlog developed in the courts. Therefore, a Temporary Commission, consisting of members from the three branches of the legal profession, was formed.\textsuperscript{56}

This Temporary Commission considered the possibility of increasing the number of judges through the \textit{housouichigen} system by appointing judges from attorneys,\textsuperscript{57} but eventually rejected the idea in its 1964 Opinion Paper. It instead recommended changes within the existing system to deal with the backlog.\textsuperscript{58} The Temporary Commission believed the \textit{housouichigen} system to be desirable but declined to recommend its adoption.\textsuperscript{59} The Japan Federation of Bar Associations (“JFBA”) strongly objected to this rejection of the \textit{housouichigen} system.\textsuperscript{60} Therefore, since at least 1964, the issue of \textit{housouichigen} has been a focal point for judicial


\textsuperscript{52} K. Kawakami, Comments at the Special Panel Discussion (Plenary Session) regarding “Querying the Ideal Judicial System for the 21st Century,” JFBA Judicial Symposium (Nov. 17, 2000) (Mr. Kawakai is a former public prosecutor). The reasons for this high conviction rate are beyond the scope of this article.

\textsuperscript{53} Supreme Court’s Thoughts, supra note 9.

\textsuperscript{54} Id.

\textsuperscript{55} Tanaka, supra note 11, at 536.

\textsuperscript{56} Supreme Court’s Thoughts, supra note 9.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Jud. Reform Council, supra note 3.

\textsuperscript{60} Id.
reform from the perspective of the JFBA. In any event, according to the Supreme Court, due to the lack of cooperation from the JFBA, only a few of the reforms proposed by the Temporary Commission, such as increasing the number of court conciliation commissioners and areas of court specialization, were adopted.

In 1970, disagreement arose between the Supreme Court of Japan and the JFBA regarding increasing the jurisdictional limit of the summary courts from 100,000 yen to 300,000 yen. Due to the Diet’s request that the three branches of the legal profession attempt to agree on the issue, a council was formed in 1975 to address this and other issues of common interest to the branches of the legal profession. All in all, according to the Supreme Court, the second phase of post-WWII judicial reform can be characterized as one in which proposed reforms were stymied because of ideological differences between the Supreme Court of Japan and the JFBA.

61 In actuality, Japan’s practicing attorneys have been raising housouichigen as an issue since at least the 1940’s. Additionally, for a few years before and after passage of the modern Bengoshi Hō [Practicing Attorneys’ Law], Law No. 205 of 1949, at http://www.nichibenren.or.jp/english/regulati1.htm (last amended May 23, 1986), a significant number of practicing attorneys were appointed to judgeships, and the number of judges appointed from among practicing attorneys and from among assistant judges was fairly equal. For example, the number of judicial appointments from practicing attorneys compared to the number of appointments from people who had recently finished training at the Training Institute ranged from 77 to 72 in 1947, 92 to 106 in 1948, 95 to 84 in 1949, 43 to 57 in 1950, 34 to 51 in 1951, and 30 to 45 in 1952. See TANAKA, supra note 11, 552. From 1953 to 1960, the numbers went to 26 to 67, 19 to 73, 8 to 77, 10 to 65, 18 to 69, 20 to 81, 22 to 83, and 18 to 75, and have remained very low. See id. (Clearly, the number of judges appointed from the ranks of practicing attorneys has fallen dramatically since the late 1940s. Hence, the current controversy.)

62 Conciliation commissioners are selected from among citizens “of broad knowledge and experience and of great insight.” SUP. CT. OF JAPAN, supra note 8, at 41. A conciliation committee is composed of one judge and two or more commissioners and is organized by the district (general jurisdiction trial court), or family or summary (limited jurisdiction trial courts). Id. The committees seek to secure amicable settlements of civil and domestic disputes, by recommending mutual concessions or by recommending a compromise plan. Id.

63 Supreme Court’s Thoughts, supra note 9.

64 At today’s exchange rate of around 125 yen to a dollar, this would amount to an increase from $800 to $2400. In 1970, before the yen rate floated against the dollar, the rate was fixed at 360 yen to the dollar, so this would have amounted to an increase from $278 to $833 in 1970 dollars.

