

1-1-2013

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Recommended Citation

Takayuki Ii, *Japan's Judicial System May Change, but Its Fundamental Nature Says Virtually the Same: Recent Japanese Reforms on the Judicial Appointment and Evaluation*, 36 HASTINGS INT'L & COMP.L. REV. 459 (2013).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol36/iss2/5

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Japan's Judicial System May Change, But Its Fundamental Nature Stays Virtually the Same? Recent Japanese Reforms on the Judicial Appointment and Evaluation

By TAKAYUKI Ii *

I. Introduction

The restructuring of Japan's judicial system was a key reform in the early 21st century. In order to secure an independent judiciary and maintain a supply of high-quality judges, the Justice System Reform Council (hereinafter JSRC, 1999-2001) proposed a set of important measures and new recommendations. Specific reforms have focused on efforts to: diversify the sources of supply of judges, reexamine judges' reappointment procedures, introduce transparency into the personnel process, and to examine how Supreme Court Justices should be properly appointed. These reforms are quite profound, especially since the last significant reforms took place over half a century ago after World War II.

The purpose of this paper then is to evaluate both the successes and failures of the JSRC's proposed reform of the judicial appointment system and to assess judicial performance in Japan. Japanese lower court judges have long been characterized and ostracized for their largely subservient role to the Supreme Court Secretariat. The Secretariat evaluates their performance and appointment (or reappointment) for judicial service, the latter of

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which often results in arbitrary transfers of individual judges to remote district courts. The overwhelming authority of the Supreme Court in this decision-making process often leaves Japanese judges with the disgraceful title of "mere employees of centralized bureaucratic judicial agencies."¹ Likewise, Supreme Court justices have also often been criticized for their conservative views, passive decision-making practices, and infrequent exercises of judicial review on constitutional issues.² The central question addressed in this paper is the following: Have the JSRC's suggested reforms on judicial selection and evaluation actually altered the Japanese judiciary?

The method of analysis adopted is a socio-legal approach that critically analyzes the judicial appointment and evaluation system as well as its respective informal practices. We cannot discern the content of the law and its concomitant legal institutions by looking at them abstractly. To truly identify the content of the law and its institutions, we must look to the actual practice of law. For instance, Article 80 of the Japanese Constitution stipulates that the judges of the lower courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. Yet, in reality, nearly all of the judicial nominees suggested by the Supreme Court have almost always been confirmed by the Japanese Cabinet like clockwork and its appointment power might become merely a decoration. Likewise, judicial legislation such as the Court Act, which stipulates that a judge shall not be transferred to a different court against his will, does not guarantee the independence of judges. In reality, any attempt by a judge to resist the Court's directive for his transfer will certainly damage his future career prospects.³

The structure of this paper is as follows. After tracing the history of Japan's judicial system in the post-WWII period in Section

1. See Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 266 (Philip C. S. Lewis ed., 1994).

2. The Supreme Court has declared the statutes to be unconstitutional only eight times so far (as of November 2012). Concerning the possible impact of the judicial appointment reform on judicial review, see Takayuki Ii, *Japanese Way of Judicial Appointment and Its Impact on Judicial Review*, 5 NAT'L TAIWAN U. L. REV. 73 (2010).

3. See Miyazawa, *supra* note 1, at 266. Judges are transferred nationwide almost every three years and the pace of increase in salary compensation varies among judges after almost 20 years of practice (there are 24 gradations of salary differentials among Japanese judges).

II, the paper examines the content of JSRC's judicial reforms in the early 21st century in Section III, followed by the impact of the reforms on the Japanese judiciary in Section IV.

II. Japan's Judge System After World War II

A. Overview

Under the 1889 Japanese Constitution and the 1890 Court Organization Act, the judicial organ was part of the Ministry of Justice, and the Emperor appointed judges for life. Judicial independence with broadened power and jurisdiction was not codified until the 1947 Constitution and the 1947 Court Act following World War II.

The judicial appointment system was modified accordingly. Under today's postwar Constitution, lower court judges are to be appointed by the Cabinet from a list of persons nominated by the Supreme Court. The term of office for lower court judges is ten years with the privilege of reappointment until the retirement age of 65, excluding summary court judges with the retirement age of 70.⁴

The Cabinet also appoints Supreme Court Justices, and the Emperor specifically appoints the Chief Justice of the Supreme Court after nomination by the Cabinet. The public reviews their appointment at the first general election for the House of Representatives, and again at the first general election for the House of Representatives after ten years of the former election. They will also be reviewed periodically in the same manner thereafter.⁵

The Justice Appointment Consultation Commission was established in 1947 for the initial nomination of the Supreme Court Justices, but it was soon dissolved.⁶ This nomination and appointment system might have been influenced by the merit-based selection of state judges in the U.S., where the initial nomination of judges must rely on the objective assessment of merits, capabilities, and competencies of judicial candidates after they are screened by the judicial nominating commission, the members of which include both legal practitioners and non-lawyers, all of whom are subject to retention election at the end of their appointment terms.

