Festschrift zu Ehren
von Christian Kirchner

Festschrift zu Ehren von Christian Kirchner

Recht im ökonomischen Kontext

herausgegeben von

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Mohr Siebeck

ISBN 978-3-16-153123-1

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliographie; detaillierte bibliographische Daten sind im Internet über *http://dnb.dnb.de* abrufbar.

Das Buch wurde von Gulde-Druck in Tübingen aus der Minion gesetzt, auf alterungsbeständiges Werkdruckpapier gedruckt und von der Buchbinderei Spinner in Ottersweier gebunden.

Vorwort

Mit der hier vorgelegten Festschrift sollte anlässlich seines 70. Geburtstages Christian Kirchner geehrt werden. Für alle ihm Nahestehenden überraschend und unfassbar ist dieser außergewöhnliche akademische Lehrer und Forscher kaum zwei Monate vor seinem Ehrentag, am 17. Januar 2014, nach kurzer heftiger Krankheit verstorben. Wir Herausgeber haben uns entschieden, die Festschrift nicht in eine Gedächtnisschrift umzubenennen, denn als solche war sie weder von uns noch den Autoren je gedacht. Das Werk ist nunmehr jedoch dem Andenken an unseren Mentor und Freund gewidmet, dessen Rat und Aufmunterung uns sehr fehlen wird, und um den wir, gemeinsam mit seiner Familie, seinen Freunden und seinen Kollegen, schmerzlich trauern.

Christian Kirchner ist in der Wissenschaft vor allem für die Verknüpfung der Rechts- mit den Wirtschaftswissenschaften bekannt. Seine Studien und Doktorgrade sowohl der Rechtswissenschaft als auch der Volkswirtschaftslehre in Tübingen sowie Frankfurt am Main haben in Verbindung mit Forschungsaufenthalten an der Harvard University, an deren Law School er seinen Master of Laws erwarb, und am Massachusetts Institute of Technology die besten Voraussetzungen geschaffen, seinen interdisziplinären Ansatz zu einem sehr frühen Zeitpunkt in Europa zu entwickeln, was ihn zu einem wissenschaftlichen Vorreiter machte. In den USA war die Ökonomische Analyse des Rechts bereits seit den 1960er Jahren auf dem Vormarsch. Zur Verbreitung dieser Methode schon ab 1978 auch im deutschsprachigen Raum hatte Christian Kirchner durch die Übersetzung, Zusammenstellung und Einleitung einflussreicher US-amerikanischer Law-and-Economics-Texte entscheidend beigetragen. Er gilt heute als einer der führenden Vordenker der Ökonomischen Theorie des Rechts. Seit 1999 ist er Inhaber eines fächerübergreifenden Lehrstuhls sowohl für Zivil- und Wirtschaftsrecht als auch für Institutionenökonomik an der Juristischen sowie an der Wirtschaftswissenschaftlichen Fakultät der Humboldt-Universität zu Berlin gewesen.

Mit seiner juristischen Dissertation über „Internationale Marktaufteilungen" hatte sich der zu Ehrende bereits das Kartellrecht erschlossen, welches er danach intensiv auch weiterhin in seinen grenzüberschreitenden Wirkungen sowie rechtsvergleichend behandelt hat. Im Anschluss daran hat die ökonomische Doktorarbeit zu „Weltbilanzen", als deren wiederum juristischer Ausgangspunkt die Kommentierung der Konzernrechnungslegung im Aktiengesetz zusammen mit Heinrich Kronstein zu sehen ist, die Basis für ein weiteres Forschungsfeld des Jubilars gelegt, nämlich die Rechnungslegung in Verbindung mit den handelsrechtlichen Bilanzbestimmungen und damit auch mit dem Gesellschaftsrecht,

erneut aus supranationaler Perspektive bearbeitet. Seine Forschung auf diesem Gebiet ist durch die Aufnahme in den Ausschuss für Unternehmensrechnung des höchst angesehenen Vereins für Socialpolitik in besonderer Weise gewürdigt worden.

Internationale Bezüge haben in der Vita Christian Kirchners durch die intensive Beschäftigung mit dem asiatischen Raum zunehmend weiter an Gewicht gewonnen: Einem längeren Aufenthalt an der Universität Tokio, den er durch ein mehrjähriges Studium der japanischen Sprache und Kultur vorbereitete, folgten weitere Gastprofessuren in Japan, der Volksrepublik China und jüngst sogar in Nordkorea, daneben Rechts(gestaltungs-)beratung in China, Japan und Vietnam. Auch die Verbindungen in die USA hat er durch zahlreiche Gastaufenthalte, etwa an der Berkeley School of Law, der Tulane Law School in New Orleans, der Law School der George Mason University in Arlington (Virginia) und dem College of Law der University of Illinois at Urbana/Champaign ausgebaut. Schließlich ist er Mitglied des äußerst renommierten American Law Institutes geworden. Weitere Gastprofessuren führten ihn nach Israel sowie regelmäßig in die Schweiz an die Universität St. Gallen. Seine durch diese zahlreichen Auslandsaufenthalte inspirierte Einbeziehung fremder Rechtsordnungen trug dazu bei, dass er in den Vorstand der Gesellschaft für Rechtsvergleichung gewählt wurde.

