The Reform of Japan's Judicial System

By Inoki Takenori

A thorough review of Japan's judicial system has been under way since the Justice System Reform Council was established within the Cabinet in July 1999. The proposed reform concerns both the quantity and quality of the judicial system. The following figures highlight the quantitative problems facing Japan's judicial system. Japan's legal population, that is, the number of its judges, prosecutors and lawyers, totals about 21,000, giving a ratio of 17 legal practitioners for every 100,000 people. This is extremely low compared to other industrialized countries. Comparative figures are 352.5 for the United States, which boasts the largest legal population in the world, 158.3 for Britain and 135.7 for Germany, eight to 20 times more than in Japan. Even in France, which is said to have one of the smallest legal populations among the industrialized countries, the ratio is 61.3, or four times greater than in Japan. Quantitative comparison of legal populations is not easy because different countries have different judicial systems. Still, these figures bolster the case for expanding Japan's legal population. Incidentally, patent lawyers are also relatively few in Japan, numbering only about 4,000.

It is said that a drastic reform of the system for nurturing jurists is essential to narrow the gaps with other countries. While the problem cannot be solved merely by a numerical increase, there is no doubt that an expansion of the legal population would be one of the requirements for improving the situation.

On the other hand, the introduction of "lay judges" has taken the spotlight as a key element of qualitative or structural reform of the judicial system. Lay judges, to be selected at random from among the general population, would sit on the bench with professional judges for trials of serious criminal cases such as murders, determine the verdict and sentence those found guilty to specific penalties. The introduction of the lay judge system was recommended by the government's Justice System Reform Council in 2001.

ACCORDING to a package of related bills approved by the Cabinet, the lay judge system is to function as follows. Three professional judges and six lay judges would work together. For cases in which defendants plead guilty, and the prosecution and the defense have no disagreements, the court could consist of one professional and four lay judges. The verdict will be decided by a majority, but it should include the approval of at least one professional and one lay judge.

Lay judges will be selected randomly by lottery from registered voters aged 20 or older. Citizens selected as lay judges cannot refuse to serve without a valid reason.

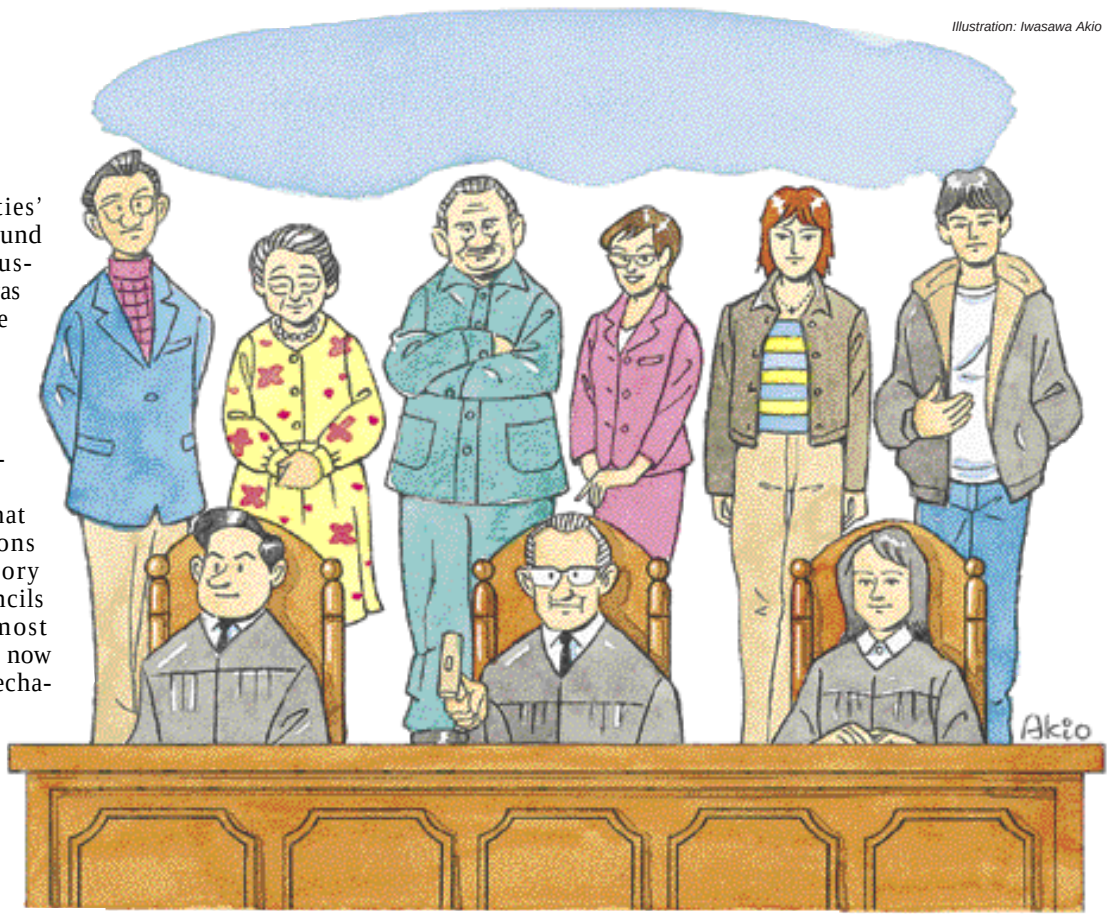
The lay judge system will be launched by 2009 after the related bills clear the Diet. The draft bills were slightly amended and Cabinet approval was delayed as some legislators of the ruling Liberal Democratic Party (LDP) voiced caution about the system, arguing that taking on the role of a judge would impose a heavy burden on ordinary citizens. Some LDP legislators argued that since there are people who object to sitting in judgment of others because it goes against their conscience, people should be given more latitude to refuse to serve as lay judges. Others insisted that since the bill would have a great impact on people's lives, greater efforts should be made toward obtaining people's understanding before the bill's enactment.

