Career Judiciary, Judicial Reform, and Practicing Attorneys

Hiroshi Takahashi

I. INTRODUCTION

The influence of judicial reform in Japan has been tremendous for several years. The judiciary is not exempt from its impact. In this article, I will analyse the relationship between the judiciary, practicing attorneys and the recent judicial reform movement. Following a brief outline of the Japanese judiciary (II), I will explore the career patterns of Japanese judges based on comprehensive biographical data (III, IV, V.).[1] A focal point will be to examine the demographic features of Japanese judges. In the second half (VI, VII.), the significance of the recent reforms in the judicial appointment system, and the attitudes of practicing attorneys toward those reforms, will be investigated from a historical viewpoint.

---

1 Parts III., IV. and V. of this article are based on my previous article while some figures are updated from the previous version. For a detailed discussion concerning those sections with comprehensive bibliography, see HIROSHI TAKAHASHI, Career Patterns of Japanese Judges, in: Dai-kwon Choi / Kahei Rokumoto (eds.), Judicial System Transformation in the Globalizing World (Seoul 2007) 183-216. I would like to express my thanks to Professor Kahei Rokumoto for giving me a first opportunity to study the Japanese judiciary as a part of the joint research project between Korean and Japanese socio-legal scholars on judicial reform in both countries (see CHOI / ROKUMOTO (eds.), *ibid.)*.

II. THE STRUCTURE OF THE JAPANESE JUDICIARY[2]

Judges in Japan are classified according to the following five categories: fifteen Justices of the Supreme Court; eight Presidents of the High Court; approximately 1630 full-fledged judges (*hanji* 判事); approximately 950 assistant judges (*hanji-ho* 判事補); and approximately 810 summary court judges (*kan'i saiban-sho hanji* 簡易裁判所判事). The latter four categories comprise the inferior court judges (*kakyû saiban-sho saiban-kan* 下級裁判所裁判官). As of April 2007, 14.6 percent of all inferior court judges (499 of 3416), including 24.2 percent of the assistant judges (230 of 950), were female.[3] Among inferior court judges, summary court judges are not eligible to handle cases at inferior courts other than summary courts, because their qualification procedure is entirely different from that of other inferior court judges. Summary court judges are thus excluded from the following analyses.

The Supreme Court is located in Tokyo. High courts are located in eight major cities (Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu) with six branches.[4] There are 50 district courts, at least one in each prefecture, with family courts in the same locations. There are 203 district and family court branches. Finally, there are 438 summary courts throughout Japan.

III. TYPICAL CAREER PATHS OF JAPANESE JUDGES

Most inferior court judges join the judiciary without having any experience of working as practicing attorneys, and many of them stay in the judiciary until they reach the compulsory retirement age. These judges are called 'career judges'.[5] Few practicing attorneys have been chosen to be judges in spite of the fact that they are institutionally eligible to enter the judiciary (as we will see below).

Most judges are initially appointed as assistant judges for a ten-year term after completing their apprenticeships at the Legal Training and Research Institute (*Shihô Kenshû-sho* 司法研修所, LTRI). Upon finishing this first ten-year term, most of those who wish to remain within the judiciary are reappointed and become full-fledged judges. The term for full-fledged judges is also ten years, and is renewable. Almost all full-fledged judges are reappointed if they wish to continue their judgeships. Their compulsory retirement age is 65, while that of the Supreme Court justices is 70.

---

2 For the institutional settings of the Japanese judiciary, see KAHEI ROKUMOTO, The Japanese Judicial System: Institutions and Issues, in: Choi / Rokumoto, *supra* note 1, 37-66; JOHN O. HALEY, The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust, in: Daniel H. Foote (ed.), Law in Japan: A Turning Point (Seattle 2007) 100-112.

3 See *http://www.gender.go.jp/2007statistics/pdf/2-1a-d-1_2.pdf.*

4 Apart from these six branches, the Intellectual Property High Court is annexed to the Tokyo High Court as a special branch.

5 For a detailed explanation of the system of career judges in Japan, also see ROKUMOTO, *supra* note 2, 63-66.

Newcomers to the judiciary are normally assigned to posts in a district court. At these courts, as a rule, a single judge handles cases. Some types of cases, however, must be managed by a collegiate court of three judges. Because assistant judges are not allowed to handle cases alone for the first five years, they necessarily comprise the junior members of collegiate courts. After five years have passed, assistant judges become eligible for the same roles as full-fledged judges and are able to adjudicate on cases alone. Most judges spend almost their entire first ten-year term at the district court (while simultaneously carrying out judicial functions at the family court). This does not mean, however, that they stay at the same particular court. Normally, they are assigned to several places in a two- to four-year cycle during their careers. It is possible to be assigned to a high court as an assistant judge, though in practice this rarely happens.

After becoming full-fledged judges, some judges are appointed as high court judges while others remain at a district court, either as senior members of the collegiate court or as a single judge adjudicating on cases alone. Some judges belong to a district court as well, but their position is branch chief (*shibu-chô* 支部長). Around the end of this second term, some judges are appointed as a presiding judge of the division (*bu-sôkatsu* 部総轄) in a district or family court. There are about 300 *bu-sôkatsu* judges. To be the president (*shochô* 所長) of a district or family court usually requires about twenty years of experience as a full-fledged judge, as does being a *bu-sôkatsu* judge in a high court.

It should be noted that a number of judges are assigned to either the General Secretariat of the Supreme Court or posts within the Ministry of Justice in order to engage in judicial administration (*shihô gyôsei* 司法行政)[6] such as management of personnel matters and court budgets. Because the main role of judges is obviously to carry out the various judicial functions at court, those judges who engage in judicial administration are an important exception.

