# Japan's Crazy Judges

## KAORU INOUE, *Kurutta Saibankan* *

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Some of what Kaoru Inoue says in his book on the Japanese judiciary has been described elsewhere, both in Japanese and English.[1] Anyone familiar with the subject will thus already know that judges in Japan are essentially a type of career bureaucrat, that they are subject to yearly personnel evaluations, that these evaluations impact their reassignments to different courts throughout the country every few years, and that despite being putatively independent, they are subject to rigid control by the administrative apparatus of the Japanese Supreme Court. Still, it is worth seeing this reality confirmed in a mass-market book by a former judge, one who is trying to explain why at least some of his former colleagues seem to suffer from a type of institutionally-induced pathology.

Kaoru Inoue achieved a degree of notoriety with an earlier book that he published while still on the bench and in which he criticized Japanese judicial opinions for being full of unnecessary dicta.[2] He was subsequently (and probably not coincidentally) driven

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* Transl.: "Crazy Judges". This review is part of a series of reviews of non-academic works in Japanese on law-related subjects which it is hoped will provide some insights into the way the legal system in Japan is explained to and understood by the general public in that country. Prior works in this series by the reviewer include *Saiban'in Seido: Prospects for Citizen Participation in Criminal Trials in Japan,* in: 15 Pac. Rim L. & Pol. J. 363 (Feb. 2006); *Kaoru Inoue's Shihô no Shaberisugi* (Blabbermouth Judiciary): Moral Relief, Legal Reasoning and Judicial Activism in Japan, in: 19 Emory Int'l L. Rev. 1563 (2005); Watch What you Say: Defamation in Japan, in: 20 Temple Int. & Comp. L. J. 499 (2006); Money Laundering, in: 71 J. Crim. L. 88 (2007); and, Apologies and Corporate Governance in the Japanese Context – *Tatsumi Tanaka's Sonna shazai de wa kaisha ga abunai* [Apologizing that Way will Endanger your Company], in: 3 Int'l Law & Management Rev. 303 (2007).

1 A sample of works in English on the Japanese judiciary include, for example: J. MARK RAMSEYER & ERIC B. RASMUSEN, Measuring Judicial Independence: The Political Economy of Judging in Japan (2003); SETSUO MIYAZAWA, *Administrative Control of Japanese Judges*, Law and Technology in the Pacific Community (Philip S.C. Lewis, ed. 1991); J. MARK RAMSEYER / ERIC RASMUSEN, *Skewed Incentives: Paying for Politics as a Japanese Judge*, in: 83 Judicature 190 (2000), PERCY R. LUNEY, The Judiciary, Its Organization and Status in the Parliamentary System, in: 53 L. & Contemp. Prob. 135 (1990).

2 KAORU INOUE, *Shihô no shaberisugi* [Blabbermouth Judiciary] (2005), for a review of this work in English *see* COLIN P.A. JONES, *Kaoru Inoue's Shihô no Shaberisugi* (Blabbermouth Judiciary): Moral Relief, Legal Reasoning and Judicial Activism in Japan, in: 19 Emory Int'l L. Rev. 1563 (2005).

out of the judiciary on the grounds that his own opinions were too short.[3] Needless to say, he has an axe to grind on the subject of his former employers, though this is part of what makes his new book more fun than his earlier work.

Drawing on his own 20 years as a judge, Inoue makes a number of interesting revelations about the inner workings of the Japanese judiciary. Having passed one of the most difficult exams in the world (the old Japanese bar exam), not to mention having suffered through whatever exam-centered educational track which led them to being able to so, Judges are not only accustomed to being evaluated, but coming out at the top of the curve. Once within the judiciary, however, judges are readily able to evaluate how they are doing compared to their colleagues through the results of judicial postings. This puts tremendous pressure on judges to perform, performance being apparently a function of how efficiently they clear their docket, how rarely their decisions are appealed, and whether litigants or members of the bar complain about them.