Their argument is that the draft bills obligate people to become judges and it is not desirable to force obligations and burdens onto people. The cautious attitude of some LDP legislators toward the lay judge system is said to be politically motivated, in light of the House of Councilors election scheduled for this summer. This is because a policy which gives voters the impression they will have to shoulder heavy burdens will cost the ruling parties votes in the election. On the other hand, some warn that allowing more people not to serve as lay judges would effectively compromise the representativeness of lay judges as a whole. Court trials would become biased if only certain types of people served as lay judges.

The process leading to the Cabinet decision was a typical Japanese political process, giving the impression that structural reform is proceeding at a glacial pace. Amendment of the related bills and the subsequent delay in the Cabinet decision reminds one of the resignation in December of two members of the Promotion Committee for the Privatization of the Four Highway-Related Public Corporations. They quit the committee in protest over a proposal by the government and ruling coalition to privatize the Japan Highway Public Corporation. They were angered at being ignored by the government and ruling bloc despite being appointed to the committee at the prime minister's initiative and his promise that the results of committee discussions would be respected. Reading newspaper articles about their resignation, I was reminded of a saying about power and where it lies. It goes as follows: In a family the husband decides on important matters and the wife decides on unimportant matters, but it is the wife who defines what is important and what is not important. It may be said that the committee played the role of the husband.

My limited experience serving on government advisory panels has taught me that it is extremely difficult to coordinate opinions if the members are deeply divided from the very beginning. Therefore, it was natural for some panel members to be offended by the govern-

Illustration: Iwasawa Akio



ment and ruling parties' intervention as they found the committee's discussions were futile. It was fortunate that the Justice System Reform Council did not disintegrate, and its recommendation was basically adopted by the government.

It is not clear to what extent recommendations by government advisory panels or reform councils carry weight. The most important reform Japan now needs is to build a mechanism that makes opaque political processes more transparent, identifies the decision makers and holds leaders accountable for their decisions. There is no doubt that the secretariat staff and the members of advisory panels devote a tremendous amount of time and money to formulating reform recommendations. People are eager to know which parts of reform proposals are not being implemented.

REGARDING the introduction of the lay judge system, some argue for caution on the grounds that pushing for such reform would be counterproductive without obtaining people's full understanding. But such caution seems to be beside the point. Of course people's understanding is essential for introducing the lay judge system, but such an attitude fails to reflect the point that the introduction of the new system could have an effect of on-the-job training – that is, people would learn about the system while it is being implemented. The argument that the system should be introduced only after obtaining people's full understanding is too idealistic. In this regard, it is important to fully study why the jury system introduced in Japan in prewar days failed to take hold.

