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Public Interest Lawyering in Japan under Globalization

BY SHINICHI SUGIYAMA¹

Abstract

Globalization came to the Japanese legal community as a form of legal reform early in the millennium. The reform has impacted not only business lawyering, but also public interest lawyering, which aims at access to justice (see Parts I and II).

The growing national budget has improved legal services for the underrepresented (see Part III). The increasing number of Japanese lawyers has brought improvement in access to justice in thinly populated areas. More attorneys seek careers as in-house lawyers in business or public interest organizations such as the United Nations (see Parts IV, V).

The negative effects of public interest lawyering include the weakening of the economic base of lawyers, a decrease in the quality of legal service, and a change in the character of the Japanese lawyer. These impacts may undermine the basis of public interest lawyering, especially in cause lawyering, which has a unique history in Japan (see Parts IV, V and VII).

Restructuring the law school and legal education system, increasing the National Judiciary budget and reforming the Japanese Civil Procedure Law is required for better public interest lawyering. Rethinking the role of quasi-lawyers as well as third-party funding for public interest lawyering are to be discussed. The expectation of exchanging information—and sharing

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experiences with American law schools are increasingly looked upon positively (see Parts VII and VIII).

I. Access to Justice and Public Interest Lawyering

“Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.”²

The purpose of public interest lawyering is to improve access to justice. However, the definition of public interest lawyering itself is still arguable.³ In this paper, I will discuss its broader meaning including the following:

- a) Legal services for the underrepresented;
- b) Cause lawyering for social change;
- c) In-house lawyering at the United Nations and Non-Profit Organizations (NPOs), which intend to restore human dignity and equality under the law; and
- d) The unique definition by the Daini Tokyo Bar Association and other Japanese bar associations, which includes activities of the bar association, serving as government officers, and teaching at a law school.⁴

II. Globalization and the Legal Reform in Japan

Globalization—if one includes deregulation and dissemination of culture, policies, and institutions—triggered wide-ranging legal reform at the beginning of the millennium in Japan (hereinafter “Legal Reform”).

The Legal Reform was spurred when the U.S. and EU demanded deregulation of the legal system. They regarded regulations as one of the trade barriers in Japan.⁵ Japanese industries and bureaucrats followed the

2. *Access to Justice*, United Nations and the Rule of Law, <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>.

3. Rajiv Dhavan, *Whose Law? Whose Interest?*, in *PUBLIC INTEREST LAW* 17 (Jeremy Cooper & Rajeev Dhavan eds., 1986).

Cause lawyering is commonly described as a practice of “lawyering for the good” or using law to empower members of the weaker layers of society. Under the Japanese context in post-war era, see Part VII.

4. Bar Associations in Japan are amongst the largest and most powerful NPOs in Japanese society.

5. *Market opening problem complaint handling promotion meeting 5th report*, Office of Trade and Investment Ombudsman (Mar. 17, 1998), <http://www8.cao.go.jp/kisei-kaikaku/oto/otodb/japanese/mondai/subject/199810803.html>.

lead of the U.S. and EU, citing the population of lawyers and legal systems in France and the U.S. Arguably, they made lawyers and the legal system into scapegoats for avoiding the true reduction of trade barriers in Japan.

The Japan Federation of Bar Associations (hereinafter “JFBA”) first opposed the movement, but later accepted the deregulation—that is, increasing the population of Japanese lawyers in exchange for other reforms, such as increasing budgets for legal aid, launching law schools, and introducing a lay-judge criminal trial system.

After the political compromise, the Legal Reform was constituted as follows:

1. Deregulating legal services, i.e., increasing the population of Japanese lawyers;
2. Increasing the national budget for legal aid, and establishing a new government body for legal aid;
3. Launching the new law school system; and
4. Introducing the lay-judge criminal trial system.

The Legal Reform has no small effect on Japanese lawyers, not only in business lawyering where clients can afford legal fees and are able to choose their lawyers, but also in public interest lawyering.

Among the above, the legal aid budget increase and deregulation have had a huge impact on public interest lawyering.

III. Increasing the Government Budget and Its Effect

1. Government budget

The Japanese government has increased its budget for legal services for the underrepresented. The budget has grown by about five times from JPN2.822M in 2000 to JPN14,770M in 2015.⁶ However, the total judiciary-related budget is still low, at only 0.325% of the 2005 national budget.⁷

The government also launched a corporate body, the Japan Legal Support Center, in 2006, which aims to improve access to justice, especially in areas outside the larger metropolitan areas of Japan.⁸

6. *White Paper on Attorneys 2015*, Japanese Fed’n of Bar Ass’ns, 2015, at 261 (Japanese version).

