

Open Society Through Justice System Reform

– Transparent, Clear Rules Can Vitalize Japanese Society –

By Kojima Akira

Countries around the world are now vying to reform their systems in an effort to vitalize their economies and societies and attract skilled labor and other resources of production. A country's or society's competitiveness depends on whether it is attractive enough to lure human and natural resources from home or abroad. If its systems and practices are not attractive, it will experience a drain of resources to more attractive countries. The world is in an era when companies and people choose countries.

For Japan, which has been floundering in serious economic and social stagnation for the past 10 years amidst global reform competition, justice system reform, political reform, administrative reform, decentralization, deregulation and other reforms are becoming an important agenda.

The planned justice system reform will be the first to be undertaken in Japan since the current system was inaugurated under the Constitution enacted in 1947. The reform is aimed at drastically overhauling the current system from the standpoint of people who are the actual users of the system. The current system in Japan is more or less based on the perception that the state governs the people. The justice system reform envisaged by the Koizumi Cabinet is based on the concept that people should stop considering themselves as being governed and regard themselves as an entity to govern, with autonomous and social responsibilities so that they participate in reform programs themselves and make Japan an affluent and vital society.

It is often pointed out that Japan, despite its adherence to the rule of law, is not necessarily a law-governed society but a bureaucrat-controlled society. Takeuchi Yasuo, a sociologist and professor at Seikei University, who is known for his sharp, yet witty social

observations, concluded in his 1997 book with the tremendous title of *Nihon no Owari (The End of Japan)* (published by Nihon Keizai Shimbun Inc.) that Japan is not governed by rules but is instead controlled by bureaucrats.

In making the analysis, he made a humorous comparison between the essential characters of major countries by quoting an ingenious joke:

- *In Germany, what is banned by law is actually banned.*
- *In Italy, what is banned by law is sometimes permitted.*
- *In the defunct Soviet Union, everything was banned except what was permitted.*
- *In present-day Russia, even what is permitted by law is sometimes banned.*
- *In Great Britain, the law refers neither to what is banned nor to what is permitted.*
- *In the United States, anything is permitted except what is banned.*

How about Japan?

In Takeuchi's analysis, people in Japan must consult the government about what is both permitted and banned. In other words, though what is banned by law is not permitted as a matter of course, people must still consult the government about everything except what is clearly permitted by law. If you do something not banned by law without consulting the government, it will exact unexpected revenge on you one way or the other somewhere down the line. This is what companies and individuals alike perceive. Japan is not necessarily an example of a "Big Government" compared with the United States and European countries, given the government's size (tax burdens and expenditures) relative to the size of the nation's economy (measured by gross domestic product, for example). Even so, as the late popular writer

Shiba Ryotaro put it, "Japan has a heavy government, because people must consult the government about everything."

American businessman Glenn Fukushima, one-time chief of the Japan Division of the U.S. Trade Representative and former president of the American Chamber of Commerce in Japan, described Japan's various regulations as being structured like an onion, with one regulation layered by another. He pointed out that Japanese regulations consist of at least seven layers: 1) laws, 2) cabinet orders, 3) ministerial ordinances, 4) notifications, 5) regulations, 6) internal regulations and 7) administrative guidance.

Citing government documents, Fukushima also noted that there are 20 types of regulations alone: 1) *kyoko* (permit), 2) *ninka* (authorization), 3) *menkyo* (license), 4) *shonin* (approval), 5) *shitei* (designation), 6) *shodaku* (consent), 7) *nintei* (recognition), 8) *kakunin* (confirmation), 9) *shomei* (verification), 10) *ninsho* (validation), 11) *shiken* (examination), 12) *kensa* (inspection), 13) *shomei* (certification), 14) *toroku* (registration), 15) *shinsa* (investigation), 16) *todokede* (notification), 17) *teishutu* (filing), 18) *hokoku* (report), 19) *kofu* (submission) and 20) *shinkoku* (statement). It seems that Fukushima must have racked his brain translating all those Japanese terms into English.

