Rule of law, human rights, and the independence of judiciary, all are fundamental issues relating to the essence of the judicial system, and to debate these in a short space is difficult. This paper shall deal with two issues of high interest. One of these issues, which concerns primarily the rule of law and the independence of judiciary, is that up to now judiciary in Japan has not sufficiently fulfilled the function of being a check against the administration, although, under the present judicial reforms, this is to be reformed. Another issue is primarily related to human rights, and this paper will report on the human rights of foreigners resident in Japan.

1. Toward an expanded role for judiciary

I. Ideas for judicial system reform

Japan’s contemporary judicial system was originally established as “Rule by Law” system by the Meiji government, and after the post-WWII judicial system reforms, the judiciary has developed its role in the society. As Japan’s society moves toward maturity, it has become increasingly important to put all concerned parties on an equal footing pursuant to the principles of the rule of law, and to have judicial operations be executed by impartial third parties in accordance with reasonable and transparent processes. The government considers it a nationwide objective to reform judiciary system substantially from the viewpoint of public as the system users. In 2001, after two years of debate, the Judicial System Reform Council, a Cabinet advisory body submitted to the Cabinet an opinion paper entitled “A Judicial System to Support 21st Century Japan” (hereinafter referred to as “Opinion Paper”). Upon receiving the Opinion Paper, the Cabinet established the Judicial System Reform Promotion Headquarters (hereinafter referred to as “Promotion HQ”) in December 2001, with the Prime Minister appointed as its head. Setting a three-year period as the cutoff date (November, 2004), the Promotion HQ promoted such reforms as building a judicial systemic infrastructure that the public can easily utilize (building systemic infrastructure), gaining public confidence in the judicial system through public participation (public participation in judicial procedures), and completely bolstering the capabilities of the legal professions (building human resources).

Concerning the building of a systemic infrastructure, following issues are being investigated: (1) expanding access to judiciary through such things as expanding legal aid and improving the convenience of courthouses, (2) expediting lawsuit trials, specialized tribunals handling of lawsuits in specialized areas such as Intellectual Property which enhances function of dispute resolutions (3) expanding and activating means of alternative dispute resolution (ADR) so that the public can choose as needed from a variety of means of dispute resolutions, (4)
reinforcing the judicial function as a check against the administration. These are all important issues for the enhancement of the role of judiciary, but this paper shall focus on the function of judiciary being a check against the administration, and the problem areas of the present system and the challenge to such problems by the JFBA shall be introduced.

II. Function of the judicial system as a check against the administration
In Japan, under the former Constitution and up to the end of WWII, the administrative courts, which were part of the administrative department, were in control of administrative trials. With regard to the post-WWIII judicial reforms, with the Supreme Court positioned at the summit, the courts, independent from the authority of the administration, have been assigned the authority to determine administrative cases, and a system of judicial checks on the administration was established. The 1947 Constitution expected the judicial courts to play an important role in the midst of a system of checks and balances by checking administrative operations through the exercise of judicial power and protecting human rights and freedom of people.

To put this into action, the Administrative Case Litigation Code was enacted in 1962 as a special clause of the Code of Civil Procedures. Nonetheless, in practice, the courts were unable to free themselves from the consciousness from the former Constitution in which they placed reliance on administrative office judgments, and they have continued to refrain from exercising the judicial power. As a result, the courts have been unable to fulfill adequately the check function as expected by the Constitution.

Specifically, under the present administrative trial system, even if there is a claim to invalidate or rescind an administrative action, 14.7% of claims are denied due to such technicalities as lack of standing. Even if the case reaches an actual trial, because the judges respect for administrative discretion, the court determines only 13% of the cases in favor of plaintiffs. This result in a low case load, more specifically, one year’s caseload is between 1,400 and 2,000 cases, no more than one fourteenth the number of cases in neighboring country South Korea.