7. *Id.* at 260.

8. *White Paper on Attorneys 2015*, Japanese Fed’n of Bar Ass’ns, 2015, at 90-91 (English version).

2. Effect

The following statistics show that the increase in the government budget, together with the deregulation of legal services, has improved legal services for the underrepresented in both criminal defense and civil legal-aid cases.

(a) Criminal defense for low income people

The Japanese government has widened the criteria for court-appointed criminal defense attorneys that are government-funded lawyers. For example, criminal defense for detained suspects before indictment has only been funded by the government after the reform.⁹

The government has also expanded the number of court-appointed juvenile attendants who are government funded lawyers. The percentage has clearly improved from 0% in 2004 to 22% in 2015.¹⁰

After the reform, JFBA also began to fund criminal defense in areas that the government has not yet funded. "Duty attorneys" and other forms of criminal defense for arrested suspects are being funded by JFBA.¹¹

(b) Civil Cases for low income people.

The reform also resulted in a growing government budget for legal aid for low income people. Consequently, the number of legal aid civil cases has increased about 1.6 times, from 260,000 in 2008 to 370,000 in 2014.¹²

IV. Deregulation in Legal Service

How deregulation affects public interest lawyering will be discussed in Part V. The reform's relaxation of regulations includes:

(a) Growing Population of Japanese lawyers

The number of Japanese lawyers has doubled, from 17,126 (in 2000) to 36,415 (in 2015).¹³ Before the reform, successful applicants to the bar examination were around 500 out of 28,000 applicants per year. The reform aimed to increase the number up to 3,000, although it remains at around 1,500 to 2,000 per year.

(b) Population of Registered Foreign Lawyers¹⁴

9. *Id.* at 36, 39.

10. *Id.* at 42, 43.

11. *Id.* at 36, 37.

12. *Supra* note 6, at 250.

13. *Supra* note 8, at 10.

14. Those who have qualified as lawyers in foreign jurisdictions may qualify as "Registered Foreign Lawyer," by registering with the JFBA after obtaining approval of the Minister of Justice of Japan.

The qualification requirements have been relaxed after the reform. Consequently, the population has tripled from 125 in 2000 to 380 in 2015.¹⁵

(e) Joint Enterprises with Registered Foreign Lawyers

After the reform, the ban on joint enterprises between Japanese lawyers and Registered Foreign Lawyers was lifted. As a result, there are 40 joint enterprises as of 2015.¹⁶

(f) Large Law Firms are Emerging

There have been law firm mergers, especially in urban areas, which resulted in the emergence of large law firms. There are now nine law offices with more than 100 Japanese lawyers.¹⁷

(g) Quasi-lawyers' Work Areas have been Broadened

There are several categories of quasi-lawyer around Japanese lawyers (Bengoshi), such as Tax Attorney (Zeirishi), Patent Attorney (Benrishi), and Judicial Scriveners (Shihoushoshi).¹⁸

The reform did not unify the quasi-lawyers, but rather broadened some of their areas. For example, following the reform, a Shihoushoshi can now represent small civil cases in court.

V. How does the Deregulation affect Public Interest Lawyering?

1. Positive effects of the deregulation

The growing population of Japanese lawyers, together with the increase in the government budget, brought the following improvements in terms of access to justice:

(a) Access to attorneys in low-population areas

In 2000, there were 35 districts with no practicing Japanese lawyers¹⁹ and 36 districts with only one practicing Japanese lawyer. JFBA called those "Zero-One Districts." With the increase in the population of Bengoshi, more newly registered Japanese lawyers have chosen to practice in low-population districts. As a result, there were no Zero-One Districts by 2015.

(b) Access to attorneys in highly populated areas

The growing population of Japanese lawyers caused competition among them and quasi-lawyers. The competition and Information Technology (IT) have improved access to justice in highly populated areas. Young and

15. *Supra* note 8, at 29.

16. *Id.* at 31.

17. *Id.* at 25.