65 The Diet is Japan’s Parliament.

66 Supreme Court’s Thoughts, supra note 9.

67 Id.
From the Supreme Court’s point of view, the third phase of post-WWII judicial reform, from 1975 to the formation of the JRC in mid-1999, in contrast to the previous contentious interaction between judiciary and bar, saw increased cooperation. This new collaborative attitude lead to positive changes in the summary courts, family court systems, and, significantly, to the passage in 1988 of the legislation allowing practicing attorneys with fifteen years experience to be appointed as judges.\(^{68}\) With input from the JFBA, this law was further amended in 1991 to allow attorneys with five years experience to be appointed as assistant judges.\(^{69}\)

### III. The Current Judicial Reform Proposal

#### A. Membership and Methodology of the JRC

Against this backdrop, the JRC was created in mid-1999.\(^{70}\) The following thirteen members were appointed to the JRC in July 1999:

- Koji Sato, Chair Professor of Law, Kyoto University
- Morio Takeshita, Vice-Chair Professor Emeritus, Hitotsubashi University, and President, Surugadai University
- Masahito Inouye Professor of Law, Tokyo University
- Hiroji Ishii President, Ishii Iron Works Co., Ltd.
- Keiko Kitamura Dean/Faculty of Commerce, Chuo University
- Ayako Sono Author
- Tsuyoshi Takagi Vice-President, Japanese Trade Union Confederation
- Yasuhiro Torii President, Keio University
- Kohei Nakabo Attorney at Law
- Kozo Fujita Attorney at Law (Former President of Hiroshima High Court)
- Toshihiro Mizuhara Attorney at Law (Former Superintending Prosecutor of Nagoya High Public Prosecutors Office)
- Masaru Yamamoto Executive Vice-president, Tokyo Electric Power Co., Inc.
- Hatsuko Yoshioka Secretary-General, Shufuren (Housewives Association)\(^{71}\)

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\(^{68}\) See supra text accompanying note 29.

\(^{69}\) Id. Again, in the twelve years from 1988 to 2000, only forty-six attorneys have been appointed as judges or assistant judges, an average of less than four per year. Id.; supra note 30 and accompanying text.

\(^{70}\) See supra text accompanying notes 1-3.

\(^{71}\) Jud. Reform Council, Members of the JRC (last visited June 28, 2001), at http://www.kantei.go.jp/foreign/judiciary/member.html (published in English, from the
The mandate of the JRC is:

[T]o clarify the appropriate role of the justice system in the twenty-first century, and to investigate and consider fundamental measures necessarily related to the realization of a justice system that is more user-friendly to citizens, allows for participation of citizens in the justice system, considers, improves, and strengthens ideals for the legal profession, as well as other related reforms and foundational requirements of the justice system.72

The House of Representatives of the Japanese Diet73 also resolved that the JRC deliberate on such issues as: (1) the introduction of a judicial appointment system under which most judges are appointed from those with practical legal experience, such as lawyers; (2) reinforcement of the quality and quantity of the legal profession; (3) public participation in the judicial system; and (4) the relationship between human rights and the criminal justice system.74 The House of Councillors75 also passed a similar resolution.76

After appointment, the JRC began its review of the justice system from “the people’s viewpoint,”77 as mandated. Since its first public meeting on July 27, 2000, attended by then-Prime Minister Obuchi, the JRC has conducted hearings before various interested groups, heard from government officials, and conducted fact-finding inspections of the courts, public prosecutor’s office, bar associations offices,78 and law firms. The

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72 Interim Report, supra note 1.
73 The House of Representatives is the lower house of Japan’s bicameral legislature.
74 Jud. Reform Council, supra note 3.
75 The House of Councillors is the upper house of Japan’s bicameral legislature.
76 Jud. Reform Council, supra note 3.
77 Id.
JRC has actively sought out and has been provided with studies and reference materials on foreign judicial systems. It should be noted that the JFBA and its member local bar associations have taken an extremely active role in this recent judicial reform initiative. The JFBA and local bar associations have conducted many grass-roots initiatives to educate citizens regarding the background and need for judicial reform, including conducting information sessions, disseminating pamphlets, and providing information over the media. Additionally, it has conducted extensive studies, including comprehensive and lengthy study visits by numerous attorneys to examine the justice systems of Hawai‘i, Seattle, and Vancouver. Further, the JFBA and bar associations have provided extensive feedback, reports, and information to the JRC. It should also be noted that, with respect to the issue of development of additional legal professionals, law professors in Japan have been actively involved in advancing proposed models for the development of professional law schools in Japan. These proposed changes would make Japanese law schools more similar to the U.S. model than the existing Training Institute.