1982 habilitierte sich der zu Ehrende am Fachbereich Rechtswissenschaft der Johann Wolfgang Goethe-Universität in Frankfurt am Main und erwarb die Lehrbefugnis für Bürgerliches Recht, Handels- und Wirtschaftsrecht, Internationales Privatrecht und Rechtsvergleichung. Bald darauf trat er seine erste Station als Professor, für die Fächer Bürgerliches Recht, Handels- und Gesellschaftsrecht, an der Universität Hannover an. In den folgenden nahezu 10 Jahren verschaffte Christian Kirchner der Lehre und Forschung im Privatrecht am dortigen Fachbereich Rechtswissenschaften hohes Ansehen. Gleichwohl reizte ihn die Aufgabe, die nach der Wende wiedereröffnete Juristische Fakultät der Humboldt Universität zu Berlin mit aufzubauen. Er übernahm dort eine Professur für Bürgerliches Recht, Europäisches und Internationales Wirtschaftsrecht. Während seiner fast 20-jährigen akademischen Tätigkeit an der Humboldt Universität, zwei Drittel davon – wie oben bereits erwähnt – zusätzlich auch an der Wirtschaftswissenschaftlichen Fakultät, hat Christian Kirchner entscheidend zur Entwicklung des modernen Wirtschaftsrechts, insbesondere des Wettbewerbs- sowie des Regulierungsrechts, beigetragen. Nach seiner Emeritierung als deutscher Hochschullehrer hat er sich in erster Linie als Vorstandsmitglied und Senior Research Fellow des Wittenberg-Zentrums für Globale Ethik den aus Entscheidungssituationen der Individuen entstehenden gesellschaftlichen Konflikten unter ökonomischen und juristischen Gesichtspunkten, und damit vor allem der Wirtschaftsethik, gewidmet.

Daneben erscheint es uns wichtig, herauszustellen, dass Christian Kirchner ein umfassend und klassisch gebildeter, interessierter, hilfsbereiter, humorvoller und

aufgeschlossener Gesprächspartner war, der nicht nur Wert darauf legte, seine Ansichten und Ideen von anderen kritisch beurteilen zu lassen, sondern ebenso angeregt deren Gedanken aufnahm und sich kenntnisreich mit diesen auseinandersetzte. Von diesen besonderen Eigenschaften des zu Ehrenden haben die Herausgeber dieser Festschrift regelmäßig profitiert und sie schätzen sie sehr. Sein persönliches Engagement für Andere und besonders für seine Mitarbeiter und Doktoranden, trotz umfangreicher Prioritäten und ständigen Zeitdrucks, unterstreicht nachdrücklich seine menschliche Größe und zeichnete ihn als Wissenschaftler und als Mensch in besonderer Weise aus. Aufgrund seines stets freundlich gesonnenen Engagements war er international als wissenschaftlicher Ansprechpartner, Weggefährte und Mentor bei Kollegen, Schülern und ebenso bei den Studierenden sehr beliebt.

Für die vorliegende Festschrift haben zahlreiche renommierte Autoren aus Deutschland sowie unter anderem der Schweiz, den USA und Asien als Freunde, Weggefährten, Schüler und Kollegen Beiträge verfasst, die sich mit Problemen aus den zentralen Arbeitsgebieten des zu Ehrenden wissenschaftlich auseinandersetzen. Die Beiträge erfassen als Schwerpunkte das Wirtschafts- und Gesellschaftsrecht, das Kartellrecht, Recht und Ökonomie der Regulierung sowie die Institutionenökonomie. Dabei wird, wie auch von Christian Kirchner selbst, zumeist ein europäischer oder internationaler Bezug hergestellt und häufig eine wirtschaftswissenschaftliche Sichtweise gewählt.

Für das Zustandekommen dieser Festschrift danken wir herzlich sämtlichen Autorinnen und Autoren für ihre Beiträge, der langjährigen Sekretärin des zu Ehrenden, Frau Karin Weber, für vielfältige Unterstützung und dem Verlag Mohr Siebeck für die sorgsame Drucklegung. Das Erscheinen der Festschrift wurde durch großzügige finanzielle Zuwendungen über die Wirtschaftswissenschaftliche Gesellschaft an der Humboldt-Universität zu Berlin e.V. ermöglicht.

Wir werden uns nach dem Tod Christian Kirchners umso mehr bemühen, seinem wissenschaftlichen und persönlichen Leitbild zu folgen, die von ihm durch sein Werk und sein Leben gesetzten Anstöße und Ideen fortzuführen und sie in seinem Sinne an die Nachfolgenden weiterzugeben.

