

Shining a Light into the Halls of Government:
Achievement and Challenges of the Open Government
Movement in Japan
An Outline of the 2023 Japanese Law Symposium at
the University of California College of the Law, San
Francisco

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The University of California College of the Law, San Francisco ("UC Law SF"), formerly the University of California Hastings College of the Law ("UC Hastings"), held a symposium on Japanese law every fall from 2012 to 2019.¹ After a lapse of four years due to the COVID-19 pandemic, the 2023 symposium on Japanese law was held on September 22, 2023, at 333 Golden Gate Avenue, Room 501. The topic was the open government movement in Japan, and the title was "Shining a Light into the Halls of Government: Achievements and Challenges of the Open Government Movement in Japan."² The primary sponsor was the Center for East Asian Legal Studies ("CEALS") at UC Law SF, and the office of the Associate Dean for Research provided an additional fund. I am most grateful to them as the main organizer.

The symposium's topic was explained in the following manner in its publicity material.³

Public access to government information is indispensable for any democratic effort to hold the government accountable for its policies and actions. However, no law required government agencies to provide internal information to the public [in Japan] when the country was governed by the iron triangle of conservative politicians, bureaucrats, and

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¹ See Keith Hand and Mark Levin, *Introductory Remarks*, ASIAN-PAC. L. & POL'Y J. 1, 2-3 (2024) (Details of the previous symposia are provided in Hand and Levin, "Introductory Remarks, in this symposium issue.).

² Lawrence Repeta, one of the main speakers of the symposium, suggested the main title. I am grateful to him.

³ See UC Law San Francisco, *2023 Japanese Law Symposium*, Publicity Material for a UC Law San Francisco Symposium (2023), (<https://www.uclawsf.edu/event/2023-japanese-law-symposium/>) (last visited Apr. 7, 2024) [<https://perma.cc/KZ3E-ADSE>].

big businesses.⁴ The US Freedom of Information Act of 1966 inspired reform-minded scholars, lawyers, and citizens [in Japan] to start the open government movement in the 1970s. They succeeded in persuading progressive local politicians to enact local ordinances, but the central government continued to refuse their demand until the 1980s. Then, a series of severe cases of bribery, bid-rigging, and failure to take proper preventive actions (HIV cases) erupted in the 1980s and the 1990s. The government finally enacted the Act on Access to Information Held by Administrative Organs in 1999, which went into effect in 2001. Although it was a weak law with elastic categories of exempt information, high user fees, and broad government discretion to deny or delay disclosure, a group of citizens, lawyers, and scholars formed the Access-Info Clearinghouse Japan (AICJ), an NPO, to pursue the improvement of the system and practice. The AICJ led an effort to use administrative appeals and litigations to require information disclosure and prevent record destruction. The movement succeeded in forcing the government to enact the Public Records and Archives Management Act in 2009. Still, conservatives continued their effort to prevent further disclosure of government information or to limit that range of information disclosure. Under the late Prime Minister Shinzo Abe, the government enacted the Act on the Protection of Specifically Designated Secrets in 2013, which enabled government agencies to prevent the disclosure of a specific range of information concerning the Self Defence Forces, diplomacy, terrorism, and the like with criminal penalties to violators.

The open government movement in Japan has succeeded in changing the legal system and administrative practices to a great extent. But it still faces many challenges and must go on. This symposium was planned to discuss its achievements and current challenges from a comparative perspective with the United States.

We invited two main speakers.

One was Hiroshi Miyake, an attorney who has led the open government movement in Japan since the 1980s.⁵ He has been a leading

⁴ See Jeff Kingston, *Contemporary Japan: History, Politics, and Social Change since the 1980s*, 272 (Wiley-Blackwell, 2nd ed. 2013) (The “Iron triangle” in Japanese politics is defined as “[t]he nexus of power involving big business, the bureaucracy, and the Liberal Democratic Party (LDP) that controlled Japan in the post-WWII era.”).