Five months after its organization, on December 21, 1999, and after having already completed significant background work, the JRC published its essay entitled The Points at Issue in the Judicial Reform (“Initial Report”), outlining its preliminary viewpoints. On November 20, 2000, the JRC published its “Interim Report,” summarizing its general

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79 Jud. Reform Council, supra note 3.


82 Jud. Reform Council, supra note 3.
recommendations and requesting feedback from interested parties and persons.\textsuperscript{83}

The JRC is scheduled to submit its final recommendations to the Cabinet on June 12, 2001.\textsuperscript{84} The JRC has stated that its final report will contain its description of an ideal system for the administration of justice in the 21st century, will present its proposed reform plan, and “shall thoroughly discuss a specific schedule for . . . realization of the reform and . . . sure measure for its implementation.”\textsuperscript{85} Interested parties are undoubtedly awaiting this report with great anticipation.

B. \textit{Initial Report of December 1999}\textsuperscript{86}

After discussing the history of the JRC’s formation and the JRC’s deliberative process, the Initial Report outlines the historical background and significance of this judicial reform effort. The JRC opined that prior reform efforts may have been less than productive because they had been conducted solely by the three branches of the legal profession and had not included representatives or experts from other fields.\textsuperscript{87} The JRC emphasized the need for a comprehensive review as Japan enters the new millennium.

According to the JRC, its initial hearings revealed the following general criticisms of the existing justice system in Japan: lack of openness, distance from the people, lack of warmth of attorneys and courts, difficulty in understanding and utilizing the justice system, failure of the justice system to meet the needs of a rapidly developing society, and a failure of the courts to provide a check on administrative agencies and the executive branch.\textsuperscript{88} With respect to the last concern, as in the United States, Japan’s three branches of government—executive, legislative, and judicial—are supposed to provide checks and balances upon each other. Interestingly, assistant judges in Japan are apparently routinely rotated through and actually work within executive branch agencies, including the public prosecutor’s office, before becoming full judges. This appears to have

\textsuperscript{83} Interim Report, \textit{supra} note 1.

\textsuperscript{84} \textit{Id.; see also} Jud. Reform Council, \textit{supra} note 3.

\textsuperscript{85} Jud. Reform Council, \textit{supra} note 3.

\textsuperscript{86} \textit{Id.} The Initial Report, entitled \textit{The Points at Issue in the Judicial Reform}, \textit{supra} note 3, is published and available through the official web site of the Prime Minister of Japan. \textit{See} Jud. Reform Council, \textit{supra} note 4. This may suggest the importance placed by the Japanese government on this judicial reform initiative.

\textsuperscript{87} \textit{See id.}

\textsuperscript{88} \textit{Id.}
created a perception that Japanese judges are biased in favor of the executive branch and administrative agencies.89

In any event, after the initial round of investigation during the first five months of its existence, the JRC identified several goals for this judicial reform effort, which are summarized as follows:

1. Institutional improvements, including:

a. Realization of a more accessible and user-friendly justice system by improving the number of, regional distribution of, and access to and expertise of attorneys, clarifying fee issues, considering the function of quasi-legal professions, considering a legal aid system, and increasing alternative dispute resolution methods and usage;

b. Improving the civil justice system by reducing delay in civil proceedings, increasing the number of judges and attorneys, utilizing experts in other professions in an era of increased complexity of issues, and strengthening the court’s role in administrative issues and in reviewing the constitutionality of laws;

c. Improving the criminal justice system by improving investigative and trial procedures to deal with increased complexity in crimes, decreasing delay, and instituting a public defender system with a right to counsel before indictment and for juvenile cases; and

d. Increasing public participation in decision making processes, such as through considering jury and lay-judges systems.

2. Improvements to human resources in the administration of justice, including:

a. Increasing the quality and quantity of legal professionals in an era of increased diversification and complication of legal issues, through studying

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89 Id.
the possible role of graduate law departments and the establishment of professional law schools;

b. Studying possible adoption of a *housouichigen* system, while studying the desired character and capabilities of judges and recognizing the need for judicial independence; and

c. Improving the personnel systems of the judiciary and public prosecutor’s office.

3. Other improvements, including:

a. Participating actively in the development of rules of international dispute resolution; and

b. Increasing the proportion of the public budget for the justice system.