Andreas Schwartze, Wulf A. Kaal und Matthias Schmidt

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1. Wirtschafts- und Gesellschaftsrecht

The Role of Courts in Japan Seen from a Comparative German Perspective

Harald Baum[*]

I. Varying Aims of Comparison of Law

A comparative legal discovery expedition faces at its start this well-known question: What is the primary aim of the search? Is the goal a quest for the *differences* between our own and the pertinent foreign legal system? Or are we bound to look for *similarities* between the two?[1] The traditional answer given within a European context would probably be the search for similarities, for the common core of the legal orders involved is based on Roman law foundations that are ubiquitous in most of Europe.[2] However, if the question is posed in a setting involving a *non-European* legal system, such as one of the indigenous legal orders, the answer might be that the focus should be on differences between the two instead.[3]

In the case of Japan, either answer can be expected depending on whom we ask. Without a doubt, Japanese civil law is part of the Roman legal tradition – by choice, for no Roman legionnaire ever set foot on one of the Japanese islands. From this perspective, similarities between the Japanese and the French or German legal concepts acting as role models in Meiji Japan[4] could engage the focus of our comparative attention. However, the opposite expectation is equally probable, urging us to explain Japan's (in)famous Confucian heritage and its alleged "Asian" disdain of litigation.[5] Or, to give our story yet another twist, we might also be asked to explore how the adoption of American legal ideas after 1945 replaced or reshaped the civil law institutions introduced in Meiji times. Japan's present legal system is the most refined and fascinating mixed legal order of all, dwarfing even Louisiana, Scotland, or South Africa, the candidates usually cited.

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[*] Some sections of this paper are based on the author's contributions at Baum and Bälz (2011).

[1] For a brief discussion see De Coninck (2010); Michaels (2010); Schacherreiter (2013); for a comprehensive discussion, see, e. g., the following edited volumes: Legrand (2009, 2003); Reimann and Zimmermann (2006); Van Hoecke (2004).

[2] Cf., e. g., the classic treatise by Zweigert and Kötz (1998).

[3] Cf., e. g., Glenn (2010); Constantinesco (1971–1983).

[4] For a comprehensive overview, see Röhl (2005a).

[5] An authoritative short discussion of Japan's specific legal heritage can be found with Haley (2010) 313; for an extensive analysis, see Haley (1991).

Christian Kirchner, to whom these lines are dedicated, has long been a keen observer of Japan's legal order and an active participant in many comparative projects including Japanese law. Kirchner emphasizes the importance of informal rules when it comes to comparison of law with Japan. Though informal rules complement the formal legal system in Germany and elsewhere in the European Union, in Japan they play a much more prominent role due to the country's specific legal heritage.[6]

In trying to develop a comparative evaluation of the role courts play in Japanese society, this article deals with three different aspects: first, the institutional similarities and differences that can be observed between the court systems in Japan and Germany (hereafter at II); second, the access to justice in both countries (infra at III); and finally, the role of courts in shaping the legal order, constitutional and otherwise (infra at IV).

II. Institutional Similarities and Differences

1. Administration of Justice

a) The Organizational Setting

When Japan built its modern legal and judiciary system during the last three decades of the 19th century, French and German legal concepts and institutions served by and large as the main (though by no means exclusive) role models.[7] This is well known and documented for Japan's first Constitution of 1889[8] as well as for the two most important substantive law codices, the Civil Code (*Minpô*) of 1896/98[9] and the Commercial Code (*Shôhô*) of 1899,[10] and also for the central procedure law, the Code of Civil Procedure (*Minji soshô-hô*) of 1890.[11]

Perhaps less known is that the creators of Japan's modern court system also relied substantially on the German model.[12] The Code for the Constitution of Courts (*Saiban-sho kôsei-hô*) of 1890 – in force until 1947 – that regulated Japan's newly established court system was largely modeled after the German Law for the Constitution of Courts (*Gerichtsverfassungsgesetz*) of 1879. The vertical structure of four layers of courts consisting of local (summary) courts, district courts, high courts, and the former and the present Supreme Court (*Daishin'in / Saiko Saibansho*) mirrors the set-up of the German court system.

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[6] Kirchner (2007) at 314.
[7] For the latter, see Schenck (1997).
[8] See, e. g., Ando (2000).
[9] See, e. g., Frank et al (2005); Sokolowski (2010).
[10] See, e. g., Baum and Takahashi (2005).
[11] See, e. g., Röhl (2005b).
[12] See, e. g., the extensive overview by Röhl (2005c).

There is, however, one major organizational difference: Since Tokugawa times, Japan has been a highly centralized country. Accordingly, the administration of the courts is centralized. Germany, by contrast, was and still is today a decentralized state with a strong federal structure. Administration of courts falls within the responsibility of the 16 German federal states (*Bundesländer*). Only the federal courts are administered centrally. One consequence is that, as a rule, judges stay within one federal state during their professional career, except when they are promoted to one of the six federal courts. As at least in principle in Japan, a German judge cannot be transferred against his will to a court in another district. However, the actual Japanese practice, dreaded among younger judges, is to shift courts every two years on request or suggestion by the Secretary at the Supreme Court. Such a practice is virtually unknown in Germany. Some assign a disciplinary potential to this practice based on the wide discretion of the Secretary at the Supreme Court to decide which judge is sent to what court.[13]

Given the fact that the procedural laws of both countries also used to be similar (and still are to a significant extent), it comes as no surprise that the ways Japanese and German courts actually work do not differ much, at least in principle. Thus institutional similarities used to clearly dominate the comparative picture and still very much do so today in most areas, though after 1945 their paths somewhat diverged with respect to organizational matters. During the occupation of both Japan and Germany in the second half of the 1940s, the Allied Powers – and primarily the US, at least in Japan – initiated a number of legal reforms. These helped to re-establish the rule of law and built up truly functioning democratic institutions, perhaps for the first time. All this quickly met with lasting approval by the population.