In this article, posts within organisations that conduct administrative functions but are outside the particular courts are called ‘administrative posts’. These are posts within the General Secretariat at the Supreme Court and within the Ministry of Justice.[7] The

6 According to HAJIME KANEKO / MORIO TAKESHITA, *Saiban-hô* [Court Organization Law] (Tokyo, 4th ed. 1999) 126, ‘judicial administration’ can be defined as managing and organising personnel matters and the facilities of the courts. Another important administrative function carried out by Japanese judges is related to governmental legal affairs, such as legislation, the management of prisons, and litigation with which the government is involved as a party. Judges have engaged in this type of administrative function within the last 30 years, too. Judges who are in charge of these tasks are transferred temporally to the Ministry of Justice as prosecutors.

7 A few judges temporally work and perform administrative tasks at ministries other than the Ministry of Justice. Further, a few dozen judges are dispatched to private companies such as media organisation, manufacturing industries, transport industries and so on. Terms of dispatch to private companies vary from two weeks to one year.

term 'administrative post holder' will be used to refer to those who have taken up administrative post(s) during their careers as judges.[8]

IV. STATISTICAL ANALYSES ON JAPANESE JUDGES

It is commonly perceived that a large percentage of Japanese legal professionals (comprising practicing attorneys, prosecutors and judges) educated after World War II share a similar demographic profile. This section presents empirical data on the demographic features of Japanese judges. It will consider the universities from which these judges graduated as well as their age and gender.[9]

1. University

The first point of discussion is the apparent monopoly of judicial appointments from a small number of Japanese traditional elite universities. *Table 1* shows the number and percentage of passers of the legal examination (*shihô shiken*)[10] as well as the appointees to the judiciary, both by university attended. The range includes all candidates who passed the legal examination between 1949 and 1975. (This corresponds with those who entered the LTRI between 1950 and 1976, and graduated from the LTRI between 1952 and 1978.)

---

8 In the structure of the Japanese judiciary, those posts designed to support the work of the judges such as the trainers of the LTRI or the Judicial Research Officers for the Supreme Court (*Saikô Saiban-sho chôsa-kan*) occupy an important position. Those posts are also carried out by judges. For the significance of those 'back-up post' holders, see TAKAHASHI, *supra* note 1, 209-214.

9 The analyses below will focus on judges who graduated from the LTRI between December 1947 and April 1978. The number of these judges is 2420 in total. The Biographical Directory of All Judges (*Zen saiban-kan keireki sôran*) (Tokyo, 3rd ed. 1998), compiled by the Japan Democratic Lawyer's Association, Judicial System Committee (*Nihon Minshu Hôritsu-ka Kyôkai Shihô Seido I'in-kai*), provides highly beneficial information on their biographical data. Utilising this group as a parental population, two data sets have been prepared. One data set is a random-sampling data on Japanese judges. Information on the careers of 403 judges randomly chosen from the parent population was collected. Another data set is complete enumeration data on 'administrative post holders'. Some of the judges in the second data set are also in the first data set. Further, some additional data were collected from other directories and periodicals. For a detailed explanation of the data set, see TAKAHASHI, *supra* note 1.

10 For a detailed explanation of the legal examination, see KAHEI ROKUMOTO, Legal Education, in: Daniel H. Foote (ed.), Law in Japan: A Turning Point (Seattle 2007) 199-200.

Table 1

Number and percentage of judicial post appointees
who passed the legal examination (LE) by university attended

University / Status	Univ. of Tokyo	Univ. of Kyoto	Other national & municipal universities	Chûô Univ.	Waseda Univ.	Other private univer-sities	Other	Un-known	Total
Passers of the LE : Number	2,088	907	1,978	2,868	813	1,966	333		10,953
: Percentage	19.1%	8.3%	18.1%	26.2%	7.4%	17.9%	3.0%		100%
Appointees to judge : Number	465	296	158	325	100	85	12	63	2,074
: Percentage (incl. unknown)	22.4%	14.3%	7.6%	15.7%	4.8%	4.1%	0.6%	30.5%	100%
: Percentage (excl. unknown)	32.3%	20.5%	11.0%	22.6%	6.9%	5.9%	0.8%		100%

From these figures, we can confirm that the University of Tokyo and Chûô University have comfortably provided the largest number of legal examination passes. Almost half of the legal professionals who passed the legal examination from 1949 to 1975 were graduates of one of these two universities. These institutions also dominate post-1975 judicial appointments. However, other institutions, such as the University of Kyoto, also account for a significant portion of persons entering the judiciary. One of the main reasons for this is that over 32 percent of the legal examination passers who attended the University of Kyoto went on to become judges. In contrast, 22 percent of Tokyo graduates who passed the legal examination and 11 percent from Chûô University actually entered the judiciary. We can therefore conclude that Kyoto graduates are especially strongly oriented towards a judicial career.

Table 2 is exclusively concerned with administrative post holders, and presents a slightly different picture. These figures reveal the number and percentage of judges who have held administrative posts by university attended.