This dynamic has implications for the way cases are handled. Inoue attributes Japan's famous 99%+ conviction rate in criminal cases at least partially to the fact that there are few instances where a judge will want to take on the entire authority of the prosecutor's office by finding a defendant not guilty. Since a prosecutor's career is apparently doomed by more than three acquittals, such a verdict will almost certainly be vigorously appealed and, if overturned will likely show up as a black mark on the judge's record – an incorrect decision. Here Inoue links Japan's conviction rate to the common use of suspended sentences in many criminal cases: a defendant who does not actually have to go to jail is unlikely to appeal a guilty verdict, even if he or she feels it is wrong (particularly given the risk of an appellate court ordering actual imprisonment). Thus, while the common excuse for Japan's high conviction rate – that prosecutors only prosecute cases they know they will win – may have some validity, it may also become a self-fulfilling logical loop: the prosecutors took this case, therefore they must be sure. Therefore the defendant must be guilty and it is best not to rule otherwise. Inoue writes of a case he knows of in which a judge had already prepared a draft judgment finding the defendant guilty *before the initial hearing had even taken place*.[4]

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3 His background is somewhat unusual for a judge – he is a graduate of Tokyo University but in science, not law. Not having come from one of the elite law faculties, it is questionable whether he could have reached the highest levels of a judicial career even if he had not been forced to resign. After his resignation, he went on to write less restrained books, including one called "Ridiculous Judicial Opinions will Destroy Japan." KAORU INOUE, *Detarame hanketsu wa nihon wo tsubusu* (2006).

4 This may not actually be as bad as it sounds. Since Japan lacks a plea-bargain system, all defendants must go through a full trial, even those who confess and show contrition. *See*, JOHN OWEN HALEY, Authority without Power, at 128 (1991)

Disturbing as this anecdote may be, it may simply be one more example of how institutional dynamics render efficient docket clearing rather than actual justice the focus of many judges' day-to-day routine. Judges work hard, often with no end in sight: at the Yokohama District Court where Inoue worked, an announcement was broadcast every night at 11 p.m. saying "please go home for the sake of your health." A judge may have 30 new cases added to his or her docket every month. Taking into account weekends and holidays as well as administrative duties, this means that a judge may need to clear two cases a day just to stay above water and avoid a negative personnel evaluation. If even just a few of these new cases are complex matters, with case files two meters thick (Inoue says he had on an average of about one such case a week), the work load can challenge the physical endurance of even young judges. This explains why so much civil litigation ends in settlements, which spares judges the work load involved in writing a judgment.[5] This task may take three full days, and result in a judge working throughout the following weekend just to catch up on other cases. And in addition to reducing workload, parties who agree to a settlement will not launch an appeal, subjecting the judge's personnel evaluation to the risk of a reversal. Thus, judges may spend a great deal of time convincing parties to settle, either by appealing to logic or emotion and if that fails, threatening recalcitrant parties with a negative ruling if the issue is forced. Inoue writes of a judge who even used this same threat on both parties, thereby dooming the possibility of settlement. And if threats are ineffective, there is always begging, apparently there was even a judge who offered to kowtow (*dogeza*) before the parties if they would settle.

According to Inoue, judges have become a type of service provider, and one of their goals is to keep their "customers" happy because again, failing to do so may result in negative evaluations. This may mean that noisy parties (or aggressive counsel) do better in trials, since judges will seek to avoid having complaints about them made to the head of their court since, according to Inoue, even a single complaint may have an impact.[6] And since the noisy parties are more likely to appeal their judgments, judges are likely to craft their judgment so that it minimizes the likelihood of such an appeal. This may involve holding numerous unnecessary hearings even in what appear to be open-and-shut cases, so that the parties feel they were given a fair trial.

Inoue confirms the degree of control to which Japanese judges are subject. For example, a judge arriving at a posting in a new city may be given a list of bars which they are not allowed to frequent. Much of this control is based on internal, even unofficial rules.

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5 Given how rare litigation is in the lives of most Japanese people, in Inoue's view the rate at which those cases which are brought are resolved through settlement (over 50%) is high.

6 It was, after all, complaints by litigants to his chief judge that led to Inoue's own downfall (so much for judicial independence!).

Until a few years ago judges were required to receive prior permission of the chief judge of their court to travel abroad, and such permission was never given except at peak holiday seasons.[7] Asking why he could not go at some other time, Inoue was told "because that would set a precedent." Pushing the issue at a meeting of judges, the head of his court simply said "well, I don't want to travel abroad, so don't you think things are fine the way they are?"