At the conclusion of this Initial Report, the JRC set out a tentative outline of issues it felt it would be addressing during its deliberation, which is summarized as follows:

I. Institutional Issues

(1) Realization of a more accessible and user-friendly system of justice administration

a. Expansion of access to attorneys

b. Measures to cope with the shortage of attorneys

c. Relationship of attorneys to quasi-legal professions

d. Expansion of the legal aid system

e. Expansion of alternative dispute resolution (“ADR”)

f. Opening/offering information on the justice system

(2) Response of the civil justice system to public expectations

a. Expansion of access to the courts

b. Expedition of court proceedings
c. Measures to deal with cases requiring specialized knowledge
d. Execution of judgments

(3) Response of the criminal justice system to public expectations
a. Amending investigation/trial procedures
b. Expedition of court proceedings
c. Public defender system

(4) Public participation in the justice system
a. Jury/lay-judge system
b. Examining existing system of public participation

II. Human Resource Issues

(1) Number and training of legal professionals
a. Appropriate increase in the number of judges
b. Studying possible judicial training system
c. Revisiting the National Bar Examination/Training Institute system
d. The role of post-graduate law departments
e. Legal ethics
f. *Housouichigen*

(2) Improvements to personnel systems of judiciary and public prosecutor’s office

III. Other Issues

(1) Preparing a justice system responsive to internationalization

(2) Increasing judicial budget

In the Initial Report, the JRC indicated that after conducting additional investigation on these tentative issues, it would issue a written report and seek public comment on its various proposals. Eleven months
later, on November 12, 2000, the JRC issued its sixty-five page Interim Report.\textsuperscript{90}

\textbf{C. \hspace{1em} The Controversial Issues}

Of the above, the controversial issues are the two possible reforms that have clearly been JFBA’s priorities for this judicial reform initiative: (1) whether the \textit{housouichigen} system should be adopted; and (2) whether direct citizen participation in the judicial decision making process should be allowed, through adoption of either the jury or lay-judge systems. The JFBA’s emphasis on these two issues can be seen through its selection of these issues as the sole topics for its last biennial Judicial Symposium, held on November 17-18, 2000, in Tokyo, entitled \textit{The Judiciary of the Future—Toward the Realization of Housouichigen and A Jury or Lay Judge System}.\textsuperscript{91}

1. \hspace{1em} \textit{Housouichigen}

\textit{Housouichigen} has been a major point of contention between the JFBA and the Supreme Court of Japan since at least 1964.\textsuperscript{92} It became an issue that, at least from the Supreme Court’s perspective, created such a rift during a previous judicial reform effort that the even other less controversial efforts were effectively stymied.\textsuperscript{93} It was apparently through the JFBA’s efforts that a few attorneys were appointed as judges in 1988, and the JFBA continues to raise \textit{housouichigen} as a judicial reform issue.\textsuperscript{94}

In the author’s view, the JFBA’s efforts toward \textit{housouichigen} is reflective of the distant nature of the relationship between Japan’s attorneys and the judiciary. In addition to the historical perspective,\textsuperscript{95} another reason for this distance, in the author’s view, is the fact that Japan’s judges are career civil servants, with the exception of the few judges appointed from among practicing attorneys, which totals to only forty-six judges since 1988. Thus, they have not had the opportunity to experience the practice of law. This divergence of experience,

\textsuperscript{90} Interim Report, \textit{supra} note 1.

\textsuperscript{91} The JFBA has three types of major regular meetings: its Convention on Protection of Human Rights, held annually; and its Judicial and Legal Practice Symposia, held biennially. JFBA PAMPHLET, \textit{supra} note 14, at 18.

\textsuperscript{92} See \textit{supra} text accompanying notes 57-69.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.; see also} JFBA PAMPHLET, \textit{supra} note 13, at 16.

\textsuperscript{95} See \textit{supra} text accompanying notes 15-18.
understandably, probably makes it difficult for judges to comprehend and relate to the perspectives of the attorneys who appear before them.

In addition, it is also important to consider that, from the time they become assistant judges straight out of the Training Institute, Japan’s judges are subject to transfer to different geographical locations at regular intervals throughout Japan and are provided with government housing in the same area as other judges. The Japanese system is apparently based on the premise that a judge should not become a part of the community over which he or she presides in order to avoid favoritism toward persons with whom judges may become acquainted in that community.