Table 2:

Number and percentage of administrative post appointees by university attended
(LTRI graduates from 1952 to 1978)

University / Post Held	Univ. of Tokyo	Univ. of Kyoto	Other national & municipal universities	Chûô Univ.	Waseda Univ.	Other private univer-sities	Other	Un-known	Total
Secretary General of the GS, Supreme Court : Number	2	3	0	0	0	0	0	0	5
: Percentage	40.0%	60.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
Bureau Director*: Number	23	14	3	2	0	0	0	0	42
: Percentage	54.8%	33.3%	7.1%	4.8%	0.0%	0.0%	0.0%	0.0%	
Department Chief*: Number	81	34	12	8	2	2	0	11	150
: Percentage	54.0%	22.7%	8.0%	5.3%	1.3%	1.3%	0.0%	7.3%	
*Kyoku-tsuki**: Number	152	62	25	18	5	5	1	44	312
: Percentage A (incl. unknown)	48.7%	19.9%	8.0%	5.8%	1.6%	1.6%	0.3%	14.1%	
: Percentage B (excl. unknown)	56.7%	23.1%	9.3%	6.7%	1.9%	1.9%	0.4%		
Administrative Post* Holder : Number	168	74	28	22	7	5	1	46	351
: Percentage A (incl. unknown)	47.9%	21.1%	8.0%	6.3%	2.0%	1.4%	0.3%	13.1%	
: Percentage B (excl. unknown)	55.1%	24.3%	9.2%	7.2%	2.3%	1.6%	0.3%		

* *Kyoku-tsuki* [literally translated, “Those who are assigned to division”]: Including the posts at both the General Secretariat and the Ministry of Justice

Compared to the entrants to the judiciary, percentages of both Chûô and Waseda graduates dramatically decrease among the administrative post holders. In contrast, the percentage of Tokyo graduates considerably increases. Whilst the Kyoto graduates percentage is not as large as that of Tokyo graduates, the percentage of Kyoto graduates gradually rises at the more senior levels of the judicial hierarchy. As can be seen in the table, graduates of the University of Tokyo and the University of Kyoto nearly monopolize higher-ranking posts within the General Secretariat and the Ministry of Justice.[11]

2. Age

It has been alleged that legal apprentices recruited to be assistant judges are 'smarter' than other apprentices. Although it is difficult to verify this anecdotal belief accurately, we can approach this issue through an analysis of the ages at which Japanese judges complete their legal education. *Table 3* shows the average age at which all legal examination passers, judges as a whole, and administrative post holders respectively finish their training as legal apprentices at the LTRI.

Table 3:

The average career starting age in the legal profession

Category of status / Class of LTRI*	Legal examination passers	Judges as a whole**	Administrative post holders
LTRI Class of 1950-1976	29.4	27.5±0.40	26.4
LTRI Class of 1950-1956	28.6	28.3±0.80	26.6
LTRI Class of 1957-1966	30.0	28.5±0.72	26.6
LTRI Class of 1967-1976	29.3	27.0±0.50	26.1

* Hereafter, Class of the LTRI is indicated by using the year of enrolment.
** Confidence interval is 95%.

11 A pioneering 1970 study on the Japanese judiciary pointed this out (it included those judges who entered the judiciary before the end of World War II). At that point in time, however, whilst 105 out of 143 judges who were assigned to the post of *Kyoku-tsuki* or higher at the General Secretariat were Tokyo graduates, Kyoto graduates accounted for only 20 of these postings (see TOSHITAKA USHIOMI, *Hôritsu-ka* [Legal Professionals] (Tokyo 1970) 110-113). This difference suggests a great increase in Kyoto graduates over the following 30 years.

From this table we can see that candidates who became judges were younger than legal examination passers in general, whilst those who become administrative post holders were younger still. Additionally, judges who became administrative post holders were recruited from the younger graduates of the LTRI (compare *Tables 4* and *5*). If we define the concept 'smartness' as the ability to pass difficult examinations within relatively short periods with few 'flunks',[12] it can be concluded that judges as a whole are 'smarter' than most of their fellow classmates at the LTRI. Moreover, administrative post holders were recruited from the very 'smartest' group of legal apprentices.

Table 4:

The estimates of average age of starting a career as a judge by university attended*

University / Class of LTRI	Univ. of Tokyo	Univ. of Kyoto	Chûô Univ.	Judges as a whole
LTRI Class of 1950-1976	26.7±0.7	26.8±0.9	29.0±1.2	27.5±0.40
LTRI Class of 1950-1956	29.1±2.9	26.9±1.1	27.6±1.5	28.3±0.80
LTRI Class of 1957-1966	26.6±1.1	26.4±1.3	30.7±2.4	28.5±0.72
LTRI Class of 1967-1976	25.9±0.4	27.2±2.1	27.9±0.9	27.0±0.50

* Confidence interval is 95%.

Table 5:

The average age of starting a career as an administrative post holder by university attended

University / Class of LTRI	Univ. of Tokyo	Univ. of Kyoto	Chûô Univ.	Administrative post holders as a whole
LTRI Class of 1950-1976	26.2	25.9	27.0	26.4
LTRI Class of 1950-1956	26.5	25.6	27.1	26.6
LTRI Class of 1957-1966	26.3	26.5	27.6	26.6
LTRI Class of 1967-1976	26.0	25.5	26.5	26.1

12 J. MARK RAMSEYER / ERIC RASMUSEN, Measuring Judicial Independence: The Political Economy of Judging in Japan (Chicago 2003) 38-39.

Table 6 presents statistical information relating to retired judges, classified by their period of tenure. Judges examined here include those who have left the judiciary before their compulsory retirement age. The data shows that a majority of judges from the LTRI Class of 1947-1955 remained within the judiciary for 30 years or more; for the later LTRI Class of 1956-1965, about two-thirds served or have served for over 30 years. By contrast, the estimated early retirement rate (*i.e.* within the first 10 years of enrolment to the judiciary) for the LTRI class of 1947-1976 is 10.7 percent ± 3.0 percent (confidence interval 95%). It would appear that the relatively long tenure of judges may be one of the outstanding characteristics of the Japanese judiciary.

Table 6:

Judges' length of tenure at retirement

Period of tenure / Class of LTRI	0 – 10.0 years	10.1-20.0 years	20.1-30.0 years	Over 30.1 years	Stay at the judiciary as of 1997*
LTRI Class of 1947-1955	14.4%	9.6%	20.0%	55.2%	0.8%
LTRI Class of 1956-1965	11.8%	11.0%	10.2%	25.2%	41.7%

* Almost all of them stay in the judiciary for more than 30 years.

