

Judicial Reform and Japanese Attitude from Sociology of Law Perspective

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JUDICIAL REFORM AND JAPANESE ATTITUDE FROM A SOCIOLOGY OF LAW PERSPECTIVE

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Abstrak

Artikel ini mencoba untuk menyajikan sebuah analisa dari respon orang Jepang terhadap "Citizen-Judge System" yang diterapkan dalam perubahan pengadilan tahun 2009. Sebagian besar rakyat Jepang berpikir positif dalam persidangan, dengan memperhatikan pada partisipan nyata dalam persidangan, banyak orang yang enggan untuk berpartisipasi karena kurangnya rasa percaya diri, susila, urusan sendiri, dan urusan keluarga. Tapi dilain pihak, orang-orang juga berpikir negatif bagaimana dominasi warga berperan dalam pengadilan, yang akan disadari dengan membangun panel yang mayoritas anggotanya adalah warga, bukannya hakim profesional. Sebagai faktor yang menentukan dari sikap orang-orang pada sistem hakim-warga dan sikap-sikap dalam hak asasi manusia juga dianalisa. Indikasi pencarian apakah sistem ini akan berjalan sukses mengambil akar dari masyarakat Jepang di masa depan bergantung pada, sikap orang-orang Jepang terhadap HAM.

Kata kunci : *Citizen-Judge System, Judicial participation, trust in the judiciary, sociology of law perspective.*

Introduction

Since the late 1990's judicial reform have been underway in Japan. Various events, including economic liberalization in the United States and Europe, the emergence of export driven industrial states in Asia and the collapse of socialism, all have had a great impact on Japanese corporations that previously enjoyed their market competitiveness,² Japanese corporations started to expose their structural defects in the emerging global market. The make up of the Japanese economy, especially one tagged as "orderly competition," in which all market actors get a fair share under strong administrative leadership is now criticized as hindering efficient management. A consensus

rapidly formed on economic liberalization, and the interfering nature of the administration was targeted as an obstacle to overcome.³ Furthermore, in order to successfully carry out reforms, it has become essential to create a robust judicial system that fills the gap created by the withdrawal of administrative guidance, and maintain transparent rules as a necessary framework in which corporations may take risks and carry out free economic activities. The current judicial reform has been mandated by this global market.⁴

The reform is not achieved, however, solely by economic exigencies. The political and social foundations needed

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² A World Bank Policy Research Report, 1993.

³ Administrative Procedure Act, 1994.

⁴ The Liberal Democratic Party Special Investigation Committee on Judicial system, 1997.

to accept this liberalistic reform must mature. In fact, behind the collapse of the Japanese-style government controlled economy, once hailed as “Japan as Number One,”⁵ there existed not only market globalization but also changes in people consciousness.

Conventional political/administrative system and the Japanese corporate culture together have lost people’s support. People become more intolerant of the social pressures to cement collectivistic organizations. Neoliberalism as a ‘spirit of the age’ was no doubt created by market globalization, but it also a result of another globalization, for example a rapid-Japanization of Japanese culture caused by ‘ideas’ that migrate beyond national boundaries, along with people and goods.

Judicial reform is a part of the process for Japanese society to adapt to the new environment, one a globalized market, and the other a changing attitude of the people. But reform is not an automatic, passive adaptation, not a totally new creation of a system or framework. A previous framework is used as a building block, and within it new pieces are added. Consequently, it is inevitable for various strains to occur in the system. In addition, people’s existing ideas are passed into the current system and modify its operations, which contributes to the stability of the system as it converts to one that makes sense to people. Therefore, by examining judicial reform from the perspective of the people, we can evaluate the working of the system in detail. It also deepens our understanding of the forces behind the transformation of society at large. That is what I wish to achieve in this article.