This premise obviously differs from the American system, in which judges are selected from attorneys or prosecutors practicing in the area. Especially in a small state like Hawai‘i, this selection method means that many judges have practiced beside some of the attorneys who later appear before them. Even if this has not happened, American judges, in general, are able to understand and relate to the perspectives of attorneys as well as their clients, having practiced law themselves. In addition, American judges, to the extent possible without violating ethical requirements, are encouraged and expected to continue civic participation in their communities. This differs from the Japanese perspective.

The perceived distance between judges and attorneys in Japan is apparently so wide that Japanese attorneys visiting Hawai‘i in Spring 2000 to study Hawai‘i’s legal system expressed great surprise that the Hawai‘i judges whose chambers they visited, without exception, left the bench during recesses and spoke to the attorneys at the ground level. To the Japanese attorneys, this practice would have been unthinkable in Japan and, from their perspective, is a direct result of the existence of a housouichigen system in Hawai‘i. 96 In the author’s view, they are probably correct.

Experiences such as these in other legal systems reinforce the JFBA’s strong belief that a housouichigen system would improve the quality of Japan’s judiciary, by creating a system in which judges have more variation in life experiences, with judges who understand the practice of law and the perspectives of litigants, and with judges who are closer to the people. 97 The Supreme Court of Japan, on the other hand, continues to be conceptually opposed to a complete housouichigen system, suggesting that, despite the need for expanded training of career judges to deal with the deepening societal complexities and the desirability of increasing the number of attorneys appointed to judgeships, the current system should be maintained.

96 See Hawai‘i Report, supra note 80, at 39.

97 Id.
To justify this position, the Supreme Court again cites the problem raised by the Temporary Commission in 1964 regarding lack of appropriate institutional foundations to implement a *housouichigen* system.\(^98\) According to one of the attorneys who recently became a judge and then returned to the practice of law, career judges also believe that their training as assistant judges renders them better able to assess the credibility of litigants and witnesses and makes them better opinion writers.\(^99\) This attorney and former judge appeared to agree that the career judges were more accustomed to the style of writing expected of Japanese judges, but seemed to question whether career judges are better able to ascertain truth.\(^100\)

This reform, then, remains controversial. Even if *housouichigen* is not adopted in the current initiative, it appears that the issue will continue to be raised by the JFBA as a key point for judicial reform.

2. *Citizen Participation in Decision Making: The Jury or Lay-Judge Systems*

The JFBA is also strongly pushing for direct participation by citizens in judicial decision making through adoption of either the jury or lay-judge systems. Japan actually utilized jury trials in criminal cases from 1928 to 1943.\(^101\) Japan, however, has never used a lay-judge system similar to those used in certain civil law jurisdictions, such as Germany.

The JFBA’s strong push for citizen participation is, in general, based on its belief that citizen participation will increase citizen awareness, interest, understanding, and confidence, as well as openness and accountability of the justice system.\(^102\) The Supreme Court of Japan has stated its conceptual opposition to jury trials, citing the resources needed, inconvenience to citizens, lack of right to appeal acquittals by juries, possible adverse consequences of pre-trial publicity, the possibility of jury tampering, and lack of specific findings by juries, which leads to a

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\(^98\) *See Supreme Court’s Thoughts, supra* note 9.


\(^100\) *Id.*

\(^101\) *See TANAKA, supra* note 11, at 482.

\(^102\) *See generally CHUSA HOUKOKU SHO SHIRYOU SHUU (ASU NO SHIHOU—HOU SOUICHIGEN-BAI SAN SHIN NO JITSUGEN NI MUKETE) [INVESTIGATIVE REPORT COMPILATION OF MATERIALS (TOMORROW’S JUDICIARY—TOWARDS REALIZATION OF HOU SOUICHIGEN AND A JURY/LAY-JUDGE SYSTEM)] (2000) (published by JFBA 18th Judicial Symposium Administrative Committee)* (source in Japanese).
lack of clear reasoning for decisions. The Supreme Court also conceptually opposes lay-judge trials on similar grounds, but suggests that the lay-judge system might be more workable, through adjustments to decrease possible negative consequences while still maintaining the benefits of citizen participation. Additionally, although the author has not reviewed any official position papers regarding the public prosecutor’s office’s view regarding lay participation in decision-making, it appears that, based on a former public prosecutor’s comments critical of the acquittal rate by juries during 1928 to 1943, this office would also be opposed to at least the jury system.

The JRC received input from the Supreme Court of Japan, the JFBA, and other interested parties, before issuing its Interim Report of November 2000, which is summarized below.