3. *Gender*

Table 7 shows the result of investigation on the gender structure in the Japanese judiciary.[13] Three findings can be pointed out from these figures. Firstly, the percentage of women among legal examination passers was very small within the 1950 to 1976 classes at the LTRI. Secondly, the percentage of women who became judges may be smaller. Finally, women experienced enormous difficulties in obtaining administrative posts in either the General Secretariat or the Ministry of Justice throughout the postwar period.

Detailed scrutiny of the administrative posts held by the six female judges who entered the judiciary after 1976 further reveals that as of 1997 none of these judges (out

13 The main source of these analyses, the Biographical Directory of All Judges, does not contain information on gender. The study has therefore surveyed the gender of the judges based on HÔSÔ-KAI, *Shihô Taikan* [Directory of Judges and Prosecutors in Japan] (Tokyo 1967/1974/1980).

of a total of 418 administrative post holders[14]) had been assigned to the level of Department Chief or higher. This suggests that female judges who become administrative post holders face even greater obstacles in advancing within the hierarchy.

Table 7:

Percentage of women in the judiciary

Category of status / Class of LTRI	Legal examination passers*	Judges as a whole**	Administrative post holders***
LTRI Class of 1950-1976	4.5%	2.9±1.7%	2.0%
LTRI Class of 1950-1956	2.1%	2.5±3.4%	0.0%
LTRI Class of 1957-1966	4.4%	2.3±2.5%	0.9%
LTRI Class of 1967-1976	5.5%	3.8±3.3%	3.1%

* Calculated from *Hômu Daijin Kanbô Jinji-ka* 1987.
** Confidence interval is 95%, and the lower limit of estimates is 0%.
*** The figures show the percentage of female judges who had been assigned to administrative posts up until November 1997.

V. DEMOGRAPHIC FEATURES OF JAPANESE JUDGES

The analyses above illustrate characteristics of the Japanese judiciary. Japanese judges who entered the judiciary before 1978 are likely to be male, to be younger than other legal examination passers in the same class, and to have graduated from the University of Tokyo, University of Kyoto or Chûô University. Japanese judges are clearly selected from a very narrow section of the population. This homogeneity is more pronounced amongst the administrative post holders. Administrative post holders are often graduates of either the University of Tokyo or the University of Kyoto. They are likely to be the youngest amongst their classmates at the LTRI, and extremely likely to be male.

14 Moreover, one of these six judges stayed at an administrative post for just one month. She may have to be excluded from this group.

Thus, we can identify several important features of Japanese judges. Firstly, the structure of the Japanese judiciary is highly homogeneous, and the career paths of Japanese judges are not diverse among such homogeneous constituents of hierarchical organisation. Secondly, administrative post holders can be regarded as forming the "elite" among the judiciary.

The problem is that these two features bring serious drawbacks to the ideal of rule of law. Japanese judges are substantially members of hierarchical system, and to escape from the promotion race is difficult for them. Difference in the salary scale spurs the competition among them.[15] Those who exercise great influence in the evaluation of the performance of judges are said to be administrative post holders. Although the Japanese Constitution stipulates the independence of judges (Constitution of Japan, Art. 76), the actual situation in the Japanese judiciary is far from the ideal.[16]

Further, the career judge system is alleged to cause another problem: namely a lack of social experience of judges. The typical career track of Japanese judges as well as the steep path to the judiciary does not allow them to learn the common sense of ordinary people. Homogeneity of the judiciary may widen the gap between citizens and judges. Thus, the idea that judges are "ignorant of the real world (*seken shirazu* 世間知らず)" is a popular cliché used to criticise the Japanese judiciary. Though all the judges are not obviously "ignorant of the real world," the criticism holds true with some of the Japanese judges. The career judge system forms a possible background of the situation that needs to be tackled. As a consequence, what reforms have been brought about to grapple with these problems?

15 After about 20 years from the enrolment to the judiciary, difference in salary emerges among the judges of the same class.

16 The *Saiban-sho-hô* [Court Organization Law], Law No. 59/1947, stipulates that judicial administration affairs shall be conducted based on the resolution of the Judicial Conference of either the Supreme Court, which consists of all Justices of the Supreme Court, or of each inferior court, which consists of all the full-fledged judges at each court (Court Organization Law, Arts. 12, 20, 29, 31-5). However, in practice most judicial administration affairs are undertaken by judges who are appointed to posts within the General Secretariat of the Supreme Court, as well as to be presidents of the particular courts (MASASHI HAGIYA (ed.), *Nihon no saiban-sho: Shihô gyôsei no rekishi-teki kenkyû* [The Japanese judiciary: Historical Survey on the Administration of the judiciary] (Kyoto 2004) 100-108). In particular, personnel matters concerning inferior court judges are alleged to be managed and controlled by the General Secretariat of the Supreme Court (SETSUO MIYAZAWA, Administrative Control of Japanese Judges, in: Philip S.C. Lewis (ed.), Law and Technology in the Pacific Community (Boulder 1991) 267).

VI. ATTEMPTS AT THE REFORM OF JUDICIAL APPOINTMENTS

The following two newly introduced systems on judicial appointment[17] can be understood when we consider them as measures for the above-mentioned problems.

