

## INTERNATIONAL INTERESTS

Bernard W. Hoeter



# Japanese Legal Practitioners: Bengoshi and Shiho-Shoshi

At the dawn of history when, tradition tells us, Romulus had just founded Rome. “Nippon” was created a state (about 660 BC) by Emperor *Jimmu*, allegedly a direct descendant of the Sun-Goddess.

But when Japan emerged from the mist of history, tribal clans continued to challenge any central power. Law was the sword of the local lord.

We have minute records of Roman Law, going back more than 2000 years. But little is known about early Japanese Law. The *Nara* period, AD 700 to AD 800, during which central Japanese government was established, gave birth to the *Yoro* Code of Law. This pandect was written in classical Chinese, a language that served early Japanese jurists, like Latin had served their mediaeval European colleagues, as *lingua franca*.

Under strong cultural influences from China, early Japanese Law was adopted from Chinese models. During the 9th century, feudalism had developed in Japan. The head of the *Minamoto* family, *Yoritomo* became *Shogun*. He was the first of many military rulers who, from the 11th to the 19th century, governed Japan. The Imperial Court at Kyoto continued to exist, but the real power was in the hands of hereditary *Shoguns* (dukes) and their feudal *Daymios* (barons).

During the *Fujiwara* period (about AD 1200), the first land registry office, the *Kirokujo*, was created on the Japanese Mainland. Its material purpose was not the registration of titles but the collection of taxes.

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After the Mongol Invasions had failed in the 13th century, Japanese customary laws, arisen from feudal and imperial edicts, were codified under the rule of the *Kamakura* shogunate.

The 16th century saw a rising merchant class that had acquired wealth and thus, economic power. Reform was in the air. Middle class urban merchants were becoming a commercial elite, tyrants of wealth and power. The new forces exerted influence on local affairs. Affluent merchants started to control fiscal policy. They redistributed wealth in their favour, thus threatening the old order of aristocratic warriors, the Shogun, the Daymio and their men-at-arms, the Samurai.

From the 17th to the mid 19th century, law was practised in Japan by three legal practitioners:

1. the *Murayaku-nin*, the village magistrate who also served as mediator, registrar, and tax collector;
2. the *Kakiyaku*, forerunner of the Japanese Notary, who handled registration of real property for his feudal lord, like the ecclesiastical Notaries of mediaeval England had served their bishops; and finally
3. the *Kujishi*, comparable to a proctor of Henry de Bracton’s days.

### **Law Reforms**

By the middle of the 19th century, Japan was ripe for change. The *Shoguns* had become impoverished, the *Daymios* heavily indebted to the merchant class. Most *Shoguns* and *Daymios* had lost political power. Their knights, aristocratic warriors, the *Samurai*, became masterless and a serious social problem.

In 1854, US Captain Perry forced Japan to open to the West. Dissatisfied *Samurai* overthrew the *Shogunate* in 1877.

The glacial pace of law development in Japan ended abruptly with the *Meiji* Restoration (1868). Japan started to borrow from and gradually assimilated elements of Western culture, science, and administration; quickly she made

the transition from a mediaeval to a modern power.

Top-notch Japanese students were sent to England to study international commerce and naval strategy. They were sent to Germany to learn medicine and Prussian military science. Japan sent them to France to study Napoleonic law and civic administration. They went to the USA to research business management and industrial technology. Japanese officers attended West Point Academy, “Prussia on the Hudson.”

At the end of the 19th century, a new legal system was needed. The Japanese adopted the Code Napoleon, the German Civil Code, and gave themselves a Constitution.

**Non-Contentious Jurisdiction**

The Legal Professions Ordinance of 1872, the *Shiho Shokumu Teissi*, created three classes of legal practitioners:

1. the *Shosho-nin*, the Notary;
2. the *Daisho-nin*, the legal scribe; and
3. the *Daigen-nin*, the advocate.

When in 1890 a new *Civil Procedure Act* was promulgated, the *Daigen-nin* became the present *Bengoshi*, the barrister.

With the passing of the *Japanese Notaries Act* (the *Kosho-nin Ho*) of 1908, the *Shosho-nin* (Notary) became a *Kosho-nin*. The revised Act of 1919 promoted the *Daisho-nin*, the legal scribe, to *Shisho-Daisho-nin*, a scrivener<sup>1</sup>. The *Judicial Scriveners Act* of 1935 provided that a scrivener, after further legal studies and practice, could become a *Shiho-Shoshi*.

The May 2, 1950, amendment to this Act gave the *Shiho-Shoshi* the right to mediate in the lower Courts<sup>2</sup>.

A *Shiho-Shoshi* cannot give independent legal advice but is restricted to matters of the non-contentious jurisdiction, as is his BC colleague, the BC Notary Public.

The *Shiho-Shoshi* is generally conceived as being a “people’s helper,” a trusted legal practitioner for ordinary

citizens. The *Bengoshi*, on the other hand, the learned barrister-advocate, acts as trial lawyer in the Higher Courts of the land in litigation for large corporations and in criminal cases.

