Reform of the Judicial System in Japan: Current State and Theory- Training of Legal Practitioners -

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Introduction

Presently, discussions over reforms of the judicial system are being held across a broad range of areas within the Japanese society. Directly triggering these discussions was the Diet's passing of a law for establishing a council specifically for deliberating over such reforms and presenting its opinions in June of last year. The Council has been energetically studying this issue under the watchful eye of the public and has periodically made public the content of its discussions. A look at the discussions shows that the opinions to be made public in July of next year may change part of the Japanese judicial system - a system that has remained basically untouched for about 100 years.

Below, I will study the number of legal practitioners and method of training them - the issue discussed particularly often in current deliberations over reforms of the judicial system - based on the point of how the modern judicial system of Japan was born.

I. Process of Formation of Judicial System in Japan

About 130 years ago, in 1868, the government known as the "Edo Bakufu" was toppled and the new Meiji Government was born. The Edo Bakufu Government had held power for over 260 years and had maintained an isolationist policy shutting the country off from the rest of the world for almost all of that period. During that period of isolation, Japan fell behind Europe in modernizing its society and industry.

The U.S. and European countries had pressured the Edo Bakufu before its collapse to end its isolationist policy. At that time, Japan concluded treaties with five countries, including the U.S. and Great Britain, committing itself to open up for trade.

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These treaties were extremely disadvantageous to Japan in two points. The first point was the recognition of extraterritoriality, that is, Japan's waiver of its right to prosecute foreign nationals committing crimes in Japan under Japanese law. The second point was the surrender of tariff autonomy, that is, Japan's waiver of its right to set its own tariff rates.

The Japanese Government did everything in its power to negotiate to reverse these unequal treaties with the U.S., Great Britain, etc. The U.S., Great Britain, and others declined the requests from Japan to amend the treaties giving as their reasons Japan's lack of a modern judicial system. Faced with this, the Government hurried to put together a modern judicial system.

Japan, however, lacked the foundations for creating a judicial system acceptable to the U.S. and Great Britain as a result of its long years of isolation. Japan consequently dispatched numerous officials to Europe to study its laws and brought over legal scholars from France and Germany to Japan to provide assistance. This enabled it to set up its own judicial system in a short time and prodded Great Britain and other countries to accede to its requests to amend the treaties. What happened to cause the entire country to start talking about reforming this judicial system about 100 years later in modern day Japan?

The judicial system is comprised of three elements. The first is the establishment of a code of laws, the second the establishment of a trial system, and the third the establishment of a method for training legal practitioners.

Many of the starting points of the debate in modern day Japan can be found in the process of formation of the three elements of the judicial system.

1. Establishment of code of laws

About 130 years ago, when the Japanese Government was trying to establish its code of laws, it first studied and decided to introduce the code of laws of France. Germany still did not have a uniform code of laws. In swift succession, however, Prussia won a war with France, unified Germany, and created a new code of laws. Viewing these successes, Japan reversed its policy and decided to introduce the German code of laws. As a result, the then Japanese Constitution, Civil Code, Criminal Code, Commercial Code, Code of Civil Procedure, and Code of Criminal Procedure were established under the influence of German law.

Later, after the end of the Second World War, the Constitution and the Code of

Criminal Procedure were completely overhauled under the strong influence of American law. The Code of Civil Procedure was totally revamped to bring it in line with modern day Japanese civil trial practice in 1996. The amendments were put in force in 1998.

2. Establishment of trial system

The trial system was first established around 1879 with reference to the French system. Next, in 1890, the Court Organization Law was established with reference to German law. This law continued up until the Second World War.

The Court Organization Law organized the courts into the Supreme Court at the top, the Appellate Courts under it, and the District Courts and Sub-District Courts under them. The public prosecutors were organized into Public Prosecutors Offices provided in each court. The judges and public prosecutors were therefore members of the same organization in the broad sense. The Minister of Justice held the right of monitoring the two in the administration of the judiciary. During those times, courts separate from the Ministry of Justice called "Administrative Courts" examined administrative cases.

Judges were appointed and promoted by a framework called the "career system". Under the career system, a judge was appointed while young and gradually rose inside the organization. This system continues up to the present. This system is however also currently under study.

In Japan, legal experts take the lead in administration of the law. In 1923, however, the jury system was introduced for some criminal cases. The jury system was born in England and inherited by the Americans, so this would mean that Japan introduced a non-German or French judicial system at that time. The jury system, however, was suspended in 1943 as the Second World War intensified. Even after the end of the war, it remained suspended and has continued so even today. The best approach to a system of participation of the public in the law, as typified by the jury system, is also being studied as part of today's reform of the judicial system.