This paper is based on the secondary data. However, the main focus of this analysis on the correlation between variables. In fact, the result obtained is quite revealing. Let’s see the judicial reform and

⁵ Vogel, 1979.

trust in the judiciary that is the basis of accepting the system will be analyzed as follows. Finally by using a sociology of law perspective, an analysis of japane attitude toward the Citizen-Judge System and accompanying issues of press restrain.

Judicial Reform

Japan has passed a judicial reform bill in late May, 2004 that has the potential spark both major legal and social change. Some reforms have already into practice some of them are underway.

Judicial reform can be roughly divided in three parts as the Jutice System Reform Council (JSRC) advocated. First, there are reforms to create legal professionals that are rich both quantity and quality (legal profession). Second, there are reforms to strenghthen the civil and criminal justice system (legal administration). And third, there are reforms to expand public participation in justice (public participation in judicial system).

As April 1, 2004, the total number of legal professionals is 24,13. It consist of 2385 judges; 1,505 public prosecutors; and 20,240 attorneys/lawyers. In order to create the quantity of legal professioanal the JSRC aimed to secure 3,000 candidates by the 2010. If this process of increasing the legal population succeeds, the number of legal professioanals is expected to be doubled and reach 50,000 by 2018. The Japan Bar Association (JBA) had been reluctant to increased the passer of National Bar Examination (NBE), but it decided to permit the increase based on “societal demand” in November 2000.

The NBE is a higly competitive exam and passing rate has been around 2.5%. In order to pass the exam, most applicants go to prep school but do not necessarilly attend university classes. In these circumstance, the JSRC recommended the establishment of law schools that provide a professional

education to student so that most graduates could pass the NBE. In 2004, 68 law schools were newly established and 5,776 students had entered as April 6.

The ratio of judges to 100,000 people in Japan was 1.87 in 2004. This is not a large number compared to other countries.⁶ The JSRC proposed to expand the number of judges at least 500 in ten years. The number of public prosecutors is to be increased about 1,000 in the future.

One of the reforms in the civil and criminal justice system (legal administration), the JSRC recommend the reinforcement and speeding up of civil justice and criminal trials. To reduce the period of trial in civil and criminal cases, a law was passed demanding the first instant proceeding end in principle within two years.

The reform in public participation in the judicial system by using Saiban-in Seido (Citizen-Judge System). In this system, the

saiban-in are chosen at random for each case from members of the general public. Together with professional judges, they take part in the deliberation judges, they take part in the deliberation of guilt and sentencing in the trials of certain serious criminal cases such as murder. In normal cases, three professional judges and six saiban-in work together.

Trust in the Judiciary

The first issue to be looked at is public trust in the judiciary. Table 1 demonstrated trust in the judiciary along with that in lawyers, police and politicians. The first noticeable point is that levels of trust in the judiciary, lawyers, and police are all very similar, but not that in politicians. The first noticeable point is that levels of trust in the judiciary, lawyers, and police are very similar but not that in politicians. Approximately 60% of those reported that “Can somewhat trust” police, lawyers, and the judiciary. Such a high level of public trust in the police might be a Japanese characteristic.

Table 1 Trust in the Judiciary and in Other Authorities

Can trust	Judiciary	Lawyers	Police	Politician
Can somewhat trust	3%	2%	3%	0%
Cannot trust much	62	59	58	15
Cannot trust at all	22	24	29	54
Don't Know	7	6	10	32
	6	10	-	-

Source: the 21st Century COE Research Project, Faculty of Law, Kyoto University

However, the overwhelming number of people reported (86%) showed distrust in politicians. Although such a result is easily predictable, a concern remains over whether democracy in fact exists where people distrust politicians to that extent.

This means that this trust is representative of certain people's perspective. That trust is general public trust in the government.⁷ Those who have such general trust at all, the judiciary, the police, lawyers and even politicians, so that they cannot positively discriminate among them. However, the fact that there is a high

⁶ Saiko Saibansho Jimu Soukyoku

⁷ Almon and Verba, 1963:173.