18. Shozo Ota and Kahei Rokumota, *Issues of the Lawyer Population: Japan*, 25 CASE W. RES. J. INT'L L. 315, 323 (1993).

19. District means jurisdiction of district court and the branch.

ambitious Japanese lawyers have tried to get clients through websites, reducing the cost by using IT. In criminal cases, there are far more candidates for court-appointed criminal defense.²⁰

(c) Increase of in-house lawyers including in the United Nations and other international organizations

More attorneys are seeking careers as in-house lawyers. The number of in-house lawyers has risen from 122 in 2005 to 1,442 in 2015, an increase of about 11 times.²¹ More young lawyers are seeking job opportunities in international organization such as the United Nations. The number of attorneys on the International Legal Technical Assistance Roster has risen from 53 in 1999 to 301 in 2015, an increase of about six times.²²

2. Negative effects of the deregulation

On the other hand, the growing population has had a negative effect in terms of the economic status, quality, and character of Japanese lawyers.

(a) Decrease in average income

The deregulation and growing competition resulted in a decrease in the average income of Japanese lawyers, from JPN17.4M in 2006 to JPN9.07M in 2014,²³ a drop of almost 50%. The economic gap among Japanese lawyers has widened with the emergence of large law firms and specialized boutique firms. Growing competition caused a decrease in income for general practice. The above decreases and gap are likely to result in the downturn in the quality of general legal service, and may change the character of Japanese lawyers.

(b) Increase in the number of disciplinary actions, declining quality of legal services

According to the growing population and the decrease in average income, the number of newly accepted disciplinary requests has doubled, from 1,030 in 2000 to 2,348 in 2014.²⁴

The number of disciplinary actions by bar associations has also doubled, from 41 in 2000 to 101 in 2014.²⁵

In terms of public interest lawyering, we find a declining quality in legal services. Among court-appointed criminal defense attorneys, we find breaches of fundamental rules—for example, those who have no interviews

20. *Supra* note 8, at 39.

21. *Id.* at 57.

22. *Id.* at 89.

23. *Supra* note 6, at 163.

24. *Supra* note 8, at 67.

25. *Id.* at 68.

with the defendant and those who submit statements of reason to the Supreme Court without consent of the defendant.²⁶

VI...Impact from the Law School System and the Lay Judge Criminal Trial System

1.Law school system

The current problems with the law school system and the reduction in the number of those attending law school are likely to have a negative effect on the quality of Japanese lawyers. When the law school system was first introduced, it was expected that 80% of the law school graduates would pass the bar exam. However, this is not the reality. Furthermore, those who have successfully passed the exam have difficulty finding jobs in existing law firms.

2.Lay judge criminal trial system

The lay judge criminal trial system seems to have gradually improved criminal defense as well as prosecution and criminal courts in terms of transparency of the process.

VII. Is Character or Ethos of Japanese Lawyers Changing?

1.Character or ethos of Japanese lawyers

From the end of World War II to the Legal Reform, Japanese lawyers and bar associations have assumed the role of critics of the mainstream Japanese society, with a sense of noblesse oblige.²⁷ As discussed later, they

26. In terms of government funded criminal defense, the Dai-ni Tokyo Bar requests its members to report every case in detail to the Bar. The Criminal Defense Committee of the Bar checks the quality of the work. The Bar also holds a meeting regularly with Tokyo District Criminal Court to exchange information on quality of criminal defense.

27. During the high economic growth era in Japan, law department graduates who preferred a stable life chose lifetime employment in Japanese large corporations and government. Those who were skeptical of the mainstream chose to challenge the Bar Examination with an extremely low passing rate.

In the U.S., it seems to be the opposite. In the author's personal talk with Professor Frank Upham at New York University of Law, professor Upham stated that, in the U.S., law school graduates who prefer a stable life choose to belong to big law firms, and those who prefer a challenging life choose to find a job in business and try to set up his or her own business as soon as possible.

have a unique history in representing victims of environmental pollution and drug-induced harm, in which they sought changes in the policy of the national government as well as compensation. They have regarded the above lawyering as public interest litigation and/or cause lawyering. In a post-Legal Reform era, is the character or ethos of Japanese lawyers, with their unique history, changing? We do not yet know the answer to this question.

3.2. History of public interest litigation and /or cause lawyering

The Japanese lawyer has a unique history and has played an important role in society and government policy. Many individual attorneys and groups of attorneys have been vigorously involved with workers' rights, women's rights, minority rights, pollution cases (e.g., Minamata pollution case) and drug-induced diseases (e.g., Sumon, Thalidomide, HIV infection through tainted blood products).²⁸ The following is a brief overview of the case of HIV infection through blood products,²⁹ which illustrates the features of public interest litigation and /or cause lawyering in Japan:

(a) Attorneys working for victims supported their activities financially by using income from other businesses.

(b) It was in the form of consolidated torts cases. The goal was not only monetary compensation but also to change government policy and society in terms of medical priority and discrimination against people with HIV.

