

Discussion in Session IV

There were two main subjects in the discussion of session IV, one was the discussion on “rule of law” and the other was on “*res judicata*”.

Various comments were made to Mr. Sakumotos’ presentation, which lead to the discussion of “rule of law” vs. “rule by law”. One of the participants stated that the meanings of these terms are changing. Historically there were several stages of development of the term “rule of law”, which in the begging meant taking the political power from the king, which now has the connotation of citizen participation in law making process.

The other subject was about the notion of “*res judicata*”, particularly in China. In China although they have a hierarchy of court, which the Supreme Court stands on the highest level, the judgment of the Supreme Court can still be challenged for retrial. In Western notion the Supreme Court judgment should be final, but in China the Supreme Prosecutor’s Office can claim a protest against their judgments, which means a compulsory retrial. This is not a mere theory, but occurs in real life. Dr. Liu Junhai gave an example of a Hong Kong party who urged a representative from Hong Kong to the National People’s Congress to persuade the Supreme Prosecutor’s Office to protest against the Supreme Court judgment.

Although other counties shared the problem of endlessness of litigation, several participants expressed negative opinions against the judicial system in China. One argument was that the retrial system would be totally unacceptable for foreign parties, especially for business entities, because the transaction will never be stable. Another argument was that parties who go to Court often want resolution with finality of judgment and there must be an end to all litigation, and so the mere possibility for retrial without any time limitation is contradictory to legal stability.

Dr. Liu responded and claimed that the philosophy of retrial system is rather contrary. Its’ philosophy is to make the rule of law more predictable and stable, and wants to make people trust the rule of law. If there is any problems found concerning the application of law it must be corrected. It is not only an issue of procedure, but also an issue of substantial law. If the Court made a misjudgment, there should be a way for remedy, and the retrial system is one of the mechanisms to do so. Since it is not so rare for Courts in China to make misjudgment, this system for retrial is needed to insure the legality of the judicial system.