(1) Establishment of the Consultative Committee for the Nomination of Inferior Court Judges (*Kakyû Saiban-sho Saiban-kan Shimei Shimon I'in-kai* 下級裁判所裁判官指名諮問委員会):

Inferior court judges are appointed by the Cabinet according to the nomination list prepared by the Supreme Court (Constitution of Japan, Art. 80). Since 2003, the Supreme Court consults with the newly established Consultative Committee for the Nomination of Inferior Court Judges before the nomination of all judges, including assistant judges. The Committee consists of eleven members, and six or more among them have to be "persons of learning and experience" who are not qualified as lawyers.[18] The Committee offers opinions to the Supreme Court regarding the capability as a judge of each nominee based on the information collected by the Committee itself under the coordination of the Local Committee for the Nomination of Inferior Court Judges.[19] The Supreme Court is .expected to respect the opinion of the Committee, and the opinions of the Committee have been actually complied with thus far.[20]

(2) Establishment of the system of conciliation officers (*chôtei-kan* 調停官):

As is well know, a successful court-annexed conciliation is one of the striking characteristics of the Japanese legal system. While the conciliation procedure is conducted by the civil conciliation committee (for civil conciliation) or the family conciliation committee (for family conciliation), each committee ordinarily consists of one judge and two conciliation commissioners.[21] The commitment of the judge to the procedure is an important guarantee for the quality and legitimacy of court-annexed conciliation. While this regime has lasted for more than 80 years since the establishment of the modern court-

17 These systems constitute a part of the recent justice reform. For a comprehensive explanation of recent justice reform, see KAHEI ROKUMOTO, Justice System Reform in Japan: Its Background and Process, in: Choi / Rokumoto, *supra* note 1, 319-349; ROKUMOTO, *supra* note 10; HAGIYA, *supra* note 16, 247-322.

18 As of April 2008, the Committee consists of two judges, one prosecutor, two practicing attorneys, three legal academics (including former Justice of the Supreme Court), two academics from non-legal fields, and one citizen.

19 There are eight Local Committees for the Nomination of Inferior Court Judges according to the jurisdiction of the High Court. Although the number of Local Committees varies, each committee consist of both practicing lawyers and "persons of learning and experience".

20 For a detailed explanation of the Committee, see *http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/index.html.*

21 Although conciliation commissioners (*chôtei i'in*) are normally lay persons, some commissioners are occupied by practicing attorneys. Exceptionally, the conciliation committee contains three conciliation commissioners in accordance with the characteristics of the case.

annexed conciliation system in 1920s Japan,[22] the newly established system of conciliation officers, which started in 2004, brought a significant change into the system. Qualified practicing attorneys who are appointed to act as a conciliation officer are allowed to preside over the conciliation committee with the same entitlement as an ordinary judge. They discharge their duty part-time, typically once a week, for a two-year term. Therefore this system is often called the 'part-time judge' system.[23]

From our viewpoint, it is important that both systems be considered as countermeasures to tackle the problems concerning the Japanese judiciary depicted above.[24] Firstly, the aim of the establishment of the Consultative Committee for the Nomination of Inferior Court Judges is to reflect the common sense of citizens. It is also important that the decisions of the Committee are not based on the information collected by the Supreme Court (including their General Secretariat). These features are believed to contribute to bringing transparency to the judicial appointment process. Secondly, the conciliation officer system is a possible seedbed for the future recruitment of practicing attorneys to the judiciary as full-time judges. The record as a conciliation officer is expected to be important information for the Consultative Committee for the Nomination of Inferior Court Judges for assessing the ability to be a full-time judge when those who used to be conciliation officers apply for nomination as a judge. If these two systems work as expected, problems in the Japanese judiciary may be reduced to a certain extent because the increase of such judges will result in weakening the homogeneous and hierarchical character of the Japanese judiciary.

We cannot be too optimistic, however, about the future of the judiciary in Japan. The strongest obstacle is probably the internal structure of the Japanese judiciary itself. The career judge system will be difficult to extinguish in a short period because it is a product of long-standing personnel practices for more than several decades. Even if the reforms stated above succeed in undermining the career judge system, it is likely to take a considerable amount of time.

---

22 HIROSHI TAKAHASHI, *Shakuchi shakka chôtei to hôritsu-ka* [Landlord-Tenant Disputes Conciliation and Lawyers], in: Yoshihisa Hayakawa / Aya Yamada / Ryô Hamano (eds.), *ADR no kihon-teki shiza* [Fundamental Perspective of ADR] (Tokyo 2004) 93-134.

23 For a discussion and assessment on the conciliation officer system, see the articles in Jiyû to Seigi Vol. 54 No. 8 (2003), and *ibid*. Vol. 56 No. 4 (2005).

24 In addition to that, the *saiban-in* system (system of lay members in the judicial panel), which introduces lay people's direct participation to the decision-making process of criminal litigation, is also a response to the criticism of the 'ignorant' Japanese judges. This newly established system is planned to start in May 2009 while the jury (*baishin*) system has been suspended for more than 60 years in Japan. Under this system, elected members of the general public participate in the trial of serious criminal cases, and make decisions on guilt as well as sentencing based on joint deliberation with the judges. The judicial panel is planned to consist of nine members, from which six will be lay members. The value of opinion of each lay member is equivalent to that of each judicial member of the panel.

Along with the internal structural factors of the judiciary, the attitude of practicing attorneys seems another factor important for the success of the reform insofar as they are the most likely resource for the new possibility of recruiting judges from outside the judiciary. Judicial reforms may indeed not progress smoothly if practicing attorneys are reluctant to enter into the judiciary. How have they approached the judiciary so far? To understand their attitude to the problem, looking back at the history of the *hôsô ichigen* (法曹一元, unification of the bench and bar) movement in Japan is necessary.

