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Panel 16:

Comparing and Assessing Judicial System and Administrative Reform in Japan: Criminal Justice and Beyond

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Paper 1: Hitoshi Ushijima "Who judges public services? Private management of local public facilities"

Abstract

This paper explores an intersection where traditional Japan (harmony-based non-legal process) meets new Japan (transparent legal process) by examining the *Shitei-Kanrisha* system: private management of local public facilities such as gymnasiums, libraries, and community centers. The system was newly introduced in the Local Government Law (2003) to offer better management and services to local residents. This paper concludes that the *Shitei-Kanrisha* system can be a powerful tool for better local governance including fairness, accountability and transparency.

Japan has been developing various legal mechanisms for better governance. The Administrative Procedures Law (APL, 1993), and amendments to the APL (2005) as well as as the Administrative Litigation Law (ALL, 2004) are major examples. They can be a platform for possible changes in Japanese society. Judicial System Reform, including the amendment of the ALL and mandatory learning of administrative law at newly established law schools, would work in with these new laws.

Coupled with these reforms, the *Shitei-Kanrisha* system has potential to go further. This PPP scheme (public private partnership) portends the demise of a government monopoly on public services, as well as participatory opportunities in decision-making. An independent council composed of local people, an exception so far, can substantially decide among candidates comprising private business or non-profit entities, in a competitive manner, depending on legislative consent. The applicants can pursue disclosure of reviewing records, administrative remedies, and judicial review. This is distinct from the traditional bureaucratic decision-making, involving local or partial consent in a non-legal manner.

Presenter's Details

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Paper 2: Luke Nottage, Stephen Green, Shinichi Nishikawa "Who defends Japan? Government lawyers and judicial system reform in Japan and Australia"

Abstract

One novel way to test whether Japan's justice system reforms since 2001 are already gaining traction, and also to fill a major gap in the literature in both Western languages and Japanese, is to examine whether there have been any major changes in the way the Japanese government defends administrative and private law cases. In particular, our paper explores the evolving roles and activities of shomu kenji, based in the Ministry of Justice (MoJ).

We first find that there has not been any large aggregate increase in administrative law cases under the revised Act, nor indeed in other litigation involving the government. However, more litigation has emerged in certain categories, such as claims under official information disclosure law (leading also, for example, to more "taxpayers' suits" claiming wasteful expenditures by officials). There also seems to be more variance, hence the risk of large losses, as in tax litigation. Secondly, following further [reforms to civil and court procedure](#) in recent years, the pace at which cases proceed through trial has accelerated somewhat. Thirdly, the government lost some major cases around 2006 (hepatitis, lung disease, and nuclear incident victims) and is now facing further large-scale claims ([asbestos](#)).

So far, however, the system centred on shomu kenji has not changed too much. Specialised litigation involving competition or patent law remains the province of the JFTC and JPO anyway, under separate litigation. Litigation involving local governments is left largely to them, and they outsource this work to local bengoshi. The MoJ shares tax litigation extensively with National Tax Agency officials, acting like solicitors but also given the power by the MoJ to appear in court with shomu kenji as (senior) barristers. The Minister also nominates shitei dairinin from other ministries, notably now the Health Ministry in regard to suits that must proceed through the courts regarding hepatitis C claims, but within a framework now set by legislation.

Within the MoJ itself, shomu kenji mostly are rotated for one 3-year term from other (mostly criminal) work as kenji within the Ministry, or comprise judges seconded for 2-3 years (despite some doubts about this practice, from the perspective of the separation of powers). The number of jimukan, usually with some legal training (but who have not passed the Examination) and who often can deal with mundane cases, has been increased to help process cases faster. Two more senior posts were added in 2006. But, except for large-scale and therefore long-term litigation, it remains rare for the MoJ to outsource work to bengoshi. Instead, it has used a 2004 Law allowing government departments to bring bengoshi in-house on contracts up to 5 years. This is linked to a strong preference to trying to maintain consistency and predictability in litigation practices – a preference also found among kenji in criminal prosecution work.

Thus, as [Takao Tanase](#) suggests more generally, organisational and social structures are only adjusting slowly and in subtle ways. On the other hand, agency still matters. Longer-term pressure may mount, as citizens call for further access to justice and state accountability, and a new generation of bengoshi emerge with Law School training in administrative law.