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correlation between trust in the judiciary and trust in the police is contrary to legal professionals' understanding that the police wield the state power, and that is the function of the judiciary to control such authority. While the rule of law is generally established where wariness over that state's power exists, in Japan such wariness is weak, and the state power is seen as a paternalistic and guardian-like power.

As seen above, both the judiciary and the police are fairly trusted, but at the same time. Almost 30% of the people based on the surveyed have distrust in the judiciary and lawyers. In order to examine reasons for such distrust in, first, lawyers, another question was asked "Do lawyers serve the interest of powerless or the wealthy?" The majority thought that lawyers serve the interest of the wealthy. Such a response seems natural because lawyers are rich, or at least perceived to be so. However, according to Article 1 of Practicing Attorney Law, Japanese lawyers are mandated "to guarantee basic human rights and to realize social justice." The bar associations also repeatedly emphasize that lawyers act for the socially vulnerable. In fact, in answering the question, "What should be the lawyers's role?" a great majority of people chose "Realization of Social justice" instead of "Reliable and Dependable Advocate for Client." Here, the mandate of lawyers advocated by bar associations corresponds with the role of lawyers expected by people. There is, however, a gap between expectations and realities. In the future, when the number of lawyers increase and lawyers are disciplined by market, the gap may come more serious problem.

Although small in absolute numbers, there is some distrust in the judiciary. To search for the cause. Many people think that while judges have professional qualification, they are out of touch with the common people. People also think that judges lack "Warm Personality."

Professionalism and sociality refers to two basic attributes required for the judiciary. To be judge, the professional ability to deal with law is necessary. But, both the knowledge about society and compassion for people are also required of judges since they deal with disputes involving men of fresh blood in society. The four attributes such as superior legal knowledge, strong sense of justice, sound common sense, and warm personality represent different levels of the required qualities for judges, the left being more professionalism and the right being more sociality. Hence, it can be concluded that distrust in the judiciary mostly comes from a criticism that judges lack of sociality.

Japanese Attitude toward Citizen-Judge System (Saiban-in Seido) from Sociology of Law Perspective

Based on sociology of law perspective that there are some factors should be paid attention in order to enforce the law: (1) the law, (2) the law enforcers/apparatus, (3) infra structure, (4) society and culture, and (5) economics. In the following part, we use the above framework especially on the society and culture aspect to examine Japanese attitude toward Citizen-Judge System.

According to the report by Research Project, Faculty of Law, Kyoto University that public opinion about the Citizen-Judge System to be instituted by reform will be examined. A majority of people (57%) do support the implementation of a system that allows the general public to participate in a trial (Jury system) is currently underway. But at the same time, 25% of people based on surveyed "Don't Know" about the system, in spite of media coverage of system. According to a national survey by Jiji Press.Co., conducted in June 2003, the number of people who knew about the system is even smaller than the number stated herein. In these survey, only 40% of people knew the jury system. Only 50% responded

“the citizen participation system is necessary,” and 27% responded “do not know.”

According to the news reports, currently a plan of three professional judges and six lay judges (citizens) will be the government proposal. In the survey, 47% supported a panel comprising of three professional judges and two lay citizens. It seems that although people support citizen participation, they feel uncomfortable with citizens’ dominant role in judiciary.

The determining factors for the support of citizens’ participation in the judiciary is that people with strong interest in judiciary show stronger support for the Citizen-Judge System. Those who have “great interest” in the judiciary show more support for the Citizen-Centered Model (1 judge and 4 citizens) favoring the citizen dominant role in judiciary. Those who have “some interest” in the judiciary show more support for the Auxiliary Participation Model (3 judges and 2 citizens). We can conclude that many of those who support the Citizen-judge System support the Citizen-center Model, and many of those who are negative about the system would prefer the Auxiliary Participation Model if the Citizen-judge System is implemented.