As the historical situation was somewhat different in each country, reform measures differed as well. Japan established a *unified* judicial system based on the US model and abolished all special courts with a new Court Organization Law (*Saiban-sho-hô*) of 1947 that replaced the Code for the Constitution of Courts of 1890.[14] No parallel development took place in Germany, except for the abolishment of military courts. Today, besides the "ordinary" German courts for civil and criminal matters, we also find special courts for administrative law, labor law, social law, patent law, and tax law. These include special district courts, high courts, and a special federal court for each area, making a total of six federal courts. Additionally, in 1951 a constitutional court was established, the Federal Constitutional Court (*Bundesverfassungsgericht*). In sharp contrast to the situation in Japan, the Federal Constitutional Court has the *exclusive* authority to judge the constitutionality of legislative and administrative acts. This marks an

[13] Cf., e. g., Ramseyer and McCall Rosenbluth (1993).

[14] For a comprehensive analysis of the structure and organization of Japanese courts, see Haley (2007).

important institutional difference that will be analyzed in greater detail later (*infra* at IV).

b) A Cadre of Highly Skilled Professional Judges

The most important shared institutional feature of the Japanese and German judicial systems may be that both have the tradition of delivering justice through a cadre of highly skilled professional judges. German judges have lifelong tenure (i. e., until they reach the age limit). The same was true for Japan until 1945, and at least *de facto* is still true today. Although Japanese judges need to be re-elected every ten years, this seems to cause no problem in practice.[15] Judges are independent, not corrupt,[16] and enjoy the highest social prestige in both countries. In the words of the American Japan expert John Haley: "Japanese judges are among the most honest, politically independent, and professionally competent in the world."[17]

The method of training is again basically similar in both jurisdictions. After graduation from university, young jurists undergo paid professional training that lasts two years. Successful graduation from this course is a prerequisite for becoming a judge, state prosecutor, or attorney in Japan as well as in Germany. A slight difference is that this training is centralized in Japan at the Legal Training and Research Institute (*Shihô Kenshû-jo*, hereafter LTRI), whereas in Germany it is decentralized and falls under the responsibility of the federal states. A major political – not judicial – difference is that virtually everyone who passes the final law exam at one of the German universities (with a success rate of about 70 percent) can apply for the professional training. There are *no* quantitative restrictions, though some particularly popular court districts have waiting periods of up to two years. This market-based approach differs fundamentally from the procedure – obviously still inspired by the fatal attraction of central planning – that marks the entry modalities to the LTRI in Japan.

A further difference with potential political implications is that in Japan the judiciary administers itself under the authority of the Secretariat at the Supreme Court. In Germany, with the exception of the Federal Constitutional Court, all courts are supervised organizationally by the federal or state ministries of justice. However, this does not touch upon or impede the independence of the individual judges, which is regarded as sacrosanct. The judges are organized in a voluntary nonprofit association, the *Deutscher Richterbund*, which takes care of the interests of judges as a professional group. It has significant political clout, as thousands of judges are members. Though it may look paradoxical at first sight, the centralized

[15] Fujita (2011) states that a mandatory performance review of newly appointed judges by an internal advisory committee after ten years in office singles out only one or two candidates as unfit for office during each promotional cycle.

[16] The issue of *political* corruption in parts of the courts in both countries in the late 1930s and early 1940s is not overlooked, but not of relevance for this context.

[17] Haley (2007) at 99.

administrative self-supervision by the Secretariat at the Supreme Court may actually be much stricter than the decentralized governmental oversight of the judicial system in Germany.

The thorny issue of judicial independence and political influence, of course, is discussed in both countries. As in the US, in Japan and Germany these questions crystalize when positions are to be filled at the Supreme Court level. Japanese judges are officially appointed by the Cabinet. But the Cabinet does not freely choose candidates it likes for political or other reasons. Instead, practice dictates that candidates be chosen from a list assembled by the Supreme Court. Thus a *direct* political influence can be ruled out. However, some claim that decades of consecutive conservative governments nevertheless made sure that, *in the end*, only judges who were positive toward the conservative government's political course were appointed; in turn, these later proposed only conservative candidates.[18] Others claim that the Supreme Court is well aware of its informal power to propose candidates and of the Prime Minister's power to reject candidates. For these reasons it would not propose candidates that are ideologically unacceptable, and furthermore would try to avoid openly confronting the government.[19] This kind of political caution is also said to dominate the way the seats are filled at the Supreme Court. In short, in this view, a lot of non-transparent *nemawashi* behind the scenes shapes the outcome of the nomination and appointment process.[20] Others dispute these assumptions vehemently.[21] In any case, judges in Japan are by law denied the possibility of party membership.[22]

The question of political independence of judges is also critically discussed in Germany, but from a slightly different angle and, perhaps, more openly. To start with, German judges, in contrast to their Japanese colleagues, *may* hold a party membership and usually make no secret of this. In fact, a party membership may actually *promote* their career. A special election committee staffed with representatives from the executive branches of government and with members of parliament appoints the judges to the federal courts by majority vote.[23] The right to propose candidates lies with the individual members of the committee and with the competent federal minister. The fact that members of the executive branch with their political interests play a decisive role in the promotion of judges has long been criticized.