Except for bureaucrats assigned to related ministries or agencies, the average Japanese, however educated he or she may be, would be hard-pressed to make a distinction between the nuances or implications of all these terms, Fukushima noted.

Even bureaucrats may not know the differences. In fact, they are not required to have such knowledge, because all they need to do is to ensure their administrative discretionary

rights, which are incomprehensible to outsiders and lack transparency.

Accordingly, a person has to consult the government every time he or she does something. The differences of all these types of regulations are incomprehensible to most Japanese, much less to foreigners. Foreign companies planning to set up businesses in Japan would only find themselves at a loss what to do.

These regulations, as well as the onion-like regulatory mechanism, deprive Japanese society of transparency. The 2001 edition of *The World Competitiveness Yearbook*, published by the Lausanne-based International Institute for Management Development, contained some shocking facts. (Figure 1) In the global ranking of governmental "transparency" (a degree of how clearly the government informs the public of its policy intentions), Japan ranked the lowest among the 49 countries covered by the survey. As far as transparency was concerned, Indonesia, Argentina and Colombia ranked above Japan.

The survey was based on questionnaires sent to corporate executives, scholars and other knowledgeable persons throughout the world. While some Japanese experts called into question the way the survey and analysis were conducted, it is important to note that the world's leading figures held such perceptions about Japan.

In a law-governed country, rules must be clear to everybody and the punishments for violations of the rules must also be clearly defined. The lack of transparency in Japan may be attributed basically to the excessive discretionary rights given to the administrative authorities. The check and balance mechanism through division of the three powers of administration, legislation and judicature is indispensable in a sound democratic country. In Japan's case, however, national power is excessively concentrated in the administration. The Diet (legislature) makes law, upon which the administration executes its rights. But most legislative bills submitted to the Diet are prepared by ministries or agencies

Figure 1 Transparency of governmental policies

1	SINGAPORE	8.03
2	FINLAND	7.25
3	LUXEMBOURG	7.05
4	U.S.A.	6.95
5	NETHERLANDS	6.92
6	AUSTRALIA	6.79
7	IRELAND	6.69
8	ICELAND	6.69
9	CANADA	6.66
10	SWITZERLAND	6.55
11	AUSTRIA	6.24
12	CHINA	6.11
13	SPAIN	6.08
14	NEW ZEALAND	5.92
15	MEXICO	5.87
16	GERMANY	5.69
17	DENMARK	5.58
18	BELGIUM	5.55
19	ESTONIA	5.40
20	SLOVAK REPUBLIC	5.38
21	MALAYSIA	5.33
22	UNITED KINGDOM	5.26
23	BRAZIL	4.96
24	FRANCE	4.91
25	RUSSIA	4.89
26	ISRAEL	4.82
27	SOUTH AFRICA	4.75
28	NORWAY	4.73
29	GREECE	4.68
30	HUNGARY	4.67
31	SWEDEN	4.61
32	THAILAND	4.55
33	INDIA	4.46
34	CHILE	4.40
35	COLOMBIA	4.36
36	KOREA	4.11
37	HONG KONG	4.05
38	ITALY	4.00
39	PHILIPPINES	3.90
40	PORTUGAL	3.74
41	TURKEY	3.71
42	CZECH REPUBLIC	3.66
43	SLOVENIA	3.60
44	TAIWAN	3.57
45	ARGENTINA	3.37
46	POLAND	3.23
47	VENEZUELA	3.08
48	INDONESIA	2.73
49	JAPAN	2.52

Source: International Institute for Management Development, *The World Competitiveness Yearbook 2001*, Switzerland, Lausanne

(administration), and the Diet approves most bills almost automatically, without revision. Ministries and agencies prepare bills so that they can use them easily, because they are the ones who implement the law. They tend to incorporate discretionary rights which are convenient for them. The bigger the discretionary rights, the less transparent administration becomes for the people

and the less predictable government action is.

The reform of the justice system currently being studied by the government is intended to eliminate such opacity as much as possible, and to make the justice system more predictable and user-friendly.