The Jury Law was enacted in Japan in 1923, enabling ordinary citizens to try criminal cases as jury members. The actual implementation of the system was delayed for five and a half years in order to inform people about the system. The delay was based on the view that it is not good to hastily implement a system unless people fully understand it. Despite this, judicial proceedings under this law were far from successful.

The prewar jury system had the following characteristics:

1) Each jury consisted of 12 members and took part in public trials. They would only submit the results of their deliberations and were not allowed to decide the guilt of the accused.

2) If the court found a jury's recommendation unreasonable, it was entitled to replace the members of the jury and refer the case to a new jury.

3) Cases referred to juries were limited to serious criminal cases tried at district courts. The defendant was entitled to decide whether he/she would receive a jury trial.

According to legal historians, the prewar Japanese jury system was patterned after the penal code then enacted in Continental Europe and was quite different from the Anglo-American jury trial system. But it suffered from poor implementation due to the special circumstances leading to its enactment, and the number of cases tried with jurors' participation decreased year by year and finally dwindled to only a few cases a year. As a result, the jury system was suspended in April 1943 with the enactment of the Law Concerning the Suspension of the Jury Law and has

Photo: The Mainichi Newspapers

The introduction of the lay judge system was recommended by the government's Justice System Reform Council in 2001

remained suspended ever since.

During the 15 years the juror system was used, a total of 484 cases were referred to juries, mostly murder or arson cases, and defendants in 81 cases, one-sixth of the total, were acquitted.

The existing Court Law, as defined in Section 3, Article 3, does not prohibit the establishment of juries by law. This fact led to the introduction of a lay judge system patterned after the Anglo-American jury system.

LEGAL experts also cite the following problems with the prewar jury system: 1) political crime cases were not referred to juries, 2) defendants who preferred to be tried by juries were not allowed to appeal to a higher court and 3) defendants who preferred to be tried by juries were ordered to shoulder vast jury expenses if they were found guilty.

There is no denying the fact that as is the case with any system, the jury system has both benefits and drawbacks. Some people may well doubt whether jurors, who have not received professional training, can adequately judge facts, are not influenced by media opinions or lawyers' tactics, can keep secrets, or are not carried away by their emotions.

But I think the introduction of the jury scheme would have more benefits than drawbacks for Japan's judicial system under certain social environmental conditions. Participation in the judiciary allows laymen to test their opinions on professional legal experts who represent the state, thereby enhancing people's interest in judicial affairs. At the same time, working side by side with legal practitioners will provide people with an excellent opportunity to learn firsthand about law and order. As a social condition for enabling the jury system to reap such benefits, the government should consider building a mechanism under which citizens selected as jurors can take paid holidays while they are away from their workplaces and smoothly return to their former positions after long court trials. But, the most important thing is that jurors themselves must have enough intellectual power and will to make free, independent judgments.

IN this respect, the benefit of the jury system discussed by Alexis de Tocqueville, the 19th century French politician and writer, in *Democracy in America* (Vol.2, Chap. 8), one of his best-known works, serves as a good guide. Tocqueville grasped the jury system not as a mere legal system but as a political one. He even said that the extent to which the jury system has contributed to the realization of justice is debatable.

In Tocqueville's view, a nation will begin to go downhill when it loses public spirit in one way or another. On the question of how humans can be equal and simultaneously free, Tocqueville thought that the most important thing for major democratic countries was how to hold atomistic individuals together. In a society where the selection of values and the object of belief are left up to the judgment of private individuals and equal conditions are granted, the pursuit of economic welfare and material stability inevitably become people's main concern. At the same time, people in such a society are strongly inclined to be endlessly engrossed in their private lives, become apathetic toward public matters and pursue mediocrity and equilibrium. If democratic politics tends to seek equilibrium and mediocrity, it effectively neglects the nobility inherent in humans, and democracy will be turned into a device which is effective only in solving problems related to the moderate happiness of the majority of people. In commercial society, in order to offer the most effective and reliable means of satisfying human desires, business activities become the best channel for utilizing and articulating talented people's ability. The tendency of the intelligent and talented in America to enter the business world rather than politics may be a tradition nurtured in such a social system. Such a society creates a mechanism which makes it harder for talented people to enter politics or the bureaucracy, which are essentially public vocations. Even if talented people enter the public sector, they tend to make politics susceptible to private interests. This is what has often happened in the past.