Members of the Federal Constitutional Court are elected in a different way by both chambers of Parliament.[24] The political parties struck a gentlemen's agree-

[18] Cf., e. g., Ramseyer and Rosenbluth (1993); Ramseyer and Rasmusen (2003).
[19] Cf. Matsui (2011) at 1405 et seq.; Law (2011) at 1448 et seq.
[20] Law (2011) at 1450 et seq.
[21] Cf. Fujita (2011) at 1509 et seq.; Haley (2007) at 112 et seq. and (2011) at 1485 et seq.
[22] For details, see Haley (2011) at 1485.
[23] See http://www.bundesgerichtshof.de/DE/Richter/richter_node.html
[24] See http://www.bundestag.de/dokumente/analysen/2006/Die_Wahl_von_Richtern_des_Bundesverfassungsgerichts.pdf

ment (if that is the right expression in this context) that each party may propose a candidate in turn in relation to their strength. Thus, by and large the political spectrum of the Constitutional Court mirrors the political spectrum in Parliament. Again, this practice has long been criticized. On the other hand, the influence of political parties is laid open, and so far neither at the Federal Constitutional Court nor at the other federal courts can one find a pattern of decisions along party lines.

2. Size of the Judiciary

With respect to the size of the judiciary, a significant difference between Japan and Germany emerges: the widely varying number of judges. In total, Japan had 3,656 judges in 2011.[25] The figure for Germany was nearly six times higher: 20,411 judges were active in 2011.[26] An even more striking variation can be observed at the top of the judicial hierarchy. The Japanese Supreme Court is staffed with only 15 judges (plus research judges). Similarly, the German Federal Constitutional Court is staffed with 16 judges (plus research judges). However, the other six Federal Supreme Courts are staffed with an additional total of 440 (!) judges. Given that the Japanese population is some 50 percent bigger than Germany (125 million vs. 82 million), it is clear that the difference in the number of judges is even greater in relative figures than in absolute figures. A similar discrepancy between both countries is reflected in the number of attorneys: roughly 25,000 for Japan as opposed to some 150,000 for Germany (including those whose major professional occupation is *not* practicing as an attorney).

To be sure, numerical headcounts are a crude measurement for evaluating a complex social reality.[27] However, there can be little doubt that access to justice is institutionally more restricted in Japan than in Germany – for better or for worse. This *political* question of accessibility of the courts should be distinguished from the *judicial* question of how the courts are handling the cases that were filed. Here, as argued above, differences in practice between the courts in both countries seem to be small.

We will now turn to the political aspect of access to justice.

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[25] http://law.e-gov.go.jp/htmldata/S26/S26HO053.html

[26] http://www.bundesjustizamt.de/nn_2103256/DE/Themen/Buergerdienste/Justizstatistik/Personal/Gesamtstatistik,templateId=raw,property=publicationFile.pdf/Gesamtstatistik.pdf

[27] For a refined comparative analysis of litigation rates in Japan and five other selected countries (but not including Germany), see Ramseyer and Rasmusen (2010). For a comprehensive historical analysis, see Wollschläger (1997).

III. Access to Justice

1. The Deficits

Courts can only play a meaningful role in society if they are sufficiently accessible for the general public. This in turn depends on the infrastructure of the judicial system in its totality. Three factors are critical in this respect: first, whether there are enough judges to handle the caseload not only diligently but also with reasonable speed; second, whether citizens get sufficient legal counseling and guidance for their decision to sue or not to sue and during the trial; and third, whether the judicial system provides effective means for the average citizen to cope with the costs of suing.

An official survey initiated by the Japanese government in cooperation with the Japanese Supreme Court and the Japan Federation of Bar Associations in the year 2000 revealed, quite shockingly, that *only* 18.6 percent of the persons interviewed were content with the way the civil justice system worked in Japan, and *only* 22.4 percent regarded that system as sufficiently accessible.[28] In other words, if the survey was truly representative, more than three-quarters of the Japanese population seemed to have a decidedly negative view of its present civil justice system at the beginning of the 21st century. High costs and the length of proceedings were cited as the biggest impediments against the use of litigation to enforce rights.

Ironically, these results correspond exactly with the famous analysis that the American Japan expert John Haley had presented some twenty years earlier to explain low litigation rates in Japan.[29] His argument challenged the then dominant thesis of the eminent Japanese scholar Takeyoshi Kawashima that low litigation rates in Japan are predominantly the result of the fact that the Japanese traditionally lack the Western style of rights consciousness and do not define their relationships and transactions in legally enforceable rights, but instead presume the necessity of balancing interests and complying with the expectations to keep up societal harmony.[30] Haley's thesis met with criticism; Japanese academics claimed that he failed to properly understand the system and treated his work with "benign neglect."[31] Insofar as the critique seemed to assert that the civil justice system in Japan functioned well at that time, it appears to maintain a remarkable degree of academic nonchalance regarding the needs of the common Japanese citizen. However, Haley also emphasizes the lasting communitarian orientation of the Japanese society caused by the endurance of the "village" as a paradigm

[28] The results are analyzed by Teshigahara (2002).