When the Second World War ended, the philosophy of the judicial system of the U.S., as best represented by the right of the courts to examine unconstitutionality, entered Japan. The division of the judges and public prosecutors in the organizational structure also became important.

The new Court Organization Law organized the courts into the Supreme Court at the top, followed by the High Courts, the District Courts, and the Summary Courts.

The Administrative Courts were abolished and all administrative cases examined by the ordinary courts. Further, the Family Courts were newly established to examine family cases and juvenile cases. The Family Courts are parallel to the District Courts and under the Higher Courts.

The public prosecutors are organized under the Public Prosecutors Office Law into the Minister of Justice at the top followed by the Supreme Public Prosecutors Office, the High Public Prosecutors Office, the District Public Prosecutors Office, and the Sub-District Public Prosecutors Office.

The method by which judges are appointed in Japan is set down in the Constitution of Japan. The Chief Justice of the Supreme Court is appointed by the Emperor by nomination of the Cabinet. The other 14 Supreme Court Justices are appointed by the Cabinet. The judges of the High Courts and other judges of courts other than the Supreme Court are appointed from a list of nominees of the Supreme Court. As opposed to this, the right to appoint public prosecutors rests with the Cabinet for the managing public prosecutors and the Minister of Justice for the general public prosecutors.

The judges and public prosecutors are never chosen by election.

The remuneration given to judges and public prosecutors is made much higher than that of general civil servants. This is believed to be one reason why almost no corruption of judges or public prosecutors has been seen in Japan. In today's Japan, corruption being taken up as a theme in the reform of the judicial system is inconceivable.

3. Establishment of method of training legal practitioners

The Meiji Government also hurried to train legal practitioners, the persons making up the judiciary, in order to reverse the treaties. By 1889, just over 20 years after the formation of the Meiji Government, over 1000 judges had been trained and stationed around the country. Public prosecutors were trained along with the judges.

Before the Second World War, Japan trained judges and public prosecutors separate from the attorneys. Today, the three are trained together. Persons desiring to become one of the three are required to pass a national bar examination and then train at and graduate from the Legal Training and Research Institute before becoming a judge, public prosecutor, or attorney. The training used to extend over a two-year period for a long time, but was shortened to 18 months in 1999. The system of training persons

passing the bar examination at the Legal Training and Research Institute has continued for about 50 years.

Reform of the system for training legal practitioners has become one of the central themes of the today's reforms of the judicial system.

II. Deliberations in Judicial Reform Council

The Japanese Diet established a law in June of last year establishing a council for reform of the judicial system. In July of last year, the Judicial Reform Council was established under the Cabinet.

Under this law, the Council is empowered to conduct investigations and deliberations over the basic measures required for reforming the judicial system and improvement of the foundations of the judicial system. The investigations and deliberations cover the role which the judiciary should play in Japanese society in the 21st century, the realization of a judicial system more accessible to the public, the involvement of the public in the judiciary, and the best approach to legal practitioners and the strengthening of their roles and functions.

The Government explained to the Diet the need for reform of the judicial system stating that Japanese society will become more complex, varied and international in the 21st century and that the judicial will become more crucial for Japan to transform from an advanced-control type society into a post-check type society.

The 13 members of the Council were appointed by the Cabinet with the consent of the Diet. Among the 13, six are persons with experience in the practice of the law and legal scholars, while seven are knowledgeable in other fields. The members are listed in Attachment 1. Several among the persons with experience in the practice of law have experience as judges and public prosecutors. None are currently employed as such however.

The Prime Minister himself is in charge of the Council. Such a Council is of the highest type. Its opinions are respected and the chances for those opinions to be put into effect are high.

The Council is obligated by law to submit its opinions regarding reform of the judicial system within two years. The Council was established in July of last year, so more than one year has already passed. An interim report is scheduled to be released in November of this year. The debate is reaching its conclusion.

The Council first pinpointed the problems in the current judicial system. Its

findings are summarized in the points at issue of Attachment 2. According to these, the fields which the Judicial Reform Council is investigating and deliberating on are divided into those relating to the institutional framework and those relating to the human framework. These correspond to the improvement of the trial system and the method of training legal practitioners among the three elements constituting the judicial system. The improvement of the code of laws is not being investigated or deliberated on by the Council.