⁵ See *Hiroshi Miyake, Lawyer Introduction*, Harago & Partners Law Offices, <https://hap-law.com/member/hiroshi-miyake/> (last visited Apr. 7, 2024) (detailing Mr. Miyake’s legal background) [<https://perma.cc/6B4Q-6SQ6>]; see also U.C. L.S.F. Symposium, *Shining a Light into the Halls of Government: Achievement and Challenges of the Open Government Movement in Japan*, Hiroshi Miyake, *Japan’s Open Government Advocacy, the Efficacy of the Freedom of Information Act (FOIA) and Public Sector Whistleblowers, and the Public Right to Know in Japan, the U.S., and Beyond*, at 9-16, U.C. L. S.F. CTR. FOR E. ASIAN LEGAL STUD. 9-16 (2023) (detailing Mr. Miyake’s various activities and contributions to Japan’s legal community).

member of related NPOs, represented reformers in local and national governmental committees, and represented citizens in various administrative and judicial proceedings. He has also been a leading educator and scholar on the need for public access to governmental information. He was a professor at Dokkyo University Law School. He received a Ph.D. in law from Kyoto University with a comprehensive analysis of the creation, development, and challenges of the information disclosure legislation in Japan.⁶ No other person could better represent the open government movement in Japan.⁷

The other speaker was Lawrence Repeta, an American attorney who has been a prominent member of the open government movement in Japan since arriving in Japan in the early 1980s.⁸ He was a professor at Omiya Law School and Meiji University. He presented his keen and critical observations of Japanese society in several books and many articles. As a lawyer/scholar familiar with the struggle of the open government movement in the United States,⁹ he has been an important asset of the open government in Japan and a bridge to the international community of the movement.¹⁰

Miyake and Repeta have been comrades since 1985, when Repeta sued the state, seeking state compensation for the rejection of his request to the court for permission to take notes during his observation of a

⁶ See Hiroshi Miyake, *Constitutional Policy Theory of the Right to Know and Information Disclosure: Creation, Development, and Challenges of the Right to Know in Japan's Information Disclosure Legislation*, Nihon Hyoronsha (2021) (三宅 弘『知る権利と情報公開の憲法政策論：日本の情報公開の憲法政策論』日本評論社 (2021年)).

⁷ See *infra* note 9; see also *supra* note 5 (Mr. Miyake also has a close tie with UC Law SF. He was President of the Daini Tokyo Bar Association (called Niben and one of the three bar associations in Tokyo) from 2015 to 2016. He led the negotiation with UC Law SF (then UC Hastings), culminating in a cooperation and exchange agreement between Niben and UC Law SF in 2016. Under this agreement, Niben accepts UC Law SF students as summer interns, while UC Law SF accepts one Niben member each year to its LL.M. program with a half-tuition scholarship. The 2016 Japanese law symposium on “Globalization of Japanese Lawyers: Achievements, Challenges, and Expectations for American Law Schools” was also jointly sponsored by Niben and UC Law SF based on this agreement, and four prominent members of Niben, including a former President of the International Bar Association, were invited as speakers.).

⁸ See LAWRENCE REPETA OFFICIAL WEBSITE, <https://www.lawrencerepeta.com/> (last visited Apr. 7, 2024) [<https://perma.cc/NPU5-VJDL>].

⁹ He published interviews of 15 American lawyers, scholars, and journalists who challenged the secrecy of the U.S. government under President George W. Bush in Lawrence Repeta (Kunihisa Ishii trans.), *Shoot the Darkness - Secrecy and the Future of America*, Nihon Hyoronsha, 2006. (ローレンス・レペタ (石井邦久訳) 『闇を撃つ—Secrecy and the Future of American』日本評論社 (2006年)).

¹⁰ See Lawrence Repeta, *The Fight for Open Government in the Heisei Era, in JAPAN IN THE HEISEI ERA (1989-2019)* 69, 69-81 (Noriko Muraki, Jeff Kingston, and Tina Burrett eds., Routledge) (providing a concise analysis of Japan's recent development of the open government movement). This article inspired this symposium. *Id.*

criminal trial at the Tokyo District Court.¹¹ Courts in Japan then allowed note-taking only to members of the judicial press club and prohibited it to other spectators. Repeta consulted the Japan Federation of Bar Associations and other interested groups of attorneys and decided to sue the government in 1985 mainly on the grounds that the prohibition violated Articles 21 and 82 of the Constitution.¹² Miyake was one of the attorneys who represented Repeta. They lost at the Tokyo District Court and the Tokyo High Court. They appealed to the Supreme Court, and the case was handled by the Grand Bench consisting of all 15 justices. The Supreme Court rejected their appeal in March 1989 but stated that allowing note-taking to spectators fits the spirit of Article 21 of the Constitution unless special circumstances exist.¹³ The Secretary General of the Supreme Court¹⁴ announced on the same day that note-taking by spectators would be widely permitted according to today's decision, and all courts immediately removed the notice of prohibition.¹⁵ Accordingly, inviting Miyake and Repeta as a team was a natural decision.