Inoue talks about the background to his own departure from the judiciary, and covers some of the subject matter about excess dicta more fully dealt with in his earlier book. On the subject of personnel evaluations he says that at a certain point in his judicial career, he stopped paying attention to them. He did so for the simple reason that the constitution says judges are supposed to be "bound only by his Constitution and the laws."[8] Speed and efficiency are important goals in a justice system, of course, "but not everything should be a matter of resolving things speedily."[9]

He also takes potshots at the penchant of some Japanese judges to write obtusely, using obscure characters and expressions. Apparently this too may be attributed to a desire to resolve cases speedily by using precedents as models for judgments, meaning that obsolete expressions used in pre-war cases survive zombie-like in the present, giving judges proven documentary models to work off of while baffling litigants.

This reviewer was particularly happy to see a former judge commenting on the judiciary's penchant for using obscure phrases and difficult *kanji* characters in their judgments.[10] This too may go back to docket clearing and suggests another factor in the Japanese use of precedent. Language from old (sometimes pre-war) cases provide a proven model for writing a new judgment, saving both time and lessening the likelihood of criticism for writing something new and untested.[11] According to Inoue, the use of precedent also saves some judges the trouble of having to go and actually study the law applicable to a new case if it has already been applied in an earlier judgment.

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7 This is another area where the judiciary shows itself to be one more branch of the bureaucracy. The late Masao Miyamoto, a former bureaucrat in the Ministry of Health and Welfare writes of being subject to similar strictures. MASAO MIYAMOTO, Straightjacket Society, at 95-95 (Juliet Winters Carpenter, trans. 1994).

8 Kenpô [Constitution], art. 76.

9 INOUE, *supra* note 2 at 103.

10 A great deal of debate has taken place regarding the subject of the supposed Japanese aversion to litigation and lack of involvement in their legal system *See*, e.g. HALEY, *supra* note 4 at 83-119 (discussion of litigation rates in Japan, including the "myth" of Japanese non-litigiousness); MARK D. WEST, Law in Everyday Japan 1 (2004) (characterizing academic interest in Japanese litigation rates as a "fetish"). I have never seen discussed the possibility that this might have nothing to do with culture and everything to do with the simple fact that law in Japan tends to be discussed using language that the average person may have difficulty understanding.

11 It struck me that Inoue was going a bit far in his criticism of the use of precedents as a model, since the alternative would seem to be reinventing the wheel for each case.

Inoue also views the standing of judges as being threatened by the drop in their salary compared to other bureaucrats. He notes that the US occupation viewed the judiciary as so important that there were once easily a thousand judges who drew a higher salary than the vice-minister (the highest career bureaucrat) in other government agencies. With the increase in salaries in other agencies, this number has dropped to about 250. To Inoue this is just one more sign of the judiciary's loss of stature. Despite a single judge having the power to find a law unconstitutional, or to interpret existing laws in a new and different way, the daily grind and administrative control to which they are subject keeps most judges doing what is easy – following precedent and avoiding anything remotely "activistic." In this sense the judiciary has become no different from any other Japanese bureaucracy, so perhaps it is appropriate that they get paid the same as other bureaucrats doing the same thing.

> "The fair and independent trial is an indispensable national mechanism for a modern state. If the fact that this was just a sham, and did not actually exist became clear to foreign countries, the way foreign countries evaluated Japan would probably change."[12]

If Inoue's book were a Hollywood movie, having spent dozens of pages talking about all of the failings of the Japanese judiciary and the harmful effect this has on the administration of justice on Japan, it would be quite fitting end that Inoue's final chapter deal with Japan's new jury (or lay judge) system as a means of bringing the public voice into trials. This being the real world, however, he is scathingly critical of the new system, which he suggests was inflicted on the rest of the judiciary by the Supreme Court, possibly as a means of bringing common sense – a trait many judges are said to lack – to at least some criminal trials. In this sense, Inoue is as much a philosopher king as the former colleagues against whom he rails. Normal people do not understand the law and thus cannot conduct trials. He suggests that unlike the judges, who are pros, juries will convict defendants just because they "look bad."[13] Thus, he predicts that the new jury system will be even more disadvantageous to defendants. How this can be possible in a country where the conviction rate is already above 99% will be interesting to see.

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12 INOUE, *supra* note 2 at 165.

13 As opposed to "just because they are being prosecuted" which some might argue has been the judiciary's approach prior to the introduction of the new system.