III. System for Training Legal Practitioners in Japan - Current State and Direction of Reforms

The Judicial Reform Council is continuing with its investigations and deliberations on the points at issue of Attachment 2. Among these, the points of by how much to increase the number of legal practitioners and how to train legal practitioners appear to be being hotly debated. Therefore, I would like to point out the problems in and consider the training of legal practitioners.

First, let us consider the issue of the number of legal practitioners in Japan.

As seen in Attachment 3, the number of judges has less than doubled from 1890 to today, 110 years later. The current population of Japan is 126 million. Around 1890, it was probably about 40 million. The population increased about three-fold. When considering the fact that Japanese society has evolved during that period and the number of cases of a complicated nature and difficult resolution has increased, this increase in the number of judges is just too small. The number of attorneys has increased more than 10-fold in the same period. As shown in Attachment 4, however, when compared with other countries, the number of legal practitioners per 100,000 population is low - both in judges and attorneys. Even leaving out the litigious U.S., the ratio of practitioners in Japan is still lower than the European countries which it based its laws on 100 years ago.

As a result, as shown in Attachment 5, the number of cases where attorneys have been appointed has fallen. Under the Code of Civil Procedure, presence of attorneys is not compulsory in a civil suit. Further, according to Attachment 6, even when a legal problem arises, consultation with an attorney is not necessarily general practice among the Japanese. Further, looking at Attachment 7, there are issues where the shortage of legal practitioners is perhaps being met by occupations related to the law.

Further, according to Attachment 8, legal practitioners, in particular attorneys, tend to concentrate in the large cities. This trend has become further advanced recently.

Therefore, second, we will study the reasons why there are so few legal practitioners in Japan and the problems associated with this. The reason for the low number of legal practitioners in Japan will become clear from Attachment 3. The number of legal practitioners is governed by the number of persons passing the bar examination. The number of persons passing the bar examination has in the past been artificially sharply limited.

As a result, in present day Japan, for general students desiring to become legal practitioners, passing the bar examination has become extremely difficult with just ordinary effort. Challenging the bar examination has become a dangerous choice best described as a gamble. Therefore, some of the persons with appropriate qualities to serve as legal practitioners are believed to be avoiding the risk of the bar examination and selecting other occupations. Further, most persons wishing to challenge the bar examination pay exorbitant tuitions to preparatory schools providing special instruction on how to take the bar examination since they cannot pass the examination by just the legal courses in their universities.

Further, in Japan, broad study at the university is not required as a qualification for taking the bar examination. Therefore, persons taking the bar examination seldom study legal courses other than those aspects of the law covered by the bar examination, history, foreign languages, or the natural sciences. Consequently, the number of persons passing the bar examination who lack a general education, are not proficient in a foreign language, and lack the ability to negotiate with foreigners appears to have increased.

In view of the above situation, the Judicial Reform Council is studying the introduction of a new system under which Japan would establish a new graduate school specialized in educating legal practitioners in Japan, providing students with education in the legal practice, and having graduates take the bar examination. Further, the Council is studying a proposal to increase the number of persons passing the new bar examination after the establishment of the graduate school for training legal practitioners to an annual 3000. Last year, exactly 1000 persons passed the bar examination. Up to just 10 years ago, around 500 persons passed the exam each year. If six times the number of persons pass the bar examination every year and make their way into society, how will the Japanese judicial system change?

Conclusion

Under current conditions in Japan, not much progress tends to be made in reforms in any field. The pace of reform of judicial system can be said to be particularly slow. Major reforms are being promoted for the method of training legal practitioners in the judicial system. This is considerably difficult to realize, however. The reason is that it is necessary to simultaneously sharply increase the number of legal practitioners and improve their quality.

Legal practitioners deal with people in vulnerable positions in society or persons in distress in the performance of their jobs, so training is inherently difficult. I believe that when considering the reforms of the judicial system, in particular the method of training legal practitioners, we should aim at creating a system able to train legal practitioners who can understand the feelings of vulnerable people or persons in distress and can be truly trusted by the public and therefore we educators in the schools of law of the universities should more seriously tackle this issue.

