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International Association of Legal Sciences Symposium: Introduction

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Colloquium Summary

Kahei Rokumoto

The Colloquium was conducted in four sessions, roughly corresponding to the four themes mentioned in the Introduction.¹ The sessions, main themes, and speakers were as follows:²

Session 1: "The Role of Lawyers in Social Change"

Professor Andras Sajo (Hungary)
Professor Frank Upham (United States)
Professor Shen Zongling (China)

Session 2: "Private Lawyers in Contemporary Society"

Professor Viraphong Boonyobhas (Thailand)
Professors Julie-Anne Kennedy and
Anthony Ashton Tarr (Australia)
Professor Haimo Schack (Germany)
Professor Michael Zander (United Kingdom)

Session 3: "The Judiciary in Contemporary Society"

Professor Philippe Fouchard (France)
Professors Julie-Anne Kennedy and
Anthony Ashton Tarr (Australia)
Professor Ichiro Kitamura (Japan)
Professor Andras Sajo (Hungary)
Professor Chang Soo Yang (Korea)

Session 4: "Issues of the Lawyer Population"

Professor Shozo Ota (Japan)
Professor Kahei Rokumoto (Japan)

In this report, a summary of the Colloquium according to the session themes, National Reports and the oral discussions is presented. Some of the theoretical issues particularly relevant to the proposed themes are highlighted.

¹ In each Session, the speakers were asked to give a fifteen minute presentation on the basis of the National Report, followed by a general discussion.

² EDITOR'S NOTE: The Session 2 contribution by Professors Kennedy and Tarr, and the Session 3 contribution by Professor Sajo were unsolicited submissions to the symposium. They are included because of their topical relation to their respective themes.

I. THE ROLE OF LAWYERS IN SOCIAL CHANGE

A. *Lawyers in Nation-building*

In the United States, as Professor Upham relates, lawyers played a predominant role in the political process of building a modern nation-state, and they continue to lead the country through major turning points in its history (Franklin D. Roosevelt, for example). Professor Zander observed in the discussion that in Britain, by contrast, few politicians are lawyers and that for those who are, being a lawyer is not an important factor, as the case of Mrs. Thatcher illustrated. In France, according to Professor Fouchard, *avocats* made an important historical contribution to the achievement of democracy, but more recently, under the Fifth Republic, their influence in political life has weakened, and the bureaucrats have gained ascendancy.

Professor Sajo's report on the Hungarian legal profession provides another interesting scenario. There, lawyers traditionally constituted a national elite in the absence of a strong bourgeoisie, and played a predominant role in the 1848 revolution. However, after the Second World War, lawyers suffered under the rule of state-socialism which preferred informality to legality, mistrusted lawyers, and replaced legally trained judges with "loyal" persons of worker and peasant origin. Finally, it was a group of law students that formed one of the strongholds of political resistance which led to the transition to democracy in 1989. In this transition, established lawyers constitute a major political force in Hungary's reform process. Lawyers are also expected to play an important role in private practice to assist in the development of an industrialized society based on a market economy.

In his oral presentation, Professor Sajo stressed the importance of making the theoretical distinction between "social transformation" and "social change." By the former he meant the changes made in concrete situations through the everyday practice of ordinary lawyers, whereas by the latter he referred to building new institutional structures by lawyers in privileged positions. He stressed that the reform experience of his country showed that transformation is much more difficult than change.

The same role of lawyers in the development of a market economy seems to be relevant in China as well. China faces the great task of creating a large reservoir of lawyers. There, the legal profession was once abolished and was recognized again only in 1979. According to Professor Shen Zongling, the number of lawyers ought to be drastically increased, and at the same time, the people's awareness of law should also be developed.

Professor Yang commented in the discussion on the role of the

Korean lawyers in social change, pointing out that they have played an important role in introducing the notion of human rights after 1945. Also, in a society where contract had minimal influence, the lawyers' practice, particularly in relation to business transactions, generally has served to rationalize human relations in Korean society. The same may be said about Japanese lawyers after 1945, but there, as mentioned in the Japanese National Report, state officials rather than lawyers played a predominant role in the process of nation building after 1868.

B. Solving Contemporary Social Problems

Another phase of this theme canvassed in the National Papers is that of the role of lawyers in advancing ideals of law under the conditions of contemporary society, which are marked, more than ever, by complexity in organization and technology, strong articulation of differing values and interests, international and multiethnic involvement, and above all, rapid change.