[29] Haley (1978); see also id. (2002).

[30] Kawashima (1967) at 166 et seq.; id. (1963) at 43 et seq., 50 et seq.; Kawashima's findings are partly confirmed by Wollschläger (1997); for a discussion, see Baum and Bälz (2011) at 6 et seq.

[31] The critique is summarized with Yoshida (2003); for the background of Haley's argument with Kawashima's thesis, see Ramseyer (2009).

of governance in Japan and one of the most striking features of the country's history.[32]

Even before the devastating 2000 survey on the evaluation of the role of courts by the Japanese populace, the Japanese legislature had repeatedly tried to improve flaws in the judicial system. The long duration of civil procedures has been the special focus of several rather limited law reforms relating to procedural provisions.[33] Although reforming the bar exam, unifying the legal profession, and reforming the Supreme Court to solve judicial backlog were recurring themes in judicial policymaking and were often demanded by various groups inside and outside the judiciary, reforms on these themes were incremental at best. They did not address the major problem in earnest: the artificially created shortage of judges and lawyers due to the strict admission limitations for the traineeship for jurists at the LTRI. The most plausible explanation for this politically intended systemic deficit has been put forward by the well-known Japanese legal sociologist Takao Tanase. According to Tanase, the non-litigious society of Japan did not develop spontaneously. Instead, it has been "cultivated by well-planned management." Bureaucratic "management, rather than litigants' attitude or institutional barriers, provides the best explanation for why the Japanese rarely litigate."[34] To make up for the shortcomings of a civil justice system, at least in the past,[35] the government, especially the bureaucratic elite, took care to set up institutions of alternative dispute resolution rather than improving the judicial system. Additionally, and equally important, it simultaneously created and promoted the general "myth" that the use of these ADR institutions was more advantageous than litigation for conflicting parties.[36]

2. The Reform

The situation changed, however, from 1999 onward with the establishment of the Justice System Reform Council (*Shihô Seido Kaikaku Shingi-kai*, hereafter JSRC) at the Japanese Cabinet, chaired by the Prime Minister.[37] Two years later, on June 12, 2001, the JSRC presented its report to then Prime Minister Jun'ichiro Koi-

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[32] Haley (2010) at 349.

[33] For this, see Kakiuchi (2004); Nottage (2004).

[34] Tanase (1990) at 679; for a discussion of the varying explanations of Japan's (only very slowly rising) internationally low litigation rates, see Feldman, E. A. (2007).

[35] For the far-reaching judicial reforms since the beginning of the millennium, see hereafter at 2.

[36] The claim that ADR institutions are designed and actually function as a substitute and not only as a complement to court-based litigation is, however, refuted by Ginsburg and Hoetker (2007) at 115 et seq.

[37] On the basis of the *Shihô seido kaikaku shingi-kai setchi-hô* [Act for the Appointment of a Commission for Judicial Reform] Act No. 68/1999.

zumi.[38] Only three days later, the Cabinet decided to pay full attention to the reforms and to draft bills to realize the objectives of the JSRC. Politicians' expectations for the judicial reform were high. In his policy speech in May 2001, Koizumi emphasized that "it is imperative that we reform our judicial system so that we can make the transition to an 'after-the-fact check and relief society' based firmly on clearly established rules and the principles of self-responsibility."[39] The task formulated by the JSRC for itself seems to indicate a clear break with the past:[40]

> How must the various mechanisms comprising the justice system and the legal profession, which serves as the bearer of that system, be reformed so as to transform the spirit of the law and the rule of law into the 'flesh and blood' of Japan?

The role of the courts is seen critically:[41]

> There are a considerable number of evaluations suggesting that the judiciary has not necessarily met these expectations sufficiently.

To achieve these aims and to improve the role courts could and should play in and for society, the JSRC proposed, among others, a significant increase in the number of successful candidates to the legal profession, the establishment of specialized professional law schools, as well as more swift legal proceedings and an expansion of access to courts. As is well known, most of the proposals were quickly picked up by the legislator in the following few years.[42]

From a public policy perspective, it is interesting to understand how such fundamental reforms could be possible in a context of conservative and closed judicial policymaking controlled by the Supreme Court, the Japan Federation for Bar Associations, and the Ministry of Justice. A second question is why the reform of the administration of justice finally happened then and not earlier.[43] The process of policy change is a complex process that gradually builds up from a situation of relative stability to drastic policy change.[44] The reform of 2001 is seen as a spectacular punctuation in an otherwise incremental evolution of reforms over the previous decades.

For a long time, a policy equilibrium existed among the three main actors that formed a public policy monopoly in the field of administration of justice in Japan: the Supreme Court (and its Secretariat), the Ministry of Justice, and the Japan

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[38] The Justice System Reform Council (2001); see also Sato (2002) for an illuminating interview.

[39] The Japan Times, 8 May 2001.

[40] The Justice System Reform Council (2001) at Chapter I.

[41] Id., at Part 2., 1. "Role of the Justice System."