Two arguments can be made as the reasons for the choice of the Judicial Panel. The first relates to knowledge. Compared with the Auxiliary Participation Model, the Citizen-Centered Model will bring a drastic change in the present form of the judiciary, and in order to make a choice, sufficient knowledge about the judiciary is required. Strong support for any judicial or administrative reform can be obtained only from those who have knowledge about such a reform. This is indicated by the fact that people with extensive interest in the judiciary support the Citizen-Centered Model more.

The second reason relates to the legal independence of citizens. This legal independence refers to citizens’ awareness as sovereign members in the legal arena. As the Citizen-Centered Model is a system acknowledging the dominant role of citizens in the judiciary, choosing such a model indicates the awareness of their own responsibility for undertaking a trial instead of judges. Tocqueville states in his famous phrase: “The jury system puts the rule directly in the hand of the people.” And a man “who is a judge in a criminal trial is the real master of society.” This is the awareness as sovereign members of society that lies behind legal independence. However, it may not be right to think that this awareness comes from self-confidence and that he/she can handle a trial because she/he has the ability to do so. On the contrary, people with higher education are more skeptical about citizens’ participation in a trial and thus negative about the Citizen-Centered Model. The determinant factor is more likely distrust in the judiciary rather than ability.

It is said that there is people’s believe that “power tends to corrupt” behind the emergence of democracy, particularly the popular democracy known as Jacksonian Democracy in the United States. We tried to find out the correlation that distrust in power creates participation of citizens, for example, power tends to corrupt, it must be reserved in the hands of citizens.

The willingness of citizen to participate in a trial if chosen as a citizen-judge is only 31% or a third. Many give it allow priority for business or family reason. On the other hand, based on the report only 23% is willing to serve the system. With regards to the factors that affect the willingness to participate, people with higher interests in the judiciary, and those with lower trust in the judiciary, for example, the stronger the distrust in the judiciary, the higher the willingness to participate.

⁸ Tocqueville, 2000:260.

This result is consistent with the explanation stated earlier that citizens are critical about the judicial system in terms of its sociality and hence, the more critical about the judiciary the more willing, to participate. Another explanation is possible. Many of those seek “warm personality” in judges might feel uncomfortable between the judicial system and themselves. There might be an urge for those people to overcome the distance that has been created from professionalism by sharing a feeling of warm, for example human empathy. In the light of political philosophy, to stretch the point, this might be a romantic impulse to overcome the alienation of man created by the modern rationalis by uniting the self and other, for example, the self and the society.

In implementing the Citizen-Judge System, press restraints are also discussed. Some people are deeply concerned about the proposal, which includes both prior restraints on crime reporting and after restraints on interviewing a person who has served as a citizen-judge regarding his/her experience. There is an opinion that criminal reporting should be restrained in order for a citizen who participates in the judiciary not to be influenced by a media coverage.

The report resulted that most one half, 46% of the people surveyed opposed press restraints. Other about 37% support restraints and the rest, 17% do not know about that. For comparison, in the United States where under the jury system, citizens are vested a full power to make a decision, press restraints are out of the questions in light of the U.S constitution that all guarantee for freedom of expression. Some of the factors relevant to press restraints are those who are more willing to participate are more negative about press restraints. On the other hand, those who seek superior legal knowledge in judges supports press restraints more. This is probably because those who put greater emphasis on the professionalism of judges place more emphasis on the

fairness of a trial and hence think that information disseminated through mass media will hinder the fairness of trial.⁹ This issue was raised in the article “*Saiban Hihan* (Criticism against Judiciary),” written by the former Chief Justice of the Supreme Court of Japan, Kataro Tanaka, who strongly supported the view and criticized the media. In this article, he stated that “A lawsuit is a mean of pursuing the truth like a scholarly work; and that as judges must concentrate on listening to the arguments only made in the court room, the criticisms made by non-legal professionals outside the court are mere disturbing noises, and such noises should never affect judges when they make decision.”¹⁰ What is difficult to comprehend is age. In general, according to the report that young people tend to detest any control by authority and support freedom, but the data contradicts this. Young people are in favor of press restraints, and the higher the age (40s and 50s), the more people oppose such restraints. This is probably due to a uniquely Japanese perception on human rights.