An important and controversial area encompasses "legal aid" in general, for instance any form of institutionalized financial assistance for legal matters. This is nothing new; however, if lawyers today tend to split into two camps, it is becoming increasingly urgent to develop a viable scheme of legal aid in the interest of the general public and the legal profession itself.

Professor Upham describes the historical and political processes in which two forms of legal aid schemes developed in the United States. One is innocuously called "legal service," but is characterized as "an attempt to empower the poor *as a class*." The other is called the "public interest law firm," and is characterized as a way of "providing legal representation to *interests* that have historically been unrepresented or under-represented." Both schemes emphasize efforts to serve individual persons in need of legal professional help, to "make justice work," and to effect structural changes through the mechanisms of law and means of legal expertise.

During the discussion, a question was raised as to the importance of legal aid in the actual work of American lawyers. Professor Schack remarked that even the notion of structural change through legal aid is absent in Germany.

Lawyers may be conservative by nature, as Professor Fouchard notes, discussing French *avocats*. This issue, together with that of lawyer's "power," was hotly debated in the discussion, and, in this context, Professor Glendon drew our attention to a passage of Max Weber where he observed, with heavy qualifications (as usual in his writings), "the vocational responsibility of maintaining the existing legal system

seems to place the practitioners of the law in general among the conservative forces."²

At the same time, as Professor Fouchard also points out, lawyers are uniquely capable of defending values, such as environmental values and minority rights, that are difficult to assert through other more ordinary channels. The legal aid schemes oriented to structural reforms may be characterized as ways of coping with the characteristic duality in the legal profession.

Although less ambitious than the American example, each legal system has a legal aid system of its own. The degree of development varies a great deal. One is struck by the fact that Japanese legal aid expenditures are far below Western industrial nations.

On the other hand, one must recognize that somewhere along the line some optimal level of legal aid must exist, for one aspect of legal aid is supporting private lawyers on public money. We are reminded of this aspect by Professor Zander's remark in his National Report that "the single most important reason for the spectacular growth of the bar since the 1960s was an enormous increase in the volume of legal aid work and of prosecution work."

To return to the issues raised in the American Report, another question is whether certain forms of legal aid, in routinizing the treatment, might not impede an attack on the social or structural problems that may be lying behind the particular cases at hand, or even stop short of a full realization of justice in particular cases.

II. PRIVATE LAWYERS IN CONTEMPORARY SOCIETY

A. *Expanding Lawyer Population*

Most National Reports from the industrialized west indicate a great expansion or at least strong pressure for expansion of bar associations. The Australian Bar quadrupled during the past thirty years, and German and British private lawyers tripled in number. While it is undeniable that a growing social need for lawyers exists behind these expansions, some signs of overpopulation of lawyers is apparent as Professor Schack reports regarding the German situation. In the United States, where the number of lawyers relative to the general population is by far the largest, the recent increase has been modest, but some call for a reduction in the number of lawyers.

In all these countries, no formal mechanism for controlling the number of new entrants to the bar exists. It is directly determined by

² MAX WEBER ON LAW IN ECONOMY AND SOCIETY 298 (1954).

the number of law students, which in turn is determined by educational institution policies. The market situation of legal services affects the lawyer population mainly through the demands of students knocking at the doors of law departments. Professor Kennedy drew attention to the fact that the number of Australian law schools had doubled in five years, and that this was the cheapest way to expand higher education. In the United Kingdom, according to Professor Zander's Report, there seems to be some direct contact with the market place at the stage where the aspirant must find an apprenticeship (pupilage or articulated clerk).

By contrast, the number of new entrants is strictly controlled in Japan and Korea, whose bars are by far the smallest of all, except for China. The Japanese Bar is ten to twenty times smaller than Western nations relative to the general population, and yet its growth rate is also the lowest, showing an interesting contrast with Korea, where the bar has expanded greatly in recent years.

Along with the rapid growth of the overall size of the bar, the proportions of female lawyers and young lawyers are also increasing globally. The increased number of women entering the legal profession led to a discussion of many interesting issues, including work conditions of career-seeking female lawyers as compared with their male counterparts, although this type of question has not been explicitly dealt with in the National Reports. Again in the degree of feminization, Japan and Korea are lagging behind. In Japan the underrepresentation of the younger generation in the bar is another feature conditioned by Japan's recruitment system.