[42] For a comprehensive overview, see Rokumoto (2001 and 2005).

[43] The answers are given in a seminal paper by Vanoverbeke and Maesschalck (2009); this and the following two paragraphs significantly draw on that article.

[44] Vanoverbeke and Maesschalck (2009) at 13, referring to Baumgartner and Jones (1993); see also Foote (2005).

Federation of Bar Associations (including their member associations).[45] The equilibrium was not only maintained by the impasse in the policy subsystem dealing with the administration of justice, but also by the lack of political will at the macro-political level to change the policy image.[46] One reason for this disinterest was the political cultivation of the rhetoric of a culturally exceptional and successful informal approach to dispute resolution and law in Japan. This policy image reinforced the power of those in the policy venue, maintaining the power of the happy few within the venue.[47]

However, a variety of converging factors including demands for judicial improvements from a business world trying to cope with the demands of globalization, the fall-out from Japan's economic and structural crises of the 1990s, and a generational change at the helm of the bar association with charismatic leaders calling for a more open society lifted the issue of judicial reform to the macro-political agenda in the late 1990s.[48] Thus the reform of the judicial system in its totality suddenly gained top priority in Japan's national policies.[49] Establishing the JSRC under direct control of the Cabinet (and not the Ministry of Justice or the Secretariat of the Supreme Court) as well as staffing it with reform-minded, independent, and highly respected members was crucial for its success. As a result, the JSRC "embodied the new image of a comprehensive reform for a society based on the rule of law."[50]

3. The Outcome

The far-reaching reform proposals were greeted by most as a radical, if not paradigmatic,[51] "turning point in the modern history of the Japanese justice system,"[52] and regarded as the first fundamental change since the Judicial Reform initiated immediately after the end of the Second World War.[53] Others are more skeptical.[54] Especially the central point of raising the number of successful candidates at the entrance exam for the LTRI seems to have hit the rocks. Pass rates are already falling again rapidly and hitting a 25 percent low – as opposed to the originally promised success rate of some 70 percent – while the number of successful candi-

[45] Id., at 14 et seq.
[46] Id., at 19.
[47] Id., at 20.
[48] Id., at 32; Foote (2005) at 221 et seq.
[49] Miyazawa (2001/2007).
[50] Vanoverbeke and Maesschalck (2009) at 33.
[51] Cf., e. g., Miyazawa (2001/2007) at 89.
[52] Rokumoto (2005) at 35.
[53] Satô (2001).
[54] Cf. Haley (2005); Nottage (2001b); Anderson and Ryan (2010).

dates is nowhere near the envisaged goal of 3,000 candidates that should eventually be allowed to pass each year.[55]

There seems to be a fundamental conceptual flaw in the way the reform is conceived: The original central idea was to double the number of attorneys in private practice in Japan to 50,000 by the year 2018 (together with a proportional increase in the number of judges). This figure roughly matches the lawyer population of (a much smaller) France. Why France was chosen as a role model remains mysterious. Even more alarming appears the fact that the responsible bureaucrats obviously still do not trust market forces in the market for legal talent but instead adhere to artificially set numerical goals, once more trying to outguess the market in the time-honored but rarely successful fashion of central planning.[56]

However, these doubts notwithstanding, the number of judges *has* been rising constantly (albeit slowly) over the last years. This, together with organizational and procedural reforms (even if incremental), has obviously enabled courts to conclude trials much quicker than in the past. Latest figures show that Japanese district courts need roughly the same amount of time to handle a civil procedure case as do their German counterparts: on average about eight months.[57] This means that one of the major impediments against an efficient role of the courts in dispute settlement seems to be successfully mitigated – at least as a rule.

The second question raised at the beginning – whether citizens can get competent legal counseling for their decision to sue or not to sue and sufficient guidance during the trial – is harder to answer. The number of practicing attorneys has also constantly (if slowly) risen over the last years. However, in comparison with other countries it is still surprisingly low.[58] Furthermore, most of the attorneys have set up business in the large cities and only a few are active in the countryside. To compensate for this deficit in legal counseling, the government established Legal Aid Centers (*Nihon Shihô Shien Sentâ*) across the country in 2006 that are staffed with attorneys and judicial scriveners. It seems doubtful, however, that these can fully make up the deficit. Instead, legal advice as a crucial piece of court-external infrastructure is still missing to a significant degree. This deficit impedes the courts from living up to their full potential and playing a broader role in society as envisaged by the reformers.

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[55] Jones (2013) at 46 et seq.

[56] See the highly critical analysis by Jones (2009); but see somewhat more positively McAlinn (2010); see also Anderson and Ryan (2010) at 57 emphasizing the regained control by the Ministry of Justice and the increasing opposition by the Japanese bar.

[57] For Germany, see http://www.bundesjustizamt.de/nn_2103252/DE/Themen/Buerger dienste/Justizstatistik/Geschaeftsbelastungen/Geschaeftsentwicklung__Zivilsachen,template Id=raw,property=publicationFile.pdf/Geschaeftsentwicklung_Zivilsachen.pdf for Japan: http://www.courts.go.jp/about/siryo/hokoku_02_hokokusyo/index.html; for a comparative statistic for the years 1992–2001, see http://www.courts.go.jp/saikosai/vcms_lf/80928020.pdf

[58] See *supra* at II. 2.