It was a tradition of the UC Law SF symposia on Japanese law to invite its faculty as a discussant because one of the purposes of the symposia was to raise interest in Japanese law from comparative perspectives among faculty members. This symposium required a faculty member who was familiar with the FOIA of the United States. Marsha Cohen, the Honorable Raymond L. Sullivan Professor of Law, graciously accepted our request. A graduate of Harvard Law School, she clerked for the late Associate Justice Raymond L. Sullivan of the California Supreme Court.¹⁶ Before joining the faculty, she practiced in the public law office of Consumer Union (now Consumer Reports)¹⁷ and had much practical experience with the FOIA.

The program of the symposium was as follows.

¹¹ See *Japan v. Kim and Kato*, 1161 Hanji 27 (Tokyo District Ct., Mar. 22, 1985) (also known as the "Seibi Group Tax Evasion Case").

¹² NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 21 and 82 (Japan).

¹³ See Order Dismissing Pet'r's Appeal, Page 2, Paragraph 2. https://www.courts.go.jp/app/files/hanrei_jp/213/052213_hanrei.pdf. [<https://perma.cc/4NPT-LDV2>].

¹⁴ See Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* 263-281 (Philip S.C. Lewis ed., Westview Press) (1994) (detailing the administrative control of the Japanese judiciary and explaining that the Japanese Secretary General is the head of the administrating organ of the Supreme Court called the "General Secretariat").

¹⁵ See Lawrence Repeta, *Why We Sued the Judges*, 22 L. JAPAN 49, 49-64 (1989); Lawrence Repeta et al., *I Can't Take Notes: The Men Who Challenged the Supreme Court*, (Jun'ichi Hamada, trans., Yuhikaku) (1991) (Lawrence Repeta · 浜田純一 (訳) · 三宅弘 · 山岸和彦 · 鈴木五十三 · 秋山幹雄 · 喜多村洋一 『メモがとれない: 最高裁に挑んだ男たち』有斐閣 (1991年)).

¹⁶ See *Marsha Cohen Bio*, U.C.S.F., <https://www.uclawsf.edu/people/marsha-cohen/> (last visited Apr. 7, 2024) [<https://perma.cc/ZFR7-UTUD>].

¹⁷ See *id.*

Noon: Lunch provided by the CEALS.

12:30: Welcome by Morris Ratner, Provost and Academic Dean and Professor of Law, UC Law SF.

12:40: Welcome by Keith Hand, Professor of Law and Director of the CEALS, UC Law SF.

12:50-13:00: Group photo.

13:00-13:20: Speech by Hiroshi Miyake, "The Information Disclosure Law and the Development of Democracy in Japan."

13:20-13:50: Speech by Lawrence Repeta, "Hiroshi Miyake and Japan's Open Government Movement."

13:50-14:00: Discussion by Marsha Cohen.

14:00-15:00: Q&A.

15:00-15:30: Reception hosted by the CEALS.

Despite the timing of the symposium on Friday afternoon, when the school is usually almost deserted, the symposium attracted a large audience, including students, faculty members, and guests from outside the school. The audience included three young attorneys Miyake kindly brought from Japan, Assistant Dean Jonathan Marshall of Berkeley Law School,¹⁸ who wrote a Ph.D. dissertation about the role of courts under the information disclosure law in Japan with assistance from Japanese attorneys, including Miyake,¹⁹ and Professor Hiroshi Fukurai in sociology and legal studies of the University of Santa Cruz,²⁰ who is a prolific socio-legal scholar with a strong interest in public participation in the administration of justice in Japan and a former President of the Asian Law and Society Association. Recently appointed as an Affiliated Scholar of the CEALS at UC Law SF,²¹ Fukurai kindly volunteered to contribute a paper to this symposium issue from an audience's perspective. The paper he actually submitted is a tour de force which goes beyond the scope of the symposium by adding a detailed analysis of the role of whistleblowers. I appreciate his extraordinary cooperation.

This is not the first time *the Asian-Pacific Law and Policy Journal* (APLPJ) has provided an outlet for papers presented at a Japanese law symposium at UC Law SF, but it is the second time to do so. The first time

¹⁸ See *Jonathan Marshall Profile*, U.C. BERKLEY, https://www.law.berkeley.edu/our-faculty/faculty-profiles/jonathan-marshall/#tab_profile (last visited April. 7, 2024) [<https://perma.cc/Z8PQ-TWZD>].

¹⁹ See Jonathan Marshall, *Leveraging Accountability: How Freedom of Information Act Brought Courts to Governance in Japan*, (2003) (Ph.D. dissertation, Univ. of Cal., Berkeley) (ProQuest).