4. JAPAN CONST. art. 80, English translation available at <http://www.ndl.go.jp/constitution/e/etc/c01.html#s6>.

5. JAPAN CONST. art. 79.

6. *Id.*, *supra* note 2, at 88.

In Japan, judicial officers consist of the Chief Justice of the Supreme Court (1), Justices of the Supreme Court (14), presidents of the high court (8), lower court judges (1,782), assistant judges (1,000), and summary court judges (806). New assistant judges are appointed from those who have completed their judicial training at the Legal Training and Research Institute (LTRI). These assistant judges can participate in adjudication as a member of a collegiate panel for they are not qualified to sit alone on the bench. At the present time, however, a special law authorizes jurists who have served as an assistant judge for at least five years, after having been nominated by the Supreme Court, to sit alone as a special assistant judge.⁷

Judges in Japan are also required to engage in practical affairs as assistant judges, public prosecutors, or practicing attorneys, etc. for at least 10 years. At present, judges are likely to have been appointed from those who have served as assistant judges for at least ten years in the government. There is also a separate system where judges are appointed from a pool of practicing attorneys.

B. The Procedure of Judicial Appointment

1. Lower Court Judges

The number of judicial appointments made by the Cabinet has been nearly the same as the number of judicial nominees submitted by the Supreme Court. The number of judicial candidates placed on the nomination list by the Supreme Court was just one more than the total number of judicial vacancies, and as a result, all but one nominee has been always accepted by the Cabinet. This practice is seen to be the *de facto* power of the Supreme Court in judicial appointment. Otherwise, judicial nominations by the Supreme Court might be conducted with undue influence from the Cabinet (Liberal Democratic Party (LDP)), which was demonstrated in the infamous non-renomination of Assistant Judge Yasuaki Miyamoto in 1971.⁸

7. *Id.* at 91.

8. Assistant Judge Miyamoto once belonged to the progressive Young Lawyers League (*seihyokyo*). Though he was recommended for reappointment and promotion to full judge by the Supreme Court, the Cabinet denied his reappointment in 1971, showing a heavy-handed political influence on the appointment of Japan's judges. See JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 6-108 (1998).

The process by which the Supreme Court nominates judicial candidates is not necessarily clear or transparent from a non-legal standpoint. The materials used for the evaluation of potential judicial nominees are also often quite obscure. In the case of appointing new assistant judges from LTRI graduates, final decisions were made on the basis of the following: (1) final examination grades, (2) student evaluations, and (3) results of interviews with chief judges of the General Secretariat of the Supreme Court. The number of candidates who were not nominated totaled 59 between 1970 and 2002.⁹ In terms of the reappointment to full judges from assistant judgeships and judicial officerships, the materials and criteria used are still largely unknown. Compared to the number of LTRI applicants, there were only three non-nominees among judge applicants from 1970 to 2002. Indeed, nearly all assistant judges and judicial officers have been appointed to full judges.¹⁰ In the case of the judicial appointment of practicing attorneys, materials and specific criteria used for the evaluation are unclear. But the total number of candidates selected from the pool of practicing attorneys is relatively few, compared to LTRI graduates or judge applicants.¹¹

2. Supreme Court Justices

Supreme Court Justices are appointed by the Cabinet after hearing opinions from the Court's Chief Justice. The list of candidates selected by the Chief Justice is submitted to the Cabinet Council through the Prime Minister's judgment on the basis of the opinions of the Chief Justice, other judges, attorneys and public prosecutors. The list may also be altered by the Cabinet Secretary based on the opinions of other personnel who have experience in administrative and foreign affairs.¹²

Much like the appointment of lower court judges, the appointment of Supreme Court Justices is not very transparent. Judicial nominations are made in the following manner: six from

9. *Ii, supra* note 2, at 85 (see Table 1).

10. *Id.*

11. *Id.* Practicing attorney nominees consisted of mere 46 applicants from 1991 to 2001.