How, then, has public spirit been maintained in American society? As Tocqueville observed, the tradition of equality and individualism in America takes the form of the pursuit of economic welfare, mediocrity and isolationism and has been upheld by bonds

expressed by such words as compassion, public spirit, religion or morality. Needless to say, the maintenance of America's freedom, whose principle is tied with democracy, requires constant efforts and scrutiny. Generally speaking, freedom and equality are incompatible, while freedom can be more easily lost than equality.

Fully reflecting on the tendencies I have mentioned, American society has conceived various political and social mechanisms for preventing the decline of public spirit, and prepared several systems allowing people to become aware of their public obligations more directly.

As one measure, America has placed a great value on local autonomy in order to apply the brakes to centralization. Delegation of power to local autonomies, such as counties, municipalities, townships, towns and school districts, has enabled American citizens to receive specific training on the exercise of freedom, and to understand the essence of public spirit and public obligations firsthand. At the same time, this has prompted individuals filled with egocentric interests to pursue the public good. Given the rule of thumb that as a nation expands, the spirit of local autonomy tends to weaken, Americans have really conceived an excellent idea.

The American jury system, both for civil and criminal cases, is a similar mechanism. Like local autonomy, the jury system takes much time and money. But it can also be viewed as a system for nurturing solidarity among citizens concerning social justice. Even though jurors' role in court trials is not the application of law but merely the judgment of facts, jurors are required to have fairness and common sense, which are the very feelings constituting the nucleus of public spirit. The jury system also has the effect of expressing the process of court trials and judgments in a language that is understandable for laypersons. It represents the optimization of "linguistic democratization." Such a system has helped to adjust and nurture the feelings and tastes of a great number of people. At the same time, it has given jurists the function of applying the brakes to the high-handedness of the majority. Under the jury system, therefore, jury service is viewed as a "public profession," or the embodiment of public spirit, as jurists represent a neutral third party for the mediation of disputes.

The jury system is also regarded as a political system, because it means delegating society's commanding rights to those who are ruled, not those who rule. Execution of law requires compelling power. The penal code clearly bears this out. Those who try criminal cases are the real masters of society, and it can be said that jurors who are granted such power possess sovereignty. In this sense, the jury system can be viewed as a form of popular sovereignty.

Tocqueville shed light on the relationship between the jury system and popular sovereignty, and pointed out the jury system's social effects. By participating in jury trials of civil cases, people are afforded an opportunity to deliberate the implementation of justice, the social responsibilities for their actions and administrators' way of thinking, Tocqueville noted. He also considered that participation in juries would enable people to formulate judgment abilities and enhance their intelligence. In fact, American people's practical intelligence and political sense can be considered as the educational effect of the tradition of jury trials in civil cases.

The influence of judges' opinions in jury trials may be different in criminal and civil cases. In criminal cases, judges and jurors are basically on a equal level as the latter's job is mainly to acknowledge the simple facts which can be judged by common sense. In civil cases, however, as judges' technical knowledge far exceeds that of jurors, the influence of judges' skill on jurors would become stronger. If compared with trials without a jury system, it generally seems that the jury system weakens judges' power. As Tocqueville noted, however, in practice judges have strengthened their authority through jury trials and the jury system has the effect of spreading the spirit of jurists among the people, even those who have the lowest level of intellectual interest.

AS I have observed, the jury system offers a valuable opportunity for people to learn the practical meaning of "rule" and "being ruled." What is important for democracy is whether people have high levels of the capability not only to rule and govern but also to be ruled and governed. The most essential quality for a liberal democracy is whether people have the wisdom to coexist with those who have different opinions. The process of respecting, coexisting with and absorbing different opinions is the essential condition for nurturing and maturing people's capability to be ruled under a liberal democracy. Leaders must be selected from among those who have the capability to be ruled. Everyone bemoans political malfunctions and the absence of leaders in Japan today. But these deficiencies and the lack of the capability to be ruled are two sides of the same coin.

It can be said that the introduction of a lay judge system in Japan amidst such a situation represents an important reform in the sense that the opportunities for educating people about public consciousness have increased. It must be remembered that a liberal democracy would be corrupted if people simply asserted their rights while being unaware of their obligations. Politicians who express the cautious view that the lay judge system would only end up increasing people's obligations and burdens can hardly be spared the charge that they are just seeking public favor with an eye to winning votes. JS

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