²⁰ See *Hiroshi Fukurai Bio*, U.C. SANTA CRUZ, <https://hfukurai.sites.ucsc.edu/> (last visited Apr. 7, 2024) [<https://perma.cc/F7TL-SCEV>].

²¹ See *CEALS Appoints Professor Hiroshi Fukurai as Affiliated Scholar*, U.C.S.F., (Feb. 23, 2023), <https://www.uclawsf.edu/2023/02/23/ceals-appoints-professor-hiroshi-fukurai-as-affiliated-scholar/> (last visited Apr. 7, 2024) [<https://perma.cc/UG4G-Z3KU>].

was for the 2014 symposium on “The Role of Law and Lawyers for Disaster Victims: A UC Hastings-Waseda Symposium on the Legal Aftermath of the Fukushima Daiichi Nuclear Power Station Disaster,” as described in note 9 of “Introductory Remarks” by Keith Hand and Mark Levin at the top of this symposium issue. I do not know any other cases where a journal published at one law school publishes a symposium issue for a symposium held at another law school. I deeply appreciate Professor Levin's extraordinary sense of collegiality and student editors' strong support. Otherwise, these papers will not have a chance to contribute to the advancement of Japanese legal studies and the improvement of the information disclosure law in Japan.

Last but not least, I would like to express my amazement to receive an article from Justice Katsuya Uga of the Supreme Court of Japan.²² What an honor! Inviting Justice Uga to contribute an article was an idea of Professor Levin. I am extremely grateful to both Justice Uga and Professor Levin for providing us with this great honor.

A renowned professor of administrative law at the University of Tokyo before his appointment to the Court, Justice Uga is the only academic in the Court that is heavily dominated by career bureaucrats in the judicial and administrative branches of the government.²³ Justice Uga is considered the most liberal in the Court and often finds himself in the minority.²⁴ However, given the Court's power of judicial review, in particular, his presence on the Court is most precious because his opinions might sow seeds for the development of better decisions in the future.

Justice Uga's contribution to this symposium issue reflects his experience in the legislative processes of the Act on Access to Information Held by Administrative Organs (行政機関の保有する情報の公開に関

²² See *Supreme Court Judge Katsuya Uga Biography*, SAIKOSAI (JAPAN SUPREME COURT), <https://www.courts.go.jp/saikosai/about/saibankan/uga/index.html> (last visited Apr. 7, 2024) [<https://perma.cc/J3NP-7KTB>].

²³ See *Supreme Court Judges*, SAIKOSAI (JAPAN SUPREME COURT), <https://www.courts.go.jp/saikosai/about/saibankan/index.html> (last visited Apr. 7, 2024) (as of this writing, among the 15 justices, six are former lower-court judges, three are former prosecutors, one is a former diplomat, and four was former practicing attorneys) [<https://perma.cc/J3NP-7KTB>].

²⁴ See *Major Cases Involving Supreme Court Justice Uga*, SAIKOSAI (JAPAN SUPREME COURT), https://www.courts.go.jp/saikosai/about/saibankan/uga_05/index.html, (last visited Apr. 7, 2024) (Justice Uga mentions 14 cases as the most significant cases he participated in 2023 on the Court's website, and he wrote a dissenting opinion in six) [<https://perma.cc/DN2Y-BBMV>]; see also *Top court rejects retrial request for 1961 poisoned wine murders*, THE JAPAN TIMES (Jan. 30, 2014), <https://www.japantimes.co.jp/news/2024/01/30/japan/crime-legal/court-reject-poison-wine-retrial-request/> (detailing Justice Uga's dissenting opinion objecting to the Majority's decision to reject the tenth application for retrial on behalf of the death row inmate who died in 2015 while waiting for the execution for the crime committed in 1961) [<https://perma.cc/Q27H-62ZE>].

する法律) of 1999, the Act on Access to Information Held by Independent Administrative Organs (独立行政法人等の保有する情報の公開に関する法律) of 2001, the Public Records and Archives Management Act (公文書等の管理に関する法律) of 2009, and the related ordinance of the Tokyo Metropolitan Government, and provides the most authoritative account of those processes. Justice Uga concludes his paper by emphasizing the necessity of in-camera proceedings in information disclosure litigation, which is exactly what Mr. Miyake wants.²⁵

I hope that this symposium issue will be read widely.

²⁵ See U.C. L.S.F. Symposium, Shining a Light into the Halls of Government: Achievement and Challenges of the Open Government Movement in Japan, Hiroshi Miyake, *The Information Disclosure Law and the Development of Democracy in Japan*, U.C. L. S.F. CTR. FOR E. ASIAN LEGAL STUD. (2023).