12. Naikaku Kanbou [Secretary of the Cabinet], Saikousai Saibankan no Ninmei ni Tsuite [On the Appointment of the Supreme Court Justices] (paper presented at the fifth meeting of the Daigokai Shihōseido Kaikaku Suishin Honbu Komon Kaigi [Adviser Assembly of the Judicial Reform Promotion Office] (July 5, 2002).

judges, four from practicing attorneys, two from public prosecutors, two from public servants (one of whom is female), and one university law professor. Once they have been nominated and chosen, the public review serves little practical purpose, as there has never been a single dismissal of a nominated Justice.¹³

3. *Judicial Evaluation*

While there has been little legal basis or necessity for conducting judicial evaluations, they were conducted informally from the mid-1950s until the late 1990s. They were called a "report on judges submitted by chief judges of the courts for making transfer plans."¹⁴ There is no procedural mechanism to disclose the content of judicial evaluations, or to facilitate the complaint whereby a judge objects the court's directive to transfer to another court.

According to the Supreme Court's answer to the question by the JSRC in 2000,¹⁵ the evaluation criteria of judges included: (I) overall competency, such as: (1) the ability for disposing cases (e.g., accuracy, speed and disposition of the trial), (2) leadership skills and expertise (e.g., adequacy of instructions to the staff and competency as a presiding judge), and (3) legal knowledge and refined adeptness (evaluated on the basis of three to four grade estimations). Other criteria were: (II) general health (four grade estimations), (III) overall character and ethical aptitude, and (IV) abilities to render practical and analytical (or synthetic) judgments.

According to the General Secretariat of the Supreme Court, the main purpose of judicial evaluations was to grasp the aptitude of individual judges in their placements under the principle of "the right man in the right place" and in the promotion of legal education and judicial training.¹⁶

13. *Id.*, *supra* note 2, at 89-90.

14. THE PERSONNEL BUREAU OF THE GENERAL SECRETARIAT OF THE SUPREME COURT, ANSWER TO THE QUESTION FROM THE JSRC 1 (July 31, 2000).

15. *Id.*

16. THE PERSONNEL BUREAU OF THE GENERAL SECRETARIAT OF THE SUPREME COURT, PRESENT STATE OF JUDICIAL PERSONNEL EVALUATION AND THE GENERAL SITUATION OF JUDICIAL PERSONNEL AFFAIRS 8 (Sept. 7, 2001).

III. Early 21st Century Reforms

A. *The Judge System*

In terms of judge reform, there was the "Housou-ichigen" proposal, suggesting the creation of a new and more expansive nomination system to recruit and appoint judges from a greater pool of legal practitioners and those who have been engaged in the legal profession. The proposal was once rejected by the Special Justice System Examinations Commission in the 1960s but was revived in the 1990s.¹⁷ The revived one was attached importance in the JFBA's movements toward judicial reform, which pursued "citizen's judiciary." It highlighted legal practitioners' business of representing citizen clients and their familiarity with citizens. As a consequence, the "Housou-ichigen" proposal played a crucial role to advance judicial reform discussion which led to the establishment of the JSRC.

On the other hand, the JSRC set a new reform agenda under the title of the "Reform of the Judge System" after extended discussion around the concept of "Housou-ichigen" in an effort to diversify judges' backgrounds.¹⁸ The judge system was considered in line with "a justice system that meets public expectations,"¹⁹ "the legal profession supporting the justice system,"²⁰ and the "establishment of the popular base."²¹ In other words, the re-shaping of the role of Japan's justice system remained central to JSRC's proposals.

B. *Reform Proposals by the JSRC*

Under the banner of "Judge System Reform," the JSRC recommended numerous strategies and measures, as shown below, in order to secure a stable supply of high-quality judges who will

17. See Takayuki Ii, *Saibankan Seido Kaikaku no Rinen to Jitsuzou [Ideal and Real Picture of the Judge System Reform]*, 5 SHIHOU KAIAKAKU TYOUSASHITSU HOU [RESEARCH OFFICE FOR JUDICIAL REFORM REVIEW] 5, 11 (2005).

18. THE JUSTICE SYSTEM REFORM COUNCIL, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, June 12, 2001, available at http://www.kantei.go.jp/foreign/judiciary/2001/0612_report.html. See Part 5. Reform of the Judge System, (1) Diversification of the Sources of Supply.

19. *Id.* See Chapter III Part 3 (2) (1) Construction of a Justice System Responding to Public expectations: Coordination of the Institutional Base.

20. *Id.* See Chapter III Part 3 (2) (2) How the Legal Profession Supporting the Justice System Should be: Expansion of the Human Base.

21. *Id.* See Chapter III Part 3 (2) (3) Establishment of the Popular Base.

bear the responsibility to maintain both an equitable and independent justice system in Japan.