VII. APPROACH OF PRACTICING ATTORNEYS TOWARDS THE JUDICIARY: *HÔSÔ ICHIGEN* AND THE CONCILIATION OFFICER SYSTEM

As Tanaka Hideo explained, the Japanese legal system has a long history since the beginning of the 20th century of being a profession 'divided' between *zaichô hôsô* (在朝法曹 lawyers in office) and *zaiya hôsô* (在野法曹 lawyers out of office).[25] Judges and prosecutors belong to the former, while practicing attorneys belong to the latter. As a consequence of this division, practicing attorneys have generally held confrontational attitudes towards judges,[26] and *hôsô ichigen* (unification of the bench and bar), that is, the system of the recruitment of judges from experienced practicing attorneys, has been eagerly demanded by the practicing attorneys' side for a long time. The recent reforms stated above can be, therefore, regarded as the fruit of a long-standing movement of practicing attorneys for *hôsô ichigen.*[27]

However, the attitude of the lawyers out of office on the reform towards realisation of *hôsô ichigen* seems constantly to be hostile to the 'lawyers in office'. It was the case even when the attitude of the judges' and prosecutors' side was positive for a realisation of *hôsô ichigen* at the time of the postwar period. Let us take a brief look at the history since the 1950s.

---

25 HIDEO TANAKA (ed.), Japanese Legal System (Tokyo 1976) 550-553. Also see TAKA'AKI HATTORI (assisted by Richard W. Rabinowitz), The Legal Profession in Japan: Its Historical Development and Present State, in: Arthur T. von Mehren (ed.), Law in Japan: The Legal Order in a Changing Society (Cambridge 1963) 119-129.

26 ROKUMOTO, *supra* note 17, 332, depicts the situation as follows: "The Japan Federation of Bar Associations (JFBA) has traditionally taken the stance of an eternal opposition party, so to speak. It has enjoyed the privilege of saying 'No, but…' to almost any reform proposal made by the government, or by the other camps within the legal profession, to change the status quo."

27 For a detailed description on the history of the *hôsô ichigen* movement, see MINORU KOYAMA, *Sengo bengo-shi-ron josetsu* [Introduction to the Postwar Debate on Practicing Attorneys], in: Kôji Miyagawa *et al.* (eds.), *Henkaku no naka no bengo-shi, jô* [Practicing Attorneys in Transition, Vol. 1] (Tokyo 1992) 39-105; NIHON BENGO-SHI RENGÔ-KAI (ed.), *Nichiben-ren 20-nen-shi* [Twenty-Year History of the JFBA] (Tokyo 1970) 185-214; ÔSAKA BENGOSHI-KAI, *Hôsô ichigen undô no rekishi to gendai-teki igi* [The *hôsô ichigen* Movement: Its History and the Contemporary Significance], Jiyû to Seigi Vol. 27 No. 1 (1976) 21-44.

The first systematic engagement of practicing attorneys for realising *hôsô ichigen* after World War II was the establishment of the Task Force of *Hôsô Ichigen* (*Hôsô Ichigen Taisaku I'in-kai* 法曹一元対策委員会) by the Japan Federation of Bar Associations (JFBA) in January 1953.[28] The Outline of *hôsô ichigen*,[29] which declared that the promotion of *hôsô ichigen* was an official policy of the JFBA, was a product of the Task Force. Subsequently, the JFBA began actively approaching all related actors such as the judiciary, the prosecutors, the Ministry of Justice and members of the Diet, claiming that *hôsô ichigen* was a logical consequence of 'democratic judiciary'.[30] Interestingly enough, those actors' attitudes toward *hôsô ichigen* were ostensibly not negative at all. For example, a judge was reported saying with a little sarcasm in 1955: "*Hôsô ichigen* is an irrefutable good cause (*nishiki no mihata*). Nobody can oppose publicly the realization of *hôsô ichigen*."[31]

In spite of such circumstances, the number of practicing attorneys to become judges was constantly low throughout the 1950s.[32] Facing this situation, the JFBA showed an ambivalent approach. Some practicing attorneys were reported to require the radical, impracticable improvement of the pay scale of the salary of judges as a necessary condition for practicing attorneys entering into the judiciary.[33] The JFBA's main argument to justify the meagre progress of the unification of judiciary and practicing attorneys seemed

---

28 It is worth noting that the favourable atmosphere for *hôsô ichigen* seemed to exist among the lawyers generally during the justice reform right after the end of the war. See SYMPOSIUM, *Shihô seido kaikaku no kihon mondai* [Basic Problems of the Justice Reform], Shihô 27 (1965) 27-30.

29 *Hôsô ichigen yôkô* (July 1954).

30 ZADAN-KAI, *Saiban-kan to no hôsô ichigen iken kôkan-kai* [Exchange of Opinions on *hôsô ichigen* with Judges], Jiyû to Seigi Vol. 6 No. 10 (1950) 50. See MICHISUKE ÔTAKA, *Jikkô-ki ni haitta hôsô ichigen-ron ni tsuite* [On *hôsô ichigen* at the Stage of Realisation], Jiyû to Seigi Vol. 5 No. 6 (1954) 3. Ôtaka was a representative advocate of the *hôsô ichigen* movement in the JFBA during 1950s. The argument of '*Hôsô ichigen* as a necessary requirement of democratic judiciary' also functioned to avoid criticism that JFBA's movement for *hôsô ichigen* aimed at the enhancement of practicing lawyers' occupational territory. See *ibid.*; ZADAN-KAI, *Hômu-shô, Kensatsu-chô gawa to hôsô ichigen seido o kataru* [Talks on *hôsô ichigen* with the Ministry of Justice and the Prosecutor's Office], Jiyû to Seigi Vol. 7 No. 3 (1956) 34-36; YOSHIMI IIMURA, *Hôsô ichigen-ron to saiban no minshu-ka* [The *Hôsô ichigen* Debate and the Democratisation of Litigation], Jiyû to Seigi Vol. 9 No. 1 (1958) 10.