D. The Interim Report of November 2000

The Interim Report is divided into the following six sections:

1. Introduction
2. Fundamental Principles and Direction of This Judicial Reform Initiative
3. Expansion of Human Resource Foundations
4. Improvements to Institutional Foundations
5. Citizen Participation in the Administration of Justice—Establishment of Citizen’s Foundation
6. In Closing—Toward the Final Report

Following up and expanding upon the tentative issues identified in the Initial Report, the Interim Report identifies various general recommendations as well as issues for further deliberation and invites further comment from interested parties and the public. Many of the recommendations are broad and do not contain specific details, but do suggest the direction of the JRC’s deliberations. The JRC has stated, however, that the final report would contain more specific recommendations for reform as well as specific schedules for their realization.

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103 See [Supreme Court’s Thoughts](#), supra note 9.
104 Id.
105 Kawakami, [supra note 53](#). Anecdotally, the author understands that a public prosecutor’s career advancement can be highly dependent on his or her conviction rate.
106 Interim Report, [supra note 1](#).
107 Jud. Reform Council, [supra note 3](#).
The major recommendations in the Interim Report are summarized below. The author, however, will first address the JRC’s position regarding the two controversial issues, *housouichigen* and citizen participation in decision-making.

1. **JRC’s Position Regarding Housouichigen**

Within Section 3 of its Interim Report, the JRC recognized that the issue of whether *housouichigen* should occur was a highly controversial issue, as expected, with strong opinions on either side. In the Interim Report, the JRC effectively rejects the concept of adopting *housouichigen* as the sole method of judicial selection. The JRC appears to agree with the Supreme Court and proposes working within the existing system. In this regard, the JRC suggests the following improvements:

1. Selecting judges with temperaments and abilities deemed desirable by citizens—humanistic, kind, warm, not condescending, good listener, discerning of the truth, with strong analytical ability, with broad knowledge and experience, fair, and just.

2. Increasing the sources from which judges are selected;

3. Amending the current method of judicial selection, which is at the Supreme Court’s sole discretion, making the selection process more public, and allowing public commentary on proposed candidates; and

4. Opening up judicial personnel issues, such as compensation and placement, to more public scrutiny and comment.

The JRC leaves details for these improvements for its later consideration.

2. **JRC’s Position Regarding Citizen Participation in Decision-Making**

In Section 5 of its Interim Report, the JRC initially expresses its opinion that citizen participation in decision-making increases citizen understanding of and interest in the justice system, and states its belief that such participation is desirable. With respect to the issue of whether direct citizen participation should be allowed in decision-making, the JRC

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108 See supra text accompanying note 34.
indicates that, although such participation is desirable, the form of such participation needs to be further explored. The JRC stresses the need for citizen involvement in further discussions regarding this issue and the need to coordinate any such form of participation with other areas of proposed reform. Overall, the JRC’s position on citizen participation appears very vague.

3. **Other Proposed Reforms**

The other proposed reform areas will now be summarized. Because the proposed areas for reform are so broad in scope, each proposal could call for a separate article. The purpose of this article, however, is to provide only an overview of the reforms and issues under consideration.

a) **Reform Of Legal Education System**

With regard to other areas within Section 3, entitled *Expansion of Human Resource Foundations*, the JRC concludes that it is imperative to increase the number of members of the legal profession, including judges, public prosecutors, and attorneys “by significant numbers,” without specifying actual numbers. The JRC notes the need for legal professionals with more diversified qualifications and specializations, to meet the growing needs of society in the twenty-first century. ¹⁰⁹

In this regard, popular lore often speaks of the fewer number of attorneys in Japan compared to the United States. Earlier, the JRC noted the popular conception that the United States has 940,000 attorneys, compared to Japan’s 21,000. ¹¹⁰ The author believes, however, that this comparison is not entirely accurate. In addition to Japan’s 21,000 attorneys, Japan has about 63,000 zeirishi (tax attorneys), 36,000 gyousei shoshi (administrative scriveners), 17,000 shihou shoshi (judicial scriveners), and 4,000 benrishi (patent attorneys). ¹¹¹ This actually amounts to a total of 141,000 legal professionals. ¹¹² Granted, some of these legal professionals may be performing work not performed by attorneys in the United States, but rather by others, such as paralegals. In the author’s view, however, the number of legal professionals in Japan is not nearly as low as the 21,000 attorney figure would indicate. The author

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¹¹² This number does not include the numerous undergraduate law graduates who work in the legal departments of various governmental agencies and corporations.
does agree, however, that 21,000 persons legally authorized to represent others in court proceedings is not nearly enough for a country with a population nearly half of that of the United States.