The report also described that some people say that investigations by the Japanese police and prosecutors are too harsh and the rights of suspects are not protected. So it is necessary press restraints. Normally, those who think that human rights are not protected have a higher awareness of human rights and those who think that investigations are not harsh have a lower awareness of human rights. Hence. The higher the awareness of human rights, the more support there is for press restraints confuses Japanese scholars, at least through the conventional understanding of Japanese legal scholars.

Let us look at trust in the police. The report said that lower the trust. For example, the more wary of authority, the

⁹ Tanaka, 1955:2-14.

¹⁰ Tanaka, 1955:2-14.

more support there is press restraints. I presume that this result should be interpreted from a very Japanese understanding of human rights. Most Japanese think that it is the media that infringers on human rights most. According to a public opinion poll conducted by NHK (Japan Broadcasting Corporation), in response to the question, “whether the following party projects rights or infringes on rights?” As regard to the police, many responded “It protects,” and to the media, a large majority of people responded, “it infringers.” Crime reporting by the media is regarded by the Japanese as the most flagrant violation of human rights. This twist, for example, those who are more sensitive to human rights are more for restraining press coverage, arises because the image of excessive media coverage at the expense of suspects’ human rights and the privacy of their families is prevalent among citizens.

This interpretation is also supported by responses to the questions, “Among human rights protected by the Constitution, which one of the following should be protected the most in the future: (1) The right not to be discriminated against; (2) the rights not to be subjected to unreasonable police investigation; (3) the right to freely criticize the government; (4) the right to live in a human manner. “An overwhelming majority (61%) of the people surveyed by CEO Project, Faculty of Law, Kyoto University chose “the right to live in human manner,” followed by “the right not to be subjected to unreasonable police surveyed chose “the right to freely criticize the government.” This trend has been consistently seen in previous opinion polls. In a society where freedom of expression is ranked low, the privacy of victims and families, whose suffering we understand with compassion and whose “right to live humanely” is seen as infringed upon, is regarded as more important than the freedom of press.

Therefore, if “for the fairness of a trial” the press restraints is insisted upon, most people acquiesce to it.

In addition, although a high percentage of people surveyed (60%) responded that they would trust the police, those who said they would not trust the police were likely criticizing the police not for violating suspects’ human rights, but for not protecting the safety of the citizen, for example for the negligence of their duties. One of the example, An incident that triggered public distrust in the police for not protecting the safety of the citizens was a murder in a stalker case, despite repeated requests for protection by the victims due to serious harassment, police did not take any measures, and consequently the stalker murdered the victim.

Conclusion

The people’s perception toward public participation in the judicial system with a focus on the Citizen-Judges System showed that those who are enthusiastic about implementation of a jury system in Japan have advocated that Japan is the only developed country that did not allow the participation of citizens in the judiciary, and criticized and Supreme Court’s negative attitude toward it. The initial response of the court to such criticism was that Japan had legal procedures that allowed many non-legal professionals to participate in its judicial system, such as in mediations. But the critical point is whether citizens are allowed to participate in the core functions of the judiciary, namely the judgment. The Citizen-Judge System is a system, and if it functions, it will change the relationship between the court and the people.

In fact, in one side, Japanese sense of independence, or the consciousness as a legal sovereign that was revealed in a form of distrust in the judiciary and its professionals, is creating a willingness to

participate. On the other side, as seen in the Japanese understanding of human rights, the Japanese have a weak confrontational attitude against the state power. From the administrative reform to the judicial reform, each of the Japanese people is now expected to depart from their dependent and subordinate relationship with the state and act as an autonomous individual in the market and the political arenas. Given the Japanese consciousness expecting the state to provide them with “the right to live in a human manner,” it is interesting to witness how society will evolve facing this new challenge. In the same manner, it is interesting to witness how society will evolve facing this new challenge.

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