LIST OF ATTACHMENTS

[Attachment 1]

List of Members of Judicial Reform Council
(Titles as of Time of Appointment)

Chairman:
Sato, Koji, Professor of Law, Kyoto University (Constitution)

Vice-chairman:
Takeshita, Morio, Professor Emeritus, Hitotsubashi University and President, Surugadai University (Code of Civil Procedure)

Members:
Ishii, Koji, President, Ishii Iron Works Co., Ltd. and Chairman of Economic Law Committee of Tokyo Chamber of Commerce and Industry

Inoue, Masahito, Professor of Law, Tokyo University (Code of Criminal Procedure)

Kitamura, Keiko, Dean of Faculty of Commerce, Chuo University

Sono, Ayako, Author

Takagi, Tsuyoshi, Vice-president, Japanese Trade Union Confederation

Torii, Yasuhiko, President, Keio University

Nakabo, Kohei, President of Resolution and Collection Organization, Attorney at Law, and former Chairman of Japanese Federation of Bar Associations

Fujita, Kozo, Attorney at Law and Former President of Hiroshima High Court

Mizuhara, Toshihiro, Attorney at Law and Former Superintending Prosecutor of Nagoya High Public Prosecutors Office

Yamamoto, Masaru, Executive Vice-president, Tokyo Electric Power Co., Inc. and Chairman of Planning Subcommittee, Economic Law Committee, Federation of Economic Organizations

Yoshioka, Hatsuko, Secretary-general, Shufuren (Housewives Association)

[Attachment 2]

Points at Issue in Judicial Reform Council

1. Institutional Framework

(1) Realization of judiciary more readily accessible to public
- Best approach to attorneys
  - Expansion of access to attorneys
  - Measures to cope with the shortage of attorneys
  - Relationship of attorneys and the quasi-legal professions, etc.
- Expansion of the legal aid system
- Best approach to alternative dispute resolution (ADR) besides court proceedings
- Best approach to open/offering of information on administration of justice

(2) Best approach to civil justice responding to public expectation
- Expansion of access to the court of justice
- Reinforcement and speed up of civil trials
- Measures to cope with the cases which require professional knowledge
- Best approach to civil execution system
- Reinforcement of the administration check function by the administration of justice

(3) Best approach to criminal justice responding to public expectation
- Investigation/trial procedures corresponding to the new era
- Reinforcement and speed up of criminal trials
- Public defense counsel of suspects/defendants

(4) Public participation in administration of justice
- Jury system/magistrate system
- Best approach to system of public participation in the administration of justice

2. Human Framework

(1) Judiciary population and the judicial training system
- Proper increase of judiciary population
- Best approach to judicial training system
  - Best approach to national bar examination system and judicial training system
  - Role of education at university law schools

(2) Hosoichigen system for leveling legal profession

(3) Reinforcement of personnel system of the court of justice/prosecutors office

3. Others
- Preparation for internationalization of the administration of justice
- Securing a judicial budge

[*Attachment 3]*
Material provided by Supreme Court and
Materials of Judicial Reform Council

Trends in Population of Legal Profession in Japan
(Persons, Percentage)

Year	Judges	Public prosecutors	Attorneys	Total	Persons passing bar exam	Rate of passage of bar exam ****	Graduates of LL.B *****
1980	1,531	481	1,345	3,357			
1912	1,129	390	2,036	3,555			
1926	1,136	564	5,938	7,638			
1945	1,189	658	Unk.	Unk.			
1949	2,139*	1,667**	5,855	9,661	265***	10.31	
1950	2,261	1,675	5,862	9,798	269	9.59	
1960	2,387	1,761	6,439	10,587	345	4.13	15,000
1970	2,605	1,983	8,888	13,476	507	2.51	31,000
1980	2,747	2,092	11,759	16,598	486	1.70	39,000
1989	2,818	2,092	13,900	18,810	506	2.18	43,000
1995	2,864	2,092	15,540	20,496	740	3.01	50,000
1999	2,949	2,223	17,283	22,455	1000	2.94	50,000

* Including number of summary court judges
** Including number of assistant public prosecutors
*** Bar examination starting from this year
**** Persons passing test/applicants x 100
***** Numbers of graduates of LL.B.