In the Opinion Paper, to improve the function of judiciary of checking the administration, it proposed to amend the Administrative Case Litigation Code, to establish specialized judicial tribunals for lawsuits against the Administrative departments, and to reinforce the specialized legal professions. The Judicial System Reform Promotion HQ organized over ten working committees with scholars, practitioners and experts to implement the reforms proposed by the Opinion Paper. The Administrative Litigation Investigation Committee (hereinafter referred to as “Administrative Litigation Committee”) which was established as one of these committees took charge of the judiciary of being a check against the administration, and met over twenty three times during the period from February 2002 to September of this year. If the judicial system performs checks against the administration, strict discipline over the exercise of administrative power will be demanded, so we can easily foresee resistance by the
administrative officials to the reforms. When the Administrative Litigation Committee held hearings at administrative officials, they raised 240 points of opposition and warnings against the reforms. In addition, the members of the Administrative Litigation Committee who had backgrounds as judiciary bureaucrats, in cooperation with the secretariat that was composed of officials seconded from the government representing the interests of the administrative department, displayed a passive stance on the reforms. The Administrative Litigation Committee has yet reached an agreement on the direction of the reforms, and there is doubt as to whether the Promotion HQ will realize the goal indicated in the Opinion Paper by the deadline of November 2004.

III Challenge to such problems by the JFBA
Along with the other judicial reform topics, JFBA considers it an important issue to revitalize the check function of the judicial system on the administration. JFBA is vigorously advocating for the reform in this respect. While judicial system reform covers a wide-range of topics, administrative litigation reform is a technical discussion, and it’s hard to say that many in the public are paying particular attention thereto. The JFBA considers that it is its duties to explain the meaning of judicial system reforms in a manner that is comprehensible to the public, and to present clearly the direction of the reforms is the duty of the JFBA. From March 2002 the JFBA organized a working group called the Administrative Litigation Working Group which created the JFBA’s draft Bill of the Administrative Litigation Law and submitting said draft to the Administrative Litigation Committee on March 13 of this year.

The JFBA draft should be distinguished in that it repudiated the scholarly principle that government action may not be rescinded without specialized legal procedure, and that it reaffirmed a plain legal principle that unlawful actions are invalid. Under the scholarly principle any administrative action is presumed to be valid unless it is invalidated under the specialized procedure. The JFBA draft reversed this presumption and treats the administrative officials and the public on an equal footing. It is also significant in that it presents in a clear manner provisions of the Bill to achieve the goal of the reform.

Because the JFBA draft proposes to reinforce the power of judicial system, the administrative officials will have its way in opposing it and will make implementation difficult. JFBA is joining with scholars, the media, politicians and like parties from all sides in aiming at practical realization of the function of judiciary as a check against the administration.
2. Human Rights of Foreign Resident

I. Japan’s Public Policy on Immigration Control and Refugee Recognition

(1) Japan’s public policy on immigration control up to now can be summarized as follows:

(i) As for unskilled laborious, such as factory workers, construction workers and so on, no residential status has been established (accordingly, no visas are issued), and for those who work with high levels of technique or specialized skill such as computer-related technologists, residential status has been established, and they are accepted with visas being issued.

(ii) Those who have some personal relation with a Japanese or a permanent residents, such as Japanese’s or permanent resident’s spouse and children, and college students etc, are accepted with visas being issued.

(2) Although the immigration control policy of not accepting unskilled labourers as described above has been adopted officially, in order to meet the demand for unskilled workers, residential status have been established for “training” in which “efforts to gain technology and skills and knowledge through acceptance by the administrative public or private organs of the nation” in reality under the immigration control law. This residential status of “training” was established originally only in order to allow foreigners to acquire technique over short periods of time and to make them to take the technique back to their home countries.

For foreigners who have “training” residential status, a set period of on-the-job training is allowed after their training is concluded, and the types of industry that are targeted for trainees’ on-the-job training include agriculture, poultry raising, fishing, such construction trades as plastering, meat processing, and many other unskilled labours that Japanese tend to avoid due to low wages and harsh working environments. What is more, accepting the demand from these industries, the types of industries to which residential status of “trainee” is applicable have been expanded gradually. The population of people residing in Japan as trainees is also increasing (20,883 people in 1996, 27,108 in 1998 and 36,199 in 2000). In other words, although Japan’s policy up to now has been to keep up the outward appearance of not accepting unskilled laborers, as written above, the actual situation in some places is that a large number of unskilled laborers are accepted as trainees and technical on-the-job trainees. However, these trainees and technical on-the-job trainees are not covered by such legal protection as the Minimum Wage Law and the Occupational Injury Insurance Law, and are outside the legal protection system for labourers and the protection of their rights is clearly insufficient.