B. Frontiers of Legal Practice

Turning to the problems of the changing patterns of lawyers' practice, "big business" law firms of the American type continue to grow in number and size in the West European countries as well as in Australia. Even in Germany, "super-regional partnerships" are tolerated in spite of their infringement, strictly speaking, on the "localization" principle of lawyers.

An important consequence of this tendency, however, is that, as Professor Fouchard points out, private lawyers are virtually split into two camps, with regard to professional activities as well as clientele. As the second branch, serving big business corporations, becomes ever more efficient and competitive, and more expensive, the first branch, dealing with the grievances of ordinary individuals, suffers because of the price gap. Moreover, as is noted both in the British and French Reports, local lawyers serving individual clients tend to maintain their traditional, inefficient work style.

In the discussion, Professor Schack also pointed out the tendency in Germany to split the international bar, drawing the brightest students from the local, small practitioners who are finding it difficult to survive on their professional income. Professor Zander observed that in 1990 twenty large-scale law firms accounted for one-third of the total income of private lawyers. These expanding firms, specialized in the lucrative areas, entice new recruits in large numbers with high salaries. Perhaps the most fundamental *raison d'être* of a legal aid system in contemporary society lies in bridging these gaps. This would mean that extensive public funding for legal aid is an indispensable ingredient of today's system of justice.

Closely related to the above, even within the Continental legal professions, there is a "shift of emphasis from court work to out-of-court work" as Professor Schack stated. The same shift is exhibited in France in the novel distinction between "*le judiciaire*" and "*le juridique*." Another related feature is the development of an international legal practice, with increasing international competition, cooperation, and reciprocal arrangements. For Japanese private lawyers whose work is still heavily concentrated in litigation, non-litigation work has also become more and more important in recent years, and larger law firms specializing in commercial and international work are also increasing.

Professor Schack also noted in the discussion that German legal education lags behind situational requirements, remaining court-oriented. At the same time, German lawyers face strong competition from outside the profession, and where they are protected by the system of compulsory representation in courts, they tend to lose the monopoly in the field of out-of-court counseling. In a similar vein, Professor Fouchard points out that French lawyers are ill-equipped with skills and knowledge, especially in the field of "big business" legal matters, and the compensatory development of "jurists of enterprise." There is parallel development of *kigyo-homuin* (staff members of corporate legal departments) in Japan. In more general terms, the conflicting and complementary relationship between "fully qualified lawyers" and "quasi-lawyers" seems to be one of the major problems facing the lawyers in private practice of industrialized countries.

In some countries, problems arise out of the existence of different branches of fully qualified private lawyers and their fusion, as is the case with Australia, France, United Kingdom, and Thailand. Moreover, in the discussion, deregulation as to lawyer advertising was also addressed, as well as problems concerning specialization.

III. THE JUDICIARY IN CONTEMPORARY SOCIETY

A. *Crisis of the Judiciary?*

This theme was the most popular in the National Reports. This is not without reason. Many of the reports stress similar kinds of difficulties that today's judges and courts face. The phrase "crisis of judiciary," which Professor Fouchard observes connotes the French situation may apply to many other countries, for these difficulties seem to be structurally rooted in all contemporary societies.

A common feature concerns the explosive increase of case loads. The French are currently experiencing the gravest problems. Symbolically, the French Supreme Court renders 10,000 decisions each year. The same problem also plagues Hungarian courts, which face increased criminality and an onslaught of business disputes in the nation's process of overall reorientation to market economy. In the United States, the litigation explosion is limited. The Federal courts handle only a minority of the total case load of the nation in the aggregate, according to Professor Upham.

Furthermore, judges must master new tasks. In addition to deciding cases, as Professor Fouchard states, a judge must conduct a dialogue with litigants, assist them, protect them, and monitor and administer their limited resources to the best advantage. The judge must attempt to reconcile the litigants as well. Judges have become constant targets of lay criticism, even though there is little popular understanding of their work. Professors Kennedy and Tarr point out that "the mystique of judges is gone." The image of judges as "demigods" has disappeared, and Professor Tarr mentioned in the discussion that two family court judges were actually murdered by some members of a first-generation ethnic minority group.