31 A similar attitude could be observed also on the legislators' side. See ZADAN-KAI, *Hôsô ichigen ni tsuite no zadan-kai* [Roundtable on *hôsô ichigen*], Jiyû to Seigi Vol. 5 No. 12 (1954) 33. (A member of the House of Representative stated that the interested parties were perhaps not able to oppose to realisation of *hôsô ichigen.*)

32 TANAKA (1976) *supra* note 25, 552, n. 6.

33 See ZADAN-KAI, *Hômu-shô, Kensatsu-chô gawa to hôsô ichigen seido o kataru* [Talks on *hôsô ichigen* with the Ministry of Justice and the Prosecutor's Office], Jiyû to Seigi Vol. 7 No. 3 (1956) 42-43; ZADAN-KAI, *Saikô Saiban-sho saiban-kan to hôsô ichigen o kataru* [Talks on *hôsô ichigen* with Justices of the Supreme Court], Jiyû to Seigi Vol. 7 No. 5 (1956) 34-35. A participant from the practicing attorneys' side claimed that at least triple wages were necessary for recruiting judges from practicing attorneys.

to be that it was impossible for practicing attorneys to become judges because officials within the Ministry of Justice, judiciary and the Ministry of Finance had fallen down on their jobs.[34]

As is well known, the movement for the realization of *hôsô ichigen* stagnated after the 1960s. A famous conclusion by the Ad hoc Committee for the Investigation into the Judicial System (*Rinji Shihô Seido Chôsa-kai* 臨時司法制度調査会)[35] was published in 1964 announcing it was too early to realise *hôsô ichigen.*[36] The JFBA reacted antagonistically to this conclusion, and released another famous report in 1967.[37] After the publication of this report, the JFBA repeatedly showed a hostile attitude to 'bureaucratic lawyers in office' from the standpoint of 'democratic lawyers out of office'. The publication of the Critique was a decisive turning point for the breakup between the judiciary and practicing attorneys.[38]

Debate on utilising practicing attorneys as chairpersons of conciliation committees for court-annexed conciliation came shortly after the breakup when the Ad hoc Council on the Conciliation System (*Rinji Chôtei Seido Shingi-kai* 臨時調停制度審議会) was established by initiative of the Supreme Court in 1971, and the report of the Council was published in March 1973.[39] The report recommended further discussion on the introduction of the *chôtei shunin-kan* (conciliation chair officer) suggesting a positive attitude on the judicial side concerning the recruitment of the chairperson of the conciliation committee among practicing attorneys.

Reacting to the proposal of the system, the JFBA again thoroughly opposed showing any reluctance to engage in the judges' role in the conciliation procedure. The JFBA's

---

34 The document *Hôsô ichigen o jikkô suru tame no jôken* [Conditions to Implement *hôsô ichigen*] (1955) also emphasises not the efforts of the practicing attorneys' side but the judiciary's side. See NIHON BENGO-SHI RENGÔ-KAI (ed.), *supra* note 27, 195.

35 For the activity of the Ad hoc Committee for the Investigation into the Judicial System, see KOYAMA, *supra* note 27, 53-69; KAHEI ROKUMOTO, *Nihon no hô to shakai* [Law and Society in Japan] (Tokyo 2004) 185-189; HAGIYA, *supra* note 16, 113-116; KIMIO KODAMA, *Nihon Bengo-shi Rengô-kai to 'rinshi mondai'* [The JFBA and 'the Ad hoc Committee for the Investigation into the Judicial System' Problem], in: Masao Ôno (ed.), *Bengo-shi no dantai* [Professional Organisation of Practicing Attorneys] (Tokyo 1970) 243-260.

36 As Sakae Wagatsuma, then the chairperson of the Committee, admitted (HYÔE ÔUCHI / SAKAE WAGATSUMA, *Nihon no saiban seido* [Judicial System in Japan] (Tokyo 1965) 62), this conclusion was elusive. For opinions of the Ad hoc Committee for the Investigation into the Judicial System (RINJI SHIHÔ SEIDO CHÔSA-KAI, *Rinji Shihô Seido Chôsa-kai iken-sho*), see Jurisuto 307 (1964) .

37 NIHON BENGO-SHI RENGÔ-KAI, *Rinji Shihô Seido Chôsa-kai iken-sho hihan* [Critique of the Opinions of the Ad hoc Committee for the Investigation into the Judicial System], Jiyû to Seigi Vol. 18 No. 6 (1967) 12-31.

38 For the debate within the JFBA before the publication of the Critique, see KODAMA, *supra* note 35; KOYAMA, *supra* note 27, 67-68.

39 RINJI CHÔTEI SEIDO SHINGI-KAI, *Rinji Chôtei Seido Shingi-kai tôshin-sho* [Report of the Ad hoc Council on the Conciliation System], Hanrei Taimuzu 291 (1973) 88-126.

Opinion on the Report of the Ad hoc Council on the Conciliation System[40] stated as follows:

> "[The proposal of the Conciliation Chair Officer system] lacks the basic understandings of the legal system as well as of the Japanese judicial system. The very reason why citizens have used court-annexed conciliation widely lies in the fact that the conciliation system is a part of the legal system in the sense that the conciliation procedure is supervised by a professional judge. If the conciliation chair officer is in charge of supervision of the conciliation procedure instead of a professional judge and the judge is excluded from the conciliatory body, such a procedure can no longer be regarded as judicial conciliation. Citizens will never trust that kind of conciliation … [In addition to that,] if conciliation chair officers who are devoted solely to conciliation are regarded as 'judges', it will violate the stipulation of the constitution."[41]

As a consequence, the conciliation chair officer system was not included in the Civil Conciliation Reform Act established in 1974. The idea of part-time judges was passed into oblivion for more than a decade since then, and the situation that few practicing attorneys have applied to enter the judiciary continued in spite of the fact that JFBA had continued to insist that the judiciary should be composed of experienced practicing attorneys.