1. Diversification of the Sources of Supply

In order to diversify the source of potential judges, the JSRC suggestions included strategies to: (1) better leverage assistant judges' diverse experiences and backgrounds as legal professionals prior to their appointment as judges; (2) terminate the Special Assistant Judge System; (3) promote the appointment of practicing lawyers; and (4) expand the Research Clerk System.²² For example, since district or high courts rarely use research clerks, the JSRC suggested expanding the research clerk system to recruit from outside the courts in order to provide recruits with invaluable judiciary work experience.²³

2. Reexamination of Procedures for Appointment of Judges

The JSRC sought to create a consultation panel for nominating lower court judges in order to restructure and introduce a more equitable nomination and appointment system for judicial officers.²⁴

3. Reexamination of the Personnel System for Judges

The JSRC wanted to: (1) introduce a mechanism that will better ensure transparency and objectivity of personnel evaluation that serves as the basis for the personnel management in courts; and (2) establish a corresponding equitable system for managing judge salaries and compensation.²⁵

4. Popular Participation in the Management of the Courts

In order to increase citizen participation in the management and accountability of judicial institutions, the JSRC recommended an expansion of the role of citizen volunteers in family court councils and the district court councils.²⁶ For example, today's

22. *Id.* See Chapter III Part 5 Reform of the Judge System.

23. *Id.* See Chapter III Part 5 (1) (3) Expansion of the Research Clerk System at the Courts.

24. *Id.* See Chapter III Part 5 (2) Reexamination of Procedures for Appointment of Judges.

25. *Id.* See Chapter III Part 5 (3) Reexamination of the Personnel System for Judges (Securing Transparency, Objectivity).

26. *Id.* See Chapter III Part 5 (4) Popular Participation in the Management of the Courts.

family court relies on an independent council to assess the proper and equitable management of the court system. While such council members included employees of local public institutions and those endowed with special skills and knowledge, the JSRC suggests such a council system should be adopted in other judicial institutions, including regional district courts. People's views and outside perspectives, according to the JSRC, should be reflected more broadly in the management of the court system.²⁷

5. Appointment of Supreme Court Justices

Similar to the nomination and appointment of judicial officers in Japanese courts, the JSRC also recommended the establishment of appropriate measures for appointing jurists in the Japanese Supreme Court. It argued that the new system of appointment must be installed in order to: (1) ensure more transparency and objectivity in their appointment; and to (2) increase the effectiveness of the system for popular review by the Japanese citizenry.²⁸

6. Mutual Exchange with the Legal Profession

In order to mitigate the divisive nature of Japan's legal landscape, the JSRC suggested the promotion of a mutual exchange of personnel from professions. They include bureaucratic judges in the judiciary, public prosecutors in the Ministry of Justice, practicing lawyers in the Japanese Federation of Bar Associations (JFBA), and legal scholars.²⁹

These JSRC recommendations were seen as ground-breaking, despite the fact that the proposal to eliminate the Special Assistant Judge System and the expansion of the Research Clerk System in courts has since then largely failed. Nonetheless, other recommendations were implemented, including the procedure to diversify the backgrounds of judicial nominees and provide existent assistant judges varied legal experiences. Similarly, a JSRC proposal was implemented to recruit and identify judicial candidates from the rank of practicing lawyers.

In accordance with the fourth recommendation to increase citizen participation in court management, the district court councils

27. *Id.*

28. *Id.* See Chapter III Part 5 (5) With Regard to How Supreme Court Justices Should be Appointed, etc.

29. *Id.* See Chapter III Part 6 Mutual Exchanges Among Legal Professionals.

were set up and a group of citizens from local communities were asked to join the independent councils. The council's court meetings have increased, but a selection process of the members is not clear and their discussions do not have any binding effects to the courts. Therefore, the reform objectives to reflect the people's will in court management and to strengthen the justice system's popular base have only been partially met. Recommendations regarding the appointment of Supreme Court Justices (5) and implementation of mechanisms to promote mutual exchange of legal professions (6) were hardly put into practice. We will move on to consider the recommendations on reexamination of the judge appointment procedures (2) and the personnel system for judges (3).

C. Birth of the Lower Court Judges Nomination Consultation Commission

Based on the JSRC recommendations, the Lower Court Judges Nomination Consultation Commission (hereinafter JNCC) was established in 2003 based on a Supreme Court rule.³⁰ The purpose was to introduce transparency into the judicial selection process and to reflect the views and opinions of the general citizenry in the nomination process.