The Japanese situation differs slightly from those aforementioned, but it may be regarded as a variation of the judicial crisis. Japanese judges enjoy moderately high prestige among the populace, but that prestige derives more from being state officials subjected to stringent selection mechanisms, including examinations, than from being independent, final decision-makers or "demigods." Salaries are reasonably high, but they are part of a highly disciplined bureaucratic organization supervised by the Supreme Court Secretariat and are subject to transfers every few years, which are unavoidable steps on the career ladder. In addition, the advent of lucrative foreign trade work for private lawyers is making the judge's position less attractive in the eyes of new graduates of the Institute of Legal Training and Research. The number of court cases is not dramatically increasing, but case loads per judge have always been high because of the small size of the judiciary, and difficult

cases, often large-scale ones, involving environmental or medical malpractice issues, for example, are increasing. Recent efforts of the Supreme Court and the Justice Ministry to recruit judges from among practicing attorneys reflects this situation.

On the other hand, the German judiciary, whose size relative to the population is amazingly large, seems to continue to enjoy traditional high prestige and to attract the finest intellect. The feminization of the judiciary is observable in Germany as well. However, Professor Schack suggested an inverse correlation between the degree of feminization and the general prestige of the judiciary. The Korean judiciary enjoys high popularity among the best law students, although Professor Yang added in the discussion that many relinquish a judicial position for private practice half-way through their career.

In the discussion, Professor Zander claimed that "there is no crisis of the judiciary in Britain." There, the number of full-time judges is rather small, and that of part-time judges large, and as a result of the recent reforms, ex-solicitors will be seen on the bench in the near future. However, where regular judges are concerned, quality and status is still considered very high. Moreover, the training program of judges is well-accepted and looks promising. The House of Lords handles only fifty cases a year, and, with rare exceptions in High court, the judgment is rendered immediately after the decision. Peculiar cases occur only in relation to sentencing in criminal courts.

In spite of common conditions of contemporary society, different degrees of crisis exist within the industrialized nations. Many factors may be involved. Perhaps the number of judges should be taken into account, although Germany maintains a great number of high quality judges. The process of education and selection also must be considered. The German education process is lengthy. In addition, the way in which judges are treated is relevant. Apart from remunerations and prestige (which presumably is a matter of tradition to a large extent), it is interesting that among the three judiciaries of the Continental type, the transfer system is operating in both the French and Japanese systems, but not the German.

B. Recruitment and Further Education

Where a judicial crisis exists, recruiting judges of good quality is becoming a difficult task. This, too, seems to be a fairly pervasive problem. In Australia, where judges are appointed from among established private lawyers, appointees tend to be younger, less experienced lawyers, because of heavy case loads and insufficient remuneration. The same problem exists in the United States where the salaries of judges do not parallel income levels of lawyers with a successful career in lucrative

corporate practice. Professor Fouchard observed that the French judiciary does not attract the best law students, because *avocats* of affairs and jurists of enterprise are much more popular. However, due to the increasing feminization of the judiciary, standards are maintained.

Would these problems be solved by a reinforcement of information technology and secretarial assistance? Professor Fouchard seems unconvinced in the French case. He almost suggests the possibility of gradually promoting present court clerks to a type of assistant judge who would draft opinions for judges. This makes sense in view of the importance of support personnel in the professions generally, but the question remains whether, in the case of court justice, the new "parajudicial" posts can be opened to laypersons without the qualifications of a regular lawyer.

Another aspect of the recruitment problem relates to the difficulty of attaining fair representation in the judiciary with regard to political or social background, sex, and, in some cases, professional sub-groups (i.e. barrister/solicitor). This occurs regardless of recruitment through election or appointment, as the American case suggests.

In France, one opinion maintains that the source of judicial recruitment should be extended externally, in order to be able to obtain judges with broad views, experience, and creativity. The same criticism is also reported from Korea. Professor Kitamura's criticism of Japanese judicial attitudes as 'non-justice' may also be interpreted in this light. This raises a fundamental question of whether a purely Continental system of recruiting judges is still adequate for the conditions of contemporary society.

Continuing judicial education poses a related problem. Its need is universally recognized, but its institutionalization seems problematic, except in Britain. As Professors Kennedy and Tarr pointed out, the idea of judges in need of systematic training offends the dignity of judges and also damages their authority. Consequently, in many jurisdictions, the task is left to ad hoc seminars organized by voluntary associations with voluntary participation of judges.

IV. ISSUES OF THE LAWYER POPULATION: JAPAN

What is the optimal number of private lawyers for a particular society? This is a question of great concern common to all the participating countries, although the direction in which this question is asked may differ from one case to another: raised or reduced.