The answer to the third question raised earlier – whether the judicial system provides effective means for the average citizen to cope with the costs of suing – is clearly negative. Costs were and still are a big impediment against proper access to justice. It seems as if Japan is caught in a path-dependent development trap here. Legal representation by an attorney before the courts is not mandatory in Japan. This principle seems to be a legal transplant imported from the US. The consequence is that the attorney's costs are not part of the necessary costs of the proceedings, and that in turn means that the loser-pays-all rule does not apply, in principle at least, to these costs. Even a winning party thus has to bear its own attorney's fees. Furthermore, the fees of attorneys are not subject to regulation or oversight in Japan. Attorneys are entirely free to negotiate their fees with their clients.[59] The US legal practice copes with these issues by using contingency fees. Under this regime, a successful claimant pays the attorney a certain percentage, usually 30 percent, of any gains but has to pay nothing if he or she loses the case. This is not common practice in Japan.

The institutional setting under German law is entirely different. Various factors facilitate the access to justice. Representation by an attorney is mandatory at German district or higher courts, but, accordingly, attorneys' costs are deemed to be part of the necessary procedural costs. The costs for both sides are to be borne by the losing party. Law regulates attorneys' fees. Legal expenses insurance – so far more or less unknown in Japan – is a thriving business in Germany. By purchasing such insurance, everyone can easily insure against the risk of costs if sued or if filing a suit. Furthermore, if a person cannot afford his or her legal costs and has no legal expenses insurance, the state takes over the costs entirely or partially, depending on the financial situation of the person involved. Again, such a rule has not been established in Japan, though under certain circumstances some kind of assistance can be obtained. The combination of legal expense insurance established in the 1970s and legal expense assistance by the state has driven up litigation rates in Germany, but it secures the right of average citizens to enforce their rights. This different institutional setting may partly help to explain the lasting difference in litigation rates in both countries.[60]

IV. Judicial Restraint vs. Judicial Activism

In the common law as well as the civil law tradition, one key characteristic of a country's supreme court is to what extent the court shapes the legal order and shows judicial activism. Japan's Supreme Court is seen – and often criticized – as overly prudent and conservative when it comes to performing judicial review and

[59] Previous guidelines developed by the Japanese Bar Associations were abolished in 2004.
[60] See *supra* at III. 1.

to striking down laws on constitutional grounds.[61] Others dispute these findings.[62] From a Continental European perspective, it is sometimes puzzling to see how much of the critical analysis of Japan's Supreme Court's praxis – mostly voiced by US academics or Japanese scholars inspired by the American judicial system – actually refers to Japan's laws and its judicial system *as such*, and how much deals with the institutions typical for civil law as opposed to those of the common law world.[63]

However, the fact that the Court has struck down *fewer* than ten laws in the past 60 years for violating the Japanese Constitution seems to justify this assumption.[64] Especially if one compares this with constitutional review by courts elsewhere, the Japanese Supreme Court seems to show remarkable judicial restraint. In sharp contrast to the situation in Japan, the German Federal Constitutional Court, for example, has so far overruled a total of some 640 norms as unconstitutional since its establishment in 1951.[65] But it should be acknowledged that a very different political dynamic is at work here:[66]

The Federal Constitutional Court is the most respected public institution in Germany. Notwithstanding the separation of powers and statements to the contrary, it plays a major role in the country's political life, at least *de facto*. In contrast to the situation in Japan, the German Federal Constitutional Court has the *exclusive* authority to judge on the constitutionality of legislative and administrative acts. This centralized authority in constitutional matters differs fundamentally from the decentralized institutional setting in Japan where each court has the authority to declare any legislative or administrative act unconstitutional (at least theoretically). Furthermore, and again in contrast to the situation in Japan, citizens who claim a violation of their basic rights provided for in the first part of the German constitution[67] have the right, under certain conditions, to file a constitutional complaint directly with the Federal Constitutional Court. Various public and political bodies also have the right to file a constitutional complaint with the Court against acts of other branches of government. In 2011 alone, the

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[61] See, e. g., the profound analysis by Matsui (2011) and Law (2011).

[62] See, e. g., Upham (2011), Fujita (2011), Haley (2011).

[63] In this venue expressively Haley (2011); see also Fujita (2011) and, in general, Nottage (2001a).

[64] For an overview of the criteria the courts apply in constitutional review cases, see Kuriki (1998).

[65] http://www.bundesverfassungsgericht.de/organisation/gb2011/A-VI.html

[66] This refers only to the time after the establishment of the Constitutional Court in 1951; before, the situation was different. The first German constitution of 1919, the so-called Constitution of Weimar (*Weimarer Reichsverfasung*), did not provide for constitutional review of laws by the courts at all. Only in 1925 did the former Supreme Court, the *Reichsgericht*, acknowledge such a competence *praeter legem*. But before courts could make much use of this instrument, the Constitution was suspended in 1933 for political reasons; for details, see Hartmann (2006/07).

[67] The Basic Law (*Grundgesetz*) of 1949.