The proposed reform is based on the "Opinion," compiled by the govern-

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Prime Minister Koizumi Jun-ichiro (right) and other ministers at a meeting of the Justice System Reform Promotion Headquarters

mental Justice System Reform Council in June 2001, which outlined the basic concept and direction of the reform. In order to implement the reforms according to the outlines of the "Opinion," the Law for the Promotion of Justice System Reform was enacted in December 2001, upon which the Justice System Reform Promotion Headquarters was established under the Cabinet. To oversee the progress of reform as envisaged by the "Opinion," the Headquarters established an eight-member advisory council, of which this writer is a member.

Referring to the desirable shape of Japan in the 21st century as intended by the justice system reform, the "Opinion" said:

"In the process of realizing a simple, efficient and transparent government fit to effectively perform important national functions, people will cooperate with each other as an independent entity with social responsibilities, and build a free and fair society, whereby they can contribute to the international community.

"The various reform programs Japan has carried out so far, such as political reform, administrative reform, decentralization as well as deregulation and other economic reforms, were intended to 1) shift Japan from a society based on prior regulations and adjustments to a society oriented to ex post facto supervision and relief measures, 2) overhaul the snowballing administrative system while promoting decentralization, and 3) enhance the

quality of the governing power (strategic capabilities, comprehensiveness and mobility) of the political sector (Diet and Cabinet). Attempts to optimize the disclosure of administrative information and accountability, enhance policy evaluation functions and realize a transparent administration are already taking shape. These reform initiatives should be based on a shift in people's perception of themselves. They must shed their perception that they are the ones to be governed. Instead they must have a new perception that they are the ones to govern. People should no longer regard the government as their ruler but assume heavy responsibilities for ruling the country themselves. The government, for its part, should transform itself into an entity which can respond to such needs of the people.

"In the 21st century, links between what is inside and outside national borders will become stronger in all sectors of society. Globalization is accelerating on the back of phenomenal innovation of information and communications technologies, while the fences separating sovereign nations are becoming lower. At stake is Japan's capability to take the necessary actions needed to govern itself rightly and speedily, and hold an honorable position in the international community. Whether Japan can take on these challenges hinges on the ruling capability of its government, on the extent of the creativity and vitality of our society, and on the value system the country can disseminate to the international community.

"According to the principle of the rule of law, the judiciary sector, in which fair third parties pass judgments based on fair legal rules and principles through proper and transparent procedure, with all parties placed on an equal footing, should become the pillar to support the public space, together with the political sector. The justice system

reform will consist of three key elements: 1) the justice system should be more usable, more understandable and more dependable, in response to people's expectations, 2) the judiciary itself must be reformed so that it can be an enhanced profession both in qualitative and quantitative terms, and 3) a new mechanism in which people participate in legal proceedings should be introduced in order to enhance people's dependability on the justice system."

The "Opinion" contained specific proposals on 1) a substantial increase in the number of judiciary officials, 2) the introduction of a jury system, 3) inauguration of law schools, starting in April 2002, 4) halving the length of court hearings, 5) wider and more frequent use of alternative dispute resolution (ADR) and 6) promotion of international cooperation in the handling of criminal cases and exchange of judiciary officials.

Social needs for judiciary officials are increasing in Japan in view of the increasing complexity of economic and social conditions, as well as globalization. Japan's population of judiciary officials is much smaller than in other major countries. Currently, there are 941,000 judiciary officials in the United States (one in about 290 people), about 83,000 in Great Britain (710), about 111,000 in Germany (740), and about 36,000 in France (1,640), far outnumbering Japan's 20,730 (6,300) as of 1999.

The number of people who pass the National Bar Examination in Japan had hovered around the 500 range for many years before it began to increase in 1991. The number of successful candidates in 1999 totaled 1,000. Yet, as mentioned above, the population of judiciary officials in Japan remains much smaller than in other major countries. The "Opinion" thus called for increasing the number of successful candidates of the National Bar Examination to 1,500 in 2004 and set a new target for increasing the population of judiciary officials to the 50,000 level by around 2018 under a new justice system that includes the establishment of law schools.