In this session, the issue of lawyer population was reviewed with special reference to the case of Japan, where the number of lawyers, particularly that of private lawyers, is less than a tenth of those of most Western industrial nations, even though Japan is today a highly devel-

oped industrial country. At the same time, this is an Asian country which has been striving to modernize itself on the Western model based on a capitalistic market economy for a little more than one hundred years. Korea, another Asian industrial nation, shows a similar profile for its legal profession. In this sense, Korean problems may be of some interest for other countries as well, industrially developed or developing.

After the presentation of Professor Ota's paper, comments and questions emanated from bewildered participants from other countries: How is it possible that successful Legal Examination candidates have failed six times on average before being finally admitted? What would those unsuccessful candidates, who must possess sophisticated legal knowledge (perhaps even better legal knowledge than qualified lawyers in other countries) do? What about unifying practicing attorneys and "quasi-lawyers"? While most other countries attempt to increase the number of lawyers to meet economic growth, how should one explain the reverse combination of the same two factors in Japan? Do the unsuccessful candidates take to the streets in protest?

Best efforts were put forth to answer these questions. Instead of reproducing them here, the fundamental importance of the cultural and historical background of these matters should be emphasized. There is no need to repeat what has been observed a thousand times concerning the Japanese culture, although this dimension should not be neglected. However, the Japanese modernization process is characterized by a strong, paternalistic leadership of the State, rather than by initiatives of private enterprise freely competing under the protection of legal institutions. In this process, examinations in schools and bureaucracies serve as siphons to concentrate on selected talents from all social strata into state organs, in a similar fashion as in Confucian regimes in former China or Korea. Thus, examinations, rigorously administered through paper tests, and functioning as a mechanism of upward mobility, have a firmly established legitimacy in Japanese society. These patterns seem to have determined some of the central features of institutional structures making up today's legal system and legal profession, which in turn generate or reinforce appropriate assumptions and exceptions.

In the abstract, the present situation of the Japanese lawyer population and the Legal Examination may seem absurd and irrational. Although it has its historical roots, it may perhaps have its own rationality as well. Some favor a system that maintains an efficient and highly developed economy, leaving harmonious human relationships intact, free from excessive legal formalities and disputes. The alternative must be examined as to whether this system can guarantee, adequately and equally to all, its benefits and, above all, the free development of individual personalities, which seems to be a fundamental prerequisite of a truly

viable society.

However, assuming that the events of 1868 or 1945 will not be repeated, reforms must be worked out and effected within the existing system, through the existing political processes and against various vested interests. Therefore, assertions such as all ceilings on admission ought to be lifted, or that only a determined political will is needed, sound "external" and simplistic for an internal observer. It is for this reason that the present situation in terms of an historical background and present institutional structures and mechanisms is portrayed.

In developing a plausible case for a radical increase in the number of lawyers in Japan in more concrete terms, difficult questions must be considered. For example: Is the Japanese Bar so small because the demand of Japanese society for legal services is so small? Or, to reverse the question: Do existing private lawyers adequately meet demands of the people? Are many legal needs unmet because no lawyer is available or because the cost is too high? These are empirical questions. Theoretically, the assumption that demand predates supply, thus obscuring the inherently subjective and elastic nature of demands, particularly for legal services should be examined. Should we not assume that a rather high degree of competition is required in order to keep the supply side responsive to the actual or potential needs of individuals or organizations?

Another point concerns "lawyer substitutes" who provide legal services. Does not the existence of many forms of "quasi-lawyers" in Japan explain or justify the relatively small size of the bar? In the National Report, the answer is in the negative. Still another question concerns the "unity of the legal profession" as a goal: Is it not desirable that the private bar functions as a training and competing ground for experienced lawyers, providing a pool of proven legal experts for the judiciary and other state legal organs?

Forty years of continuous transformation of social structures and attitudes seems to have brought about certain fundamental changes in the general outlook of the law. The idea that law and lawyers play an indispensable part is rooted in the normal functioning of society among the general public. Perhaps for the first time in history, having a lawyer by one's side has come to be regarded as part of a decent way of conducting one's affairs either in private life or in business, not frowned upon as a sign of deviant or eccentric character. Added to this was the ever growing exposure, on a day-to-day basis, to the Western legal culture, as well as the current political mood de-emphasizing governmental protections and guidances, and encouraging private risk-taking and autonomous regulations. These general trends exist behind two important institutional changes mentioned in the National Report. Recently, the need to strengthen the legal aid scheme has been officially admitted.

Hopefully, all this is a symptom of a process of gradual, but continuous movement forward.