Up to World War II, the Japanese Judiciary was subject to the Executive Branch. The post-War (MacArthur) Constitution set up an independent Judicial Branch. A Supreme Court, consisting of 15 Supreme Court judges appointed from the ranks of eminent jurists and also from the echelons of prominent public figures such as ambassadors, professors, and others.

The post-War Japanese law reforms cut the umbilical cord that had tied the Japanese legal system to the Executive Branch.

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**Legal Education**

In Japan, six years of elementary schooling and three years of junior high school are mandatory for all youngsters. About 80 percent of Japanese students, however, continue to study for another three years to graduate from senior high school.

But graduation does not automatically open the door to university. Stringent admission tests filter out about 90 percent of those trying to enter academia. Japanese universities cater to the student elite. Japan does not subscribe to the North American way of providing academic virility by flunking out one-third of students after their first year, but applies an aggressive selection procedure. Japanese students have to score very high—about 90 percent—before being admitted to university.

There are seven prestigious national universities in Japan comparable to Harvard. In addition, there are about 60

other national and 62 provincial universities in Japan. Law is taught only at national universities.

After two years of “studium generale” (comparable to the Canadian General Arts curriculum), the young law student is taught Civil and Criminal Law for four years. After graduation from university, with the equivalent of an LLB, graduates must undergo a most rigorous Bar examination under the supervision of the Ministry of Justice.

Only about the best 500 law graduates in any given year—about 50 percent of the annual crop of graduates—are admitted to a two-year period of probationary legal work within the Court system. Here they are trained in the practical application of their law studies<sup>3</sup>.

Having served the public for two years, the young lawyer is entitled to call himself a *Bengoshi*. He now has to make the decision to enter either the judiciary, to become a judge or a prosecutor, or to enter private practice as a barrister—either with a law firm or on his own (copied from the German system). At present, there are about 16,000 practising *Bengoshi* in Japan serving a population of 130 million, I have been informed.

**Japanese Notaries**

Japanese senior Notaries, the *Kosho-nin*, are modelled after the French “notaire.” A *Kosho-nin* is a jurist appointed without examination [Section 13 of the *Notaries Act* of 1935] by the National Minister of Justice. He must have had a distinguished legal career<sup>4</sup>. About 70 percent of the *Kosho-nin* are recruited from the ranks of retired judges and state prosecutors; the remaining 30 percent come from eminent barristers. Only about 500 of the *Kosho-nin* are presently practising in Japan<sup>5</sup>.

A Japanese senior Notary (a *Kosho-nin*)—like his colleague, the Common Law Notary of the City of London—must be bilingual. He must be versed in Japanese Law, Latin Law, and English (Common) Law. He is a member of the *Nippon Kosho-nin Rengikai*, the National

Society of Notaries of Japan. A *Kosho-nin* is considered to be an officer of the National Government in private practice. The highly respected (and expensive) *Kosho-nin* deals with International Shipping and Finance. He drafts civil (marriage) and commercial contracts.

### **The Shiho-Shoshi**

The Judicial Scrivener of Japan, the *Shiho-Shoshi*, comparable to a BC Notary, deals with real property transactions as well as with testamentary and probate matters. He incorporates and manages societies and commercial companies. He deals with certified translations and acts as trustee in bankruptcy and at auctions.

The *Shiho-Shoshi* is dealt with in Section 12 of the *Japanese Notaries Act* of 1935. A *Shiho-Shoshi* must be a Japanese citizen and at least 21 years old. He must have successfully passed 80 percent of all prescribed examinations and, finally, have served a “practical notarial

apprenticeship” of at least six months with an established *Shiho-Shoshi* before he can practice on his own<sup>6</sup>. ▲

*The phonetic transcription of Japanese terms into English spelling was given to me by the International Shiho-Shoshi Association of Japan.*

Sources: Mr. Hidehito Yamakita, *Shiho-Shoshi*, Tokyo, and Consul Nobukatsu Honda, *Bengoshi*, Consulate General of Japan, Vancouver, BC.

**Bernard Hoeter**, PhD, was Secretary of The Society of Notaries Public of BC for 17 years, from 1969 to 1986.

### **FOOTNOTES**

1. A Japanese scrivener is a learned scribe, a conveyancer, a person who draws contracts, writes deeds and mortgages, and prepares other documents pertaining to real property. He is a person who acts as financial trustee and mortgage broker.

2. While BC Notaries cannot get involved in litigation, they—in increasing numbers—attend to mediation. I have been advised that about 70 percent of all Japanese Lower Court cases are settled with the assistance of judicial scriveners and only rarely by *Bengoshi* advocacy.
3. Japanese law graduates do not article with private law firms but serve (and are trained by) the Courts as kind of lowly paid community service, to earn their right to practise later in the legal system of the nation.
4. In 2000, the average age of a *Kosho-nin* was 62 years, I have been told.
5. It appears that at present, there are very few, if any, female Notaries in Japan, neither *Kosho-nin* nor *Shiho-Shoshi*. None of the Japanese I contacted had ever seen or heard of a female Notary. The Japanese Society of Notaries did not answer my inquiry.
6. The present *Shiho-Shoshi* qualifications are established under the *Shiho-Shoshi Ho* (Act) of 1950.