The "Opinion" also called for qualitative improvement of legal proceedings, which is equally important. Major countries position better and speedier handling of legal cases related to intellectual property as part of their international strategy for the protection of this right. Accordingly, they take various measures for promoting the strategy, focusing on speedier handling of intellectual property-related legal cases. The "Opinion" set a target for halving the length of handling intellectual property-related legal cases, which now take more than 23 months on average in Japan.

The proposed law school system is aimed at promoting a system for specifically training judiciary officials as a "process" through the establishment of professional schools. This represents a departure from the current National Bar Examination system, which is a one-time selective system.

A number of universities have positively started preparations for opening law schools in response to the proposal made in the "Opinion." Yet, the law school plans submitted by universities so far show that their curricula are merely an extension of the present legal education in universities. This compares unfavorably with education in national law schools in the United States, which focus their education on business law, and as a result strengthen the international competitiveness of U.S. legal services.

Legal education in the law departments of Japanese universities still follows the traditional division of classes according to types of law – such as public law, civil law and criminal law. It overlooks the extreme importance of enterprise law in current economic activities. Though Japanese companies offer high-quality products and services, they will find themselves in disadvantageous positions in increasingly intensifying international competition if they are not fully prepared to assert and protect themselves in international legal disputes.

Among corporate-related laws are broader commercial laws including financial law and stock exchange law;

intellectual property-related laws such as patent law, copyright law and computer law; various taxation laws related to mergers and acquisitions, taxation of financial transactions and international taxation such as transfer prices; economic laws including antitrust law and international trade law; and international transaction law.

Harvard Law School offers a wide range of curricula directly related to actual business activities. For example, its courses for the second year include accounting and taxation, while those for the third year include antitrust law; comparative law: the role of law in China; international finance; corporate governance in Japan; law and economics; the economics of taxation; law and society in Southeast Asia: value-added taxation; bankruptcy law; intellectual property law; and the corporate taxation system.

The jury system proposed by the "Opinion" is aimed at having ordinary citizens share responsibility with the judge by taking part in the deliberations in a criminal lawsuit and becoming more involved in the process of passing judgment. The jury system was adopted in some criminal cases in Japan from 1928 to 1943. Currently, however, the general public's participation in legal matters is very limited. This makes the justice system only remotely connected to the general public and prevents sound social common sense being reflected in court proceedings.

Under the proposed jury system, jury members will be selected at random from voter lists or other materials and will only participate in criminal cases which carry heavy penalties. They will have equal rights with judges in the proceedings and will be empowered to question witnesses. Jury decisions will not be made by a simple majority. The significance of the introduction of a jury system lies in the fact that judges, who are legal experts, and jury members, who are lay people, divide responsibilities, share knowledge and experience through mutual communication and reflect the results of their joint work in court trials. Thus, the most important aim of the jury system is to have sound social common sense

reflected in trials.

The reform is also aimed at changing the difficult terminology used in the Japanese legal world. The Commercial Law and some passages of the Civil Law are written in very incomprehensible styles which are incompatible with contemporary society. The difficult terminology is another factor, which makes the judiciary world a distant existence for the general public.

The legal system can be likened to the rules in sports. Rules must be clear both to players and spectators. A referee's discretion is not necessary in any game. A judge's discretion would make a game dull.

As I mentioned at the outset, the lack of transparency in the Japanese government makes Japan opaque as a whole. Government regulations should ideally be minimized and be of the ex post facto type so that the private sector can be vital enough to create wealth and culture.

At present, Japanese laws are incomprehensible to the people and excessive discretionary rights are given to government ministries and agencies. Executive power is excessively concentrated in ministries and agencies and their huge discretionary rights make the government and its policies opaque and unpredictable.

This in turn emaciates Japanese systems in global system reform competition and as a result stymies the potential capabilities of Japanese society. As the "Opinion" emphasized, the proposed justice system reform will not be merely a technical reform of the system. It is intended to break the stalemate in Japan's economic and social conditions and establish a transparent economy and society open to the world and full of vitality. **NTI**

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