(3) In addition, Japan is a signatory of both the 1951 Convention relating to the Status of Refugees and the Optional Protocol of 1967, but in reality, the number of persons legally accepted as “refugees” remains miniscule. Furthermore, as for the present Refugee Recognition Act, there are numerous problems, such as the period during which
application for refugee acceptance can be made is limited to a short interval of within 60 days of arrival (the so-called “60-day rule”) and the point that forcible deportation procedures are brought forward against people even though they are in the process of application for refugee acceptance, and also the point that appeals petitions against refusal dispositions of refugee acceptance must be addressed to the Minister of Justice and are, in reality, examined by the Immigration Bureau under the Ministry of Justice, just as was the original application examined.

In recent years, due to requests for protection of the human rights of foreign residents and the demands of Japan’s economic rejuvenation, public support for accepting foreigners is also rising in Japan. In particular, from the standpoint of protection of human rights, since the 9/11 terror incident in 2001, there have been things involving the handling asylum seekers that drew criticism inside and outside the country, such as the incident in which persons from Afghanistan who were applying for refugee recognition were forcibly detained, and, in March 2003, the Japanese government came to submit a draft of revisions of the Refugee Recognition Act that included abolishment of so-called 60-day rule, grant of provisional rights of residency to those who applying for refugee recognition and cessation of forcible deportation procedures for persons with provisional rights of residence. However, said draft does not deal with the issue, which was pointed out by the JFBA in 2002, that an approval body independent from the government or, alternatively, an appeals petition mechanism, both of which do not exist under the regulations now in force, should be established.

II. Some examples of discrimination on the grounds of being foreign

(1) Discrimination in compensation for damages on grounds of traffic accidents

In the litigations in which foreign victims are demanding compensation for damages on grounds of such things as traffic accidents, judging from judicial precedent, there is a tendency that there are differences in the amount of concerning passive losses and payment for pain and suffering, based on the foreign victim’s type of residential status and on their intended length of stay in Japan based thereupon, and there has been harsh criticism against this tendency in the judicial precedents. In particular, there is a tendency in judicial precedent that compensation amounts would be smaller for foreigners than for Japanese not only regarding compensation for loss of earnings for future work (passive losses) but also regarding payment for pain and suffering. And it is necessary to conduct a critical examination regarding the propriety of such tendency from the viewpoint that such might be in conflict with the International Convention on the Elimination of All Forms of Racial Discrimination.

(2) Discrimination against Foreigners as Store Entry Refusal etc.
Concerning the refusal to grant entry to foreigners to public baths and stores, there have been several lawsuits for compensation for damages filed, and there are some cases in which compensation has been acknowledged on the basis of the International Convention on the Elimination of All Forms of Racial Discrimination. Because no laws have been enacted in Japan to put into effect the International Convention on the Elimination of All Forms of Racial Discrimination, voices have been raised in recent years to emphasize the necessity of enacting a racial anti-discrimination law, and a draft outline of an anti-racial-discrimination law was announced in 2003 by the Japan Civil Liberties Union, which was organized by lawyers and others. Moreover, in the first place, there are no laws in Japan that systematically establish facilities and systems necessary for foreigners to live in Japan. Therefore, the necessity of enacting a so-called Basic Foreigner Law, which prescribe the central government’s and the local public bodies’ policies on foreigners, is being emphasized, and there are already some organizations that have announced drafts outline of such.