In any event, with respect to methods of achieving this need for more legal professionals, the JRC concludes that the existing Training Institute and graduate law departments within universities are in and of themselves insufficient to reach the goal of developing significant numbers and types of additional attorneys necessary to adequately meet the needs of Japanese society in the twenty-first century. According to the JRC, the extremely competitive nature of the National Bar Examination has created a situation in which admittees are too focused on test-taking skills, while existing university law departments’ emphasis on academia and research do not provide the background for the clinical and practical training necessary for future attorneys.

The JRC, then, goes on to boldly propose a complete overhaul of Japan’s legal education system to one based on the establishment of postgraduate law institutions to provide legal education and training for future attorneys. The JRC’s proposal calls for the creation of such institutions as either independent institutions or through affiliation with existing universities. The JRC suggests development of admission examinations to test not for legal knowledge, but for judgment, analytical ability, critical thinking ability, and other areas. The JRC further suggests that the schools consider not only academic record but also work history, social background, and other intangibles, and consider diversifying their student bases geographically, from colleges of origin, and otherwise. The JRC suggests that the normal curriculum would take three years to complete and suggests the possibility of expedited programs of two years.

All in all, the general program suggested by the JRC appears to be much more similar to the American law school paradigm then the existing system in Japan. In the author’s view, this reform proposal, if adopted, would be a major change, with significant consequences for the Japanese legal system and Japanese society. First, the number of attorneys would increase significantly, increasing access to justice for Japanese citizens. Second, the quality and type of attorneys would necessarily change. Even though the Japanese attorney of the future may not have had the test taking-skills to pass the current National Bar Examination, he or she might offer other specialized knowledge, other social awareness, or other

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113 For more information and articles regarding legal education in Japan and a proposed paradigm for a professional law school similar to the type that seems to be suggested by the JRC here, see the February 2000 inaugural issue and the other articles in this special issue of the Asian-Pacific Law & Policy Journal. The inaugural issue’s article index is available at http://www.hawaii.edu/aplpj/previous.html.
experiences. At minimum, in the author’s view, adoption of such a system would broaden the variety and perspectives of the Japanese bar. This is an exciting proposal indeed.

b) Other Proposals

Turning to the remaining proposals of the JRC, with respect to Section 4 of the Interim Report, labeled Improvements to Institutional Foundations, the JRC’s general recommendations are summarized as follows:

1. Creation of a user-friendly justice system, through:

   a. Increasing access to attorneys, through:
      i. clarifying attorney fee structures; and
      ii. increasing availability and publication of information regarding attorneys, such as areas of specialization;

   b. Improving quality of legal services, through:
      i. encouraging or requiring continued legal education;
      ii. encouraging increased specialization;
      iii. allowing legal malpractice actions and instituting a system for legal malpractice insurance,
      iv. further studying the possibility of allowing quasi-legal professionals, such as zeirishi, benrishi, shihou shoshi, and gyousei shoshi, to represent clients in court on limited issues within their realm of specialty; considering the creation of administrative hearing officers; and allowing other non-judge, non-attorney professionals to preside over certain judicial type proceedings; and
      v. Increasing internationalization of attorneys, through increasing international communications and education, increasing business relationships with professionals in other areas of international business, and reviewing the “foreign legal consultant” system;
c. Increasing access to courts, through reducing litigant’s court fees and filing fees, including those in the summary and small claims courts; allowing for recovery of attorney’s fees by the prevailing party in certain situations; and creating a system of legal insurance.

d. Improving court convenience, by:

i. Increasing “access points” (information counters) that provide comprehensive information regarding litigation and alternative dispute resolution, and placing such access points in various locations, such as in courts, local bar association offices, regional public offices;

ii. Eliminating the need for divorce and paternity-type family court cases to be refiled in district court if conciliation efforts are unsuccessful;

iii. Increasing the jurisdictional limit of summary courts from the current 900,000 yen ($7,200 at 125 yen to the dollar) and the jurisdictional limit of small claims courts from the current 300,000 yen ($2,400 at 125 yen to the dollar);

iv. Reviewing court locations;

v. Introducing information technology into the courts, such as by providing Internet resources;

vi. Considering after-hours court services, such as night courts, for courts in addition to such services provided by some family courts; and

vii. Considering miscellaneous issues, such as the possibility of allowing recovery of punitive damages in certain types of cases (currently awards are limited to compensatory damages) and the possibility of instituting procedures for “class actions” or “group actions”;

e. Reviewing civil litigation rules for expansion and improvement;
f. Increasing alternative dispute resolution (“ADR”) methods and usage, including international commercial disputes by:
   i. Increasing foundational requirements for ADR by building or providing facilities for ADR, providing comprehensive information regarding ADR, and increasing international commercial arbitration; and
   ii. Improving coordination between ADR and litigation;