(c) Torts litigation against the government and consolidation of individual cases were used to achieve the target.

(d) The settlement in 1995 included the government's promise to increase the budget for HIV/AIDS treatment and to establish new hospitals. As a result, the budget grew 260% after the settlement.

(e) Half of the legal fee was reserved for funding other cause lawyering, such as Hansen disease patients' litigation against the government, watchdog organization "Yakugai Ombudsperson" for safety of medicine, and NGO activities for eliminating discrimination against people with HIV.

28. Frank K. Upham, *Law and Social Change in Postwar Japan* (Harvard Univ. Press rev. ed. 1987).

29. Personal experience of the author as a member of the lawyers' group for victims of HIV tainted blood product. Eric Feldman, *HIV and Blood in Japan: Transforming Private conflict into Public Scandal*, in *BLOOD FEUDS: AIDS, BLOOD, AND THE POLITICS OF MEDICAL DISASTER* 59-93 (Eric Feldman & Ronald Bayer eds., 1999).

VII. Aftermath of the Legal Reform: Issues to be Discussed and Expectation of American Law Schools

1. Issues to be discussed

After the Legal Reform, many issues remain to be discussed. The fundamental question is whether to move forward with the Legal Reform policy, or to return to the status quo before the Legal Reform, especially in terms of the population of Japanese lawyers. There have been two schools of thought in Japanese socio-legal study in Japan. One explains that insufficiency of rule of law in Japan is the result of the government policy which has limited the number of lawyers. This school has strongly supported the Legal Reform. The other is the traditional school of thought, which explains that the insufficiency is caused by a mixture of culture, history, and social and economic arrangements in Japan. This article takes a third approach, focusing on a feasible means of revising and improving the policy of the Legal Reform.

(a) Reconsidering the law school system and legal education

The reform has left undergraduate legal departments untouched. As a result, many undergraduate students choose employment in Japanese industry and government under the lifetime employment system, rather than take on the extra years and cost of law school and legal apprenticeship, leading to an uncertain future. Moreover, the legal profession seems to be losing its prior allure for young, talented students. To attract many young talents to public-interest lawyering, we must further reform the system, including abolishing the undergraduate legal department and merging it into the law school.

(b) Reform of Civil Procedure Code

The Japanese Civil Procedure Code does not have enough disclosure or procedures for collective redress such as class actions. Though the new special procedure code for consumer collective redress went into effect on October 1, 2016,³⁰ it is only a partial reform. Comprehensive revision of the Civil Procedure Code will be needed.

(c) Increase in the National Judicial Budget

As discussed before, the Japanese government has increased its budget for legal services for the underrepresented, but it is not enough. The comprehensive judiciary-related budget is still low, at only 0.325% of the national budget in 2015. An increase in the national judicial budget is inevitable.

30. Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers, Act No. 96 of 2013 (2013).

(d) Role of registered foreign attorneys in public interest lawyering

For now, the role of registered foreign attorneys in public interest lawyering is limited. Bar associations make an exception for mandatory public interest activities in terms of registered foreign attorneys. We need to discuss whether to change the policy. Globalization is increasing the number of foreign workers in Japan. The Japanese government is expected to deregulate restrictions on guest workers and foreign investors. Public interest lawyering for foreign residents is one of the urgent issues.

(e) Reconsidering the boundaries of qualifications

There are about 200,000 quasi-lawyers in Japan.³¹ We need to consider unifying those qualifications into the Japanese lawyer (Bengoshi) to subject quasi-lawyers to the rules and regulations of the Bar Association, which has autonomy.

(f) Third-party funding

To make up for the lack of financing for the public interest lawyering, we need to reconsider tax deduction rules in Japan. We also need to discuss introducing third-party funding for public interest lawyering. However, the conflict between the lawyer's duty to the client and third party's profit must be seriously considered.

(g) Relief for collective redress across borders

In the era of globalization, relief for collective redress across borders is important. We need to discuss how we achieve fair relief effectively, but must also respect the unique approach of each jurisdiction.³²

2. Expectation of American law schools

In order to discuss above issues in the proper way, exchanging experience and information on public interest lawyering between the U.S. and Japan is very important. For young lawyers in Japan who are interested in public interest lawyering, gaining experiences in American law schools will be essential not only for language capability, but also for diversified perspectives.

31. Ota et al., *supra* note 18.

32. Consumer Litigation Committee of the, Remarks at the International Bar Conference Annual Meeting in Tokyo, "Collective redress across borders—how consumers are flexing their multi-jurisdictional muscle" (Oct. 2014).