(3) Korean schools’ qualification issue
Although the Korean Schools that have been established all over Japan provide education of the same quality and contents as Japanese K12 schools and universities, most of these receive authorization only from prefectural governors as miscellaneous schools, and, up to now, qualification of university graduation is not approved, nor the eligibility requirements are approved for examinations of some public qualifications based on the laws. With regard to this issue, already on February 20, 1998, concerning the case of a human rights protection petition relating to university entrance qualifications of Korean schools, the JFBA judged that “it is an egregious human rights violation to disallow qualifications of those who have undergone the education equivalent to compulsory education curriculum, high school education and university education which are prescribed in Article 1 of the School Education Law, and to fail to permit such to take the examinations that certify public qualifications based on the laws,” and issued a recommendation to the Prime Minister and the Minister of Education (at that time) that this situation be rectified swiftly. Thereafter, on August 6, 2003, the Ministry of Education, Culture, Sports, Science and Technology announced its “Plan for Partial Revision of Implementation Ordinances of School Education Law to Improve Flexibility in University Entrance Qualifications” (hereinafter “Revised Plan”), revealing a policy to approve the qualification to take university entrance exams concerning the graduates of a portion of foreigner schools, but in this Revised Plan, approval of the qualification to take university entrance exams would only be given to graduates of international schools that have received accreditation from American and British international accreditation organizations (WASC, ECIS, ASCI), and to graduates of foreigner schools about which it can be officially confirmed that such
schools are positioned as equivalent to the regular curricula (12 years) of the relevant foreign countries. And, according to such standards, graduates of foreigner schools not falling under the abovementioned standards, including Korean schools, which contain a major part of the students in foreigner schools, would still not be allowed on a school unit basis the qualification to take university entrance exams, and graduates individually would have no recourse but to apply themselves for issuance of university entrance qualification certification to each university for which they hoped to take entrance exams and undergo the respective assessments of the respective universities concerning their qualifications.

In this regard, the JFBA announced the opinion papers, “Plan for Partial Revision of Implementation Ordinances of School Education Law to Improve Flexibility in University Entrance Qualifications” and “Revisions of a Part of the Implementation Ordinances of the School Education Law (Flexibility of Entrance Qualifications For Specialized Curricula of Specialized Schools)” and, concerning the graduates of Asian foreigner schools like Korean schools, has been continuously demanding certification for their entrance qualifications for universities and the specialized curricula of special training schools.

III. Other activities by Bar Associations regarding to legal problems of foreign residents in Japan

(1) Bar Associations’ legal consultation for foreigners (activities regarding to civil affairs including immigration and labour issues)

Knowledge of Immigration Control Act, international private law and high specialization is necessary for dealing with legal issues relating to foreigners. Consequently, in the Bar Associations in such large cities as Tokyo and Osaka, since around 1990, practicing lawyers who are knowledgeable about legal issues relating to foreigners has been providing legal consultation.

For instance, there are about 200 lawyers knowledgeable about the legal issues relating to foreigners in charge of legal consultation in Tokyo, with about 950 cases consulted per year, cutting across all types of civil cases relating to immigration control, labor, family problems and so on. In addition, every Thursday the Legal Aid Association provides to foreigners free legal consultation with lawyers.

In addition, there are English and Chinese language interpreters on standby at all times during legal consultation for foreigners in Tokyo, and it still remains to be considered how to respond to other foreign languages.

(2) Duty Attorney System (activities regarding to criminal cases)

The Duty Attorney is a system by which interviews can be held with lawyers at pre-indictment stages, without regard to the nationality or residential status of the suspect, and in the event a suspect is a foreigner, the interviews are attended by an interpreter and a
lawyer.
The first interview with an duty attorney is free of charge, and in the event a suspect is a
foreigner, the interpreter who accompanies the lawyer to the first meeting is also free of
charge. If the suspect continuously ask the lawyer to act as his/her defense counsel, he/she
has to pay attorney’s charge, but regardless of his/her nationality, if the suspect has no
resources, there are cases in which he/she may receive the aid of the JCLU (Criminal
Suspect Legal Assistance System).

However, due to the rapid increase in cases of such assistance, and to the fact that the
majority of cases receive forgiveness of repayment despite the fact that ordinarily
reimbursement is the rule in legal assistance, since many suspects lack resources in
criminal suspect legal assistance cases, the finances of the criminal suspect legal
assistance system are getting tight.

Not only are some JFBA members active as duty attorneys, but JFBA has been bearing the
criminal suspect legal assistance system financially by collecting special on-duty lawyer
member fees from all members. Nonetheless, the JFBA believes that, originally, for the
substantial protection of the right of defense of suspects, it is the state’s obligation to
retain defense counsels for suspects at public expense in the pre-indictment stages as well
(concerning suspects under indictment, there is already a system for retaining public
defenders at public expense), and, in the midst of the presently-advancing judicial system
reforms, it is pursuing the retaining of defense counsels for pre-indictment suspects at
public expense.