2. Realizing a civil justice system responsive to citizen’s expectations, through:
   a. Considering improvements to expedite civil litigation;
   b. Considering a “discovery” system for prompt production of documents;
   c. Improving the handling of cases requiring specialized knowledge, through:
      i. utilizing experts witnesses;
      ii. improving handling of intellectual property cases;
      iii. improving handling of labor relation cases; and
      iv. utilizing experts in other cases, such as those requiring medical or construction issues;
   d. Improving the system for execution upon civil judgments—securing realization of rights; and
3. Realizing a criminal justice system responsive to citizen’s expectations, through:

a. Improving criminal procedure, through:
   
i. Adjusting the attorney system to provide for a public defender system and to improve specialization of private attorneys;
   
ii. making specific suggestions for specific points within a criminal case;
   
iii. making specific suggestions for handling evidentiary issues; and
   
iv. making other technical suggestions.

b. Considering adoption of a public defender system, including for juvenile cases.

In closing its November 2000 Interim Report, the JRC strongly sought further public input regarding the Interim Report, again noting that this judicial reform effort differs from previous initiatives in that it includes non-law representatives. The JRC indicated that it still is planning to not only provide final recommendations but also specific plans and schedules for implementation of its recommendations, and notes that it requires the Cabinet’s cooperation in laying the groundwork for the reforms.

IV. CONCLUSION: WHAT NEXT?

Although the JRC has rejected the concept of housouichigen and appears to be vacillating on the issue of citizen participation in decision-making, the JRC’s proposals and suggestions are still sweeping and potentially transforming. Although not discussed at length in this article, the proposal for possible creation of a public defender system is extremely important. Additionally, the proposal for legal education reform, as discussed above, could lead to drastic changes to the face of the future Japanese bar. Although housouichigen may not be adopted at this time, if the new law school concept is implemented and the JRC’s recommendation to diversify the sources from which judges are selected is followed, the face of the Japanese judiciary could also change over time.
According to the JFBA members who are following the JRC’s deliberations, the JRC had indicated its intent to submit its Final Report and recommendations to the Prime Minister of Japan on or about June 12, 2001. Following up on the vague references in the Interim Report concerning citizen participation in judicial decision-making, the Final Report apparently may contain a recommendation that Japan’s judiciary adopt some sort of *Saibanin*, or “Trial Official” system, more similar to a lay-judge system than a jury system. The substance and format, however, of any such recommendation remains to be seen. Although, at first blush, it appears that such a recommendation would constitute a retrenchment from the initial jury or lay-judge proposals, depending on the nature of a *Saibanin* system, this could become an important first step towards the Japanese public taking a more active role in the judicial system. In the author’s view, increased citizen exposure to the judicial process should lead to increased interest, which may lead to future, more innovative, changes.

In addition, although the JFBA does not expect the current JRC to advocate adoption of a jury, lay judge system, or total *housichigen* system at this time, the JFBA intends to continue its efforts to achieve future realization of these reforms and to continue its grass roots initiatives to further public awareness, understanding, and interest in these reforms.

For the time being, it is important that the Japanese public follow the JRC’s plea to be involved in this and future judicial reform initiatives. As the JRC has repeatedly pointed out, for most Japanese citizens, the justice system seems remote from their daily lives. Without a jury system, the great majority of Japanese citizens spend their entire lifetimes without ever stepping foot inside a courtroom. The justice system is, however, a justice system for the people. It should not be governed by what the Japanese Supreme Court or the JFBA thinks is best for the people. The people themselves need to decide. Therefore, the author would also like to encourage any Japanese readers of this article to take interest and to get involved.

114 See *supra* note 3.

115 Various in-person and telephone conversations of the author with various members of the JFBA actively involved in the JFBA’s judicial reform efforts.

116 Various conversations of the author with various members of the JFBA actively involved in the JFBA’s judicial reform efforts.