Our paper concludes by outlining some possible lessons from Australia, where legal services to the government were liberalised in 1999. Outside lawyers were also bound to a "[Model Litigant Policy](#)", self-regulation by the government to give citizens a "fair go" in their litigation, including for example a [commitment to ADR](#). It seems perfectly consistent with Japan's judicial reform project for Japan's government lawyers to bind themselves already to such a Policy. Yet Japan also presents a cautionary tale for Australia, where government legal expenditures have ballooned.

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Paper 3: Souichirou Kozuka "Taxpayer Lawsuits for Anti-Trust Violations in Japan"

Abstract

The Antimonopoly Act has been one of the most prominent barometers for the role of law in Japanese society. Until the 1980s, it was seldom enforced effectively and was subordinated to industrial policy considerations. With the transition of the Japanese economy from the high-growth phase to stagnation over the 1990s, however, the Antimonopoly Act has come to be enforced more and more, as evidenced in the number of court decisions, as opposed to the more compromise-like consent decrees of the JFTC.

Then, from the late 1990s, in the cases of bid-rigging of public construction projects, taxpayers started to bring suits claiming recovery of excess funds paid to participants in the bid-rigging. The numbers of such cases have been rising throughout the 2000s. Enforcement of the Antimonopoly Act no longer appears to be monopolised by the government agency but partially, if not largely, conducted by citizens. This is consistent with the general tendency towards greater popular participation in the Japanese judicial system

The paper first describes basic data about the use of taxpayer suit in antimonopoly cases, in comparison with other types of enforcement, such as criminal prosecutions. It argues that the trends in both types of cases are largely parallel. Further, it examines court decisions rendered in these proceedings and argues that the active use of taxpayer suits would not have been so fruitful without case law doctrines developed over such issues as the standing of the plaintiffs or disclosure of documents held by the JFTC. Thus, the shift in the power exerted over the Japanese judiciary system should not be oversimplified as being “from elites to citizens”, as proclaimed by the Judicial Reform Council recommendations of 2001. Instead it must be understood as the collaborative outcome of both public and private initiatives.

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Paper 4: Yoshiyuki Matsumura “Japanese Attitudes Toward the Lay Judge System and Criminal Justice: Focusing on Their Evaluation”

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I will deal mainly with the Japanese people's evaluation of the lay judge system and criminal justice, showing the following. First, the people tended to demand more severe treatment toward suspects or defendants regarding both the penalty and due process. As an extreme example of this tendency, they even allowed the usage in trial of illegally collected evidence (evidence based on a confession forced by the police). Second, the people favored the lay judge system in regard to understandability and closeness. However they didn't highly evaluate quality of its trials (e.g. finding the truth). Third, concerning the prevention of false accusations, the lay judge system wasn't valued highly. Fourth, their determination of appropriate cases for the lay judge system indicated their views toward the judiciary affected by populism. Fifth, although the people preferred a trial by professional judges alone if they themselves were defendants, whether or not they would accept the introduction of the lay judge system still remains controversial.

Paper 5: Manako Kinoshita "The structure of Japanese attitudes toward the lay judge system and criminal justice"

Abstract

The attitudes of Japanese people towards the lay judge system and criminal justice are discussed based on a survey conducted in Japan in 2008. This survey was carried out before the lay judge system came into operation. The factors that determine Japanese people's attitudes towards the lay judge system and criminal justice are analyzed by multivariate analysis.

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Paper 6: Shozo Ota "Procedural Justice Evaluation by the People in the Context of Saiban-in Seido (Lay Judge System)"

Abstract

There are many issues in designing the procedure for the Saiban-in Seido (Lay Judge System) that should have been solved social scientifically before operations started on May 21, 2009. Such issues include the manner and content of instructions by the presiding judge, the proper order for revealing opinions among professional judges and the lay judges at the deliberations, to what extent the judgments by the new system should be respected by the High Courts when they are appealed. We deployed the field experiment method to find out answers to such questions. We are also interested in whether there are differences in people's attitude toward judgments, when the professional judges' initial opinion prevailed or when the lay judges' initial opinion prevailed.

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