The next phase in the recruitment of judges from practicing attorneys started at the end of the 1980s when the Supreme Court started to promote the recruitment of attorneys as judges in cooperation with the JFBA.[42] In 1991, the JFBA, the Supreme Court and the Ministry of Justice reached an agreement for enticing newcomers to the bench from the bar. Subsequently, the JFBA's huge campaign for sending practicing attorneys to the court started, and attention to the part-time judge system increased among practicing lawyers. The number of attorneys who become judges, however, remained small. According to the opinions of local bar associations, here again, the chief cause of the stagnation lay in the internal structure of the judiciary, that is, the above-mentioned exclusionary career judge system.[43]

The revival of the idea of a conciliation chair officer as it had been debated in the early 1970s emerged in the discussion at the Conference on the Recruitment of Judges from Practicing Attorneys (*Bengo-shi ninkan ni kansuru kyôgi-kai* 弁護士任官に関する協議会) between the Supreme Court and the JBFA in 2001 following the debate at

---

40 NIHON BENGO-SHI RENGÔ-KAI, *Rinji Chôtei Seido Shingi-kai tôshin ni taisuru iken-sho* [Opinions on the Report of the Ad hoc Council on the Conciliation System], Jiyû to Seigi Vol. 24 No. 12, Supplementary Volume.

41 *Ibid*., 18-19.

42 For the JFBA's activity on *hôsô ichigen* between the 1970s and the 1990s, see NIHON BENGO-SHI RENGÔ-KAI (ed.), *Shimin ni mijika-na saiban-sho e* [Towards the Court Close to Citizens] (Tokyo 1999).

43 *Ibid*., 91.

the Justice System Reform Council.[44] Although it was reported that the judicial side initially hesitated for fear of constitutional problems, they changed their position for establishing the system at an early stage of the discussion. The JFBA, while insisting at the beginning of the conference on the establishment of the part-time judge as a presiding judge in the litigation procedure, finally accepted the proposal.

The tentative agreements (*torimatome*) on recruiting judges from practicing attorneys, including the agreement to introduce the conciliation officer system, were reached in December 2001 between the bench and the bar.[45] This agreement set out the basic framework of the current conciliation officer system as well as the policy of both the JFBA and the judiciary on the recruitment of judges from practicing attorneys. Now they are entering the kick-off stage to set the newly introduced system on its way.

VIII. CONCLUSION

It should be emphasised again that the impregnable system of career judgeship has to be tackled by first bringing more diversity and transparency into the Japanese judiciary. Yet the fact that the attorneys' approach to the bar has long been ambivalent is too serious to ignore. As of autumn of 2007, the number of judges recruited from practicing attorneys since 2001 is 41.[46] The number of conciliation officers appointed between 2004 and 2007 is 165 in total.[47] In sum, the attitude of the practicing attorneys towards playing a judicial role is still not very positive.

As long as private attorneys condemn the career judgeship as a crucial obstacle for their entering the judiciary and wait for the system to purify itself, it would take a desperately long time to reform the structure of the judiciary. That is evident from the past dynamics of the *hôsô ichigen* movement. It is indeed the chicken-or-the-egg situation. To resolve this problematic situation in the Japanese judiciary, change is needed in internal factors, such as the career judgeship, as well as external factors, such as the attitude of each practicing attorney towards entering the judiciary.

---

44 For a socio-legal background and the discussion on the recent justice reform, see ROKUMOTO, *supra* note 17. For a detailed explanation on the conference, see the articles in Jiyû to Seigi Vol. 54 No. 8 (2003).

45 For related materials and the JFBA's activity since 2000, see NIHON BENGO-SHI RENGÔ-KAI (ed.), *Bengo-shi ninkan no susume* [Invitation to the Practicing Attorneys' Entrance into the Judiciary] (Tokyo 2003); HAGIYA, *supra* note 16, 289-294.

46 NIHON BENGOSHI RENGÔ-KAI (ed.), *Bengo-shi hakusho* [Practicing Attorney White Paper] (Tokyo 2007) 178. Conversely, the number of practicing attorneys whose application to the judiciary was rejected on the ground that they were incompetent as judges is about 15. This means that those attorneys who wish to be judges may be less competent than ordinary attorneys who do not wish to be judges.

47 *Ibid*., 179.

ZUSAMMENFASSUNG

Dieser Beitrag untersucht das Verhältnis von Justiz und Anwaltschaft zur jüngsten Justizreform. Ein zentraler Punkt ist die Untersuchung der demographischen Strukturen der japanischen Richterschaft. Zwei zentrale Charakteristika der japanischen Justiz – die äußerst homogene Struktur sowie die Existenz einer „Elite" unter den Richtern – werden statistisch belegt. Auf diese quantitativen Analysen aufbauend, untersucht der Autor anschließend aus historischer Perspektive die Bedeutung der jüngsten Reformen des Systems der Ernennung von Richtern für die Behandlung der durch diese Charakteristika entstandenen Probleme. Anhand der Themen der hôsô ichigen*-Bewegung (Entwicklung eines einheitlichen System juristischer Berufe durch Annäherung von Richterschaft und Anwaltschaft) und des Systems der Teilzeitrichter wird der Zugang der japanischen Juristen zur Justiz in den letzten fünf Jahrzehnten analysiert. Abschließend weist der Autor darauf hin, dass Veränderungen sowohl von externen Faktoren, etwa der Einstellung von Anwälten zu einem Wechsel zur Justiz, als auch von internen Faktoren, z.B. der Berufslaufbahn von Richtern, erforderlich sind, um die Probleme der japanischen Justiz zu lösen.*

(Übersetzung durch d. Red.)