[Attachment 4]
Material provided by Supreme Court

Comparison of Number of Attorneys and Judges in Different Countries
(1997) (Number of Persons)

	U.S.	U.K.	Germany	France	Japan
No. of attorneys	906,611	80,868	85,105	29,395	16,398
No. per 100,000 population	339.87	154.89	103.77	50.15	13.0
No. of judges	30,888	3170	20,999	4,900	2,899
No. per 100,000 population	11.6	6.07	25.6	8.4	2.3

[Attachment 5]
Material provided by Supreme Court

Change in Rate of Appointment of Attorneys in Ordinary Civil Suits of First Instance
- Rate of Cases in Which Attorneys Were Appointed for Both Plaintiff and Defendant -
(Percentage)

	District courts		Summary courts	
	1963 / 1998		1963 / 1998	
Tokyo District Court	58.3	43.6	30.4	1.2
Osaka District Court	48.8	43.6	21.9	1.1
Nationwide	39.2	40.9	11.1	1.2

[Attachment 6]
Material provided by Supreme Court

Persons Consulted When Legal Problems Arise
- Survey of Council for Reform of Judicial Training System (1994) -
(Multiple Answers Allowed, Percentage)

Acquaintances, friends, and relatives	36.9
Attorneys and bar associations	21.0
National, municipal, or other government offices	12.1
Superiors and colleagues at work	10.3
Tax accountants and judicial scriveners	10.0
Consultation offices	5.1
Courts	5.1

[Attachment 7]
Material provided by Supreme Court

Number of Jobs in Legal Profession and Related Occupations in Japan
(1999) (Number of Persons)

Legal profession	22,455	(*20,730)
Tax accountants	63,806	
Administrative scrivener	35,393	
Judicial scrivener	17,097	
Certified public accountants	12,168	
Patent agents	4,141	

* Number excluding summary court judges and assistant public prosecutors

[Attachment 8]
Material provided by Supreme Court

Concentration of Attorneys and Judges in Large Cities of Japan
(Number of Persons)

	Attorneys		Judges	
	1963 / 1998		1963 / 1998	
Tokyo	3,242	7,786	488	699
Osaka	833	2,368	238	312
Nationwide	6,932	16,852	2,445	2,881

Discussion in Session I

Outline of the Discussion

There was consensus among the participants on the importance of judicial reform, which has been taking place since the late 1990s in each country, as a key to success in today's world. It was pointed out that international organizations such as the IMF have played a significant role not only in restructuring economic related laws but also in reforming judiciary systems in developing countries. However, some participants expressed doubt regarding this fact, insisting that solutions had to be found from within rather than from the outside. It is true that the international organizations are making efforts to achieve uniformity throughout the world so that the trade can be carried out smoothly in the economy of each and every country. Nevertheless, it was stressed that to the extent that local needs prevail against economic globalization, the reforms must be thoroughly indigenous.

What are the reasons for delays in civil cases in Asian countries? Some participants argued that one reason was economic crisis and another debts. Others opposed this interpretation, arguing that the main reason was the laxity in the implementation of laws and court procedures, claiming that this was why civil procedure reforms and the establishment of special courts were frequently observed in the 1990s in Asian countries.

Special courts such as the commercial court in Indonesia and the intellectual property court in Thailand were established to deal with matters that were expected to arise with the establishment of a more market-oriented economic system. The problem pointed out was how judges, who were not familiar with economic and financial corporate business, could issue decisions on these cases. From this point view, the device of appointing ad hoc judges for particular cases gathered the interest of participants. For example, Thailand has introduced some ADR schemes involving specialists (non lawyers) into procedures not only as witnesses, but also as a kind of arbitrator.

In addition, special quasi-judicial institutions such as the National Human Rights Commission in India have come into existence in the 1990s, and Indonesia is

preparing to form a special court which will have some jurisdiction on human rights. However, the jurisdictions and procedures used in these courts are often different from ordinary courts. For example, the National Human Rights Commission in India, like international human rights instruments, is limited to issuing recommendations. The Ombudsman system is a part of good governance, although it seems that the political pressures are heavy and little action has been taken in the case of Indonesia.

There was also debate on the prosecutors system (procuracy) in Vietnam and China. The system was adopted based on the system used in the former Soviet Union. The prosecutors in those countries do not only act as the public prosecution for crimes, but also supervise the judgments in civil cases, administrative cases and other cases. This is quite different from the system used in market economy countries. In socialist countries, many people perceive the procuracy, rather than the judiciary, as the top level of the judicial system. It is clear that this system is quite different from the Ombudsman system, too.

A question was raised from the floor regarding the proper balance between control over the judiciary and its independence. One answer was to have a Code of Judicial Conduct, and the other was to ensure that proceedings were open in order to permit oversight by citizens.

Finally, one participant stated in order to achieve reform in the judicial system from the perspective of judicial independence, transparency, accountability and the quality of the legal profession, what is needed is something called inventiveness. This point appears to give meaning to exchanging views on judicial reforms.