The JNCC is composed of eleven members: two judges, one public prosecutor, two attorneys and six lay persons. It has eight regional committees nationwide, of which seven are composed of five members: three legal professionals and two lay persons.³¹ The last committee in Tokyo has ten members with the same proportion of professional and lay participants.³²

Upon consultation with the Supreme Court, the JNCC collects information on individual candidates from the courts, judges, public prosecutors, attorneys and its regional committees. The JNCC decides whether or not each applicant is "adequate" or "inadequate" by a majority vote and sends its final recommendation

30. See the outline of the JNCC in Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HOUSHAKAIGAKU [SOCIOLOGY OF LAW], 128 (2007); Takayuki Ii, *Nihon ni Okeru Saibankan Sennin Seido no Seitei: Merit Selection no Keijyu to Henyou* [Repositioning Japanese Judicial Selection System: Succession and Acculturation of the American Merit Selection], 8 AOMORI L. & POL. SCI. REV., 8, 62 (2007).

31. Ii, *supra* note 2, at 94.

32. *Id.*

to the Court.³³

The efficacy of JNCC's recommendations, however, is still debated. It is true that the judicial nomination process has become clearer than before. While non-lawyers represent the majority of the JNCC members, nonlawyers also include one former Supreme Court Justice (Chair) and two law professors. All candidates seeking judicial appointment or reappointment are subject to the consultation process, while new LTRI graduates are pre-selected by the court before formally seeking appointment. The JNCC and its regional committees are tasked with gathering information, but they have never directly interviewed individual applicants. And while the JNCC is independent from the Supreme Court, its institutional function is nearly embedded within the court's nominating process, and its decision-making procedure is subject to be influenced by the court. This situation is brought about by the fact that materials used for selection considerations consist of reports produced by the LTRI instructors, applicants' summarized evaluations of past ten years by the chief judge of the candidate's court, and evaluations based on interviews conducted by the judges in charge of the General Secretariat of the Supreme Court. In other words, all evaluation materials are created and supplied by officers who were affiliated members of the Japanese judiciary.

Recommendations of the JNCC from the Year 2003 to 2011 are shown on the following table. All JNCC recommendations have been confirmed in the Supreme Court. Comparing before and after the establishment of the JNCC, the number of non-nominees is greater in the latter. It is difficult to interpret this growing number of rejections, but it is in general becoming harder to take up judicial appointments.

33. *Ii, supra* note 2, at 104.

Table: Recommendations of the Lower Court Judges Nomination Consultation Commission from the Year 2003 to 2011: ○ suitable, × not suitable for nomination

The Year	Nomination to Assistant Judges from the LTRI Graduates	Nomination to Judges from Assistant Judges and Judges	Nomination to Assistant Judges and Judges from Attorneys	Others (Returning Assistant Judges and Judges from Transferred Positions, etc.)
2003	○101 ×8	○175 ×6	○7 ×4	○48 ×1
2004	○108 ×7	○176 ×4	○2 ×2	—
2005	○124 ×9	○186 ×4	○7 ×1	○19
2006	○115 ×8	○190 ×4	○3 ×2	○27
2007	○118 ×7	○203 ×4	○6 ×6	○22
2008	○99 ×4	○162 ×4	○8 ×3	○22
2009	○106 ×1	○186 ×3	○1 ×2	○13
2010	○102 ×2	○188 ×2	○5 ×4	○17
2011	○102 ×5	○194 ×4	○5 ×4	○19

Source: Summarized minutes of the JNCC.

D. Judicial Personnel Evaluation

The system of judicial personnel evaluation was adopted by a Supreme Court rule in 2004.³⁴ Nonetheless, the evaluation result was said to serve as the basis only for the reappointment considerations, not for the purpose of facilitating the equitable personnel management of the judiciary.

The appropriate evaluator for the personnel process was stipulated to be the chief judges of each court, although final personnel decisions reside in the judicial conference of the Supreme Court. Due care also must be paid to the external and independent views from outside of the courts. The courts excluding the Supreme Court receive a variety of objective views and performative evaluations of judicial candidates from a variety of individuals including practicing attorneys, but there is no telling if the final

34. See Takayuki Ii, *Saibankan Hyouka Seido no Seibi Katei to Shin Seido no Kentou* [Process of the Establishment of Judicial Evaluation System and Consideration in the New System], 4 SHIHOU KAIKAKU CYOUSASHITSU HOU [RESEARCH OFFICE FOR JUDICIAL REFORM REVIEW], 99 (2004).

personnel evaluation submitted by the chief judge will reflect or incorporate these views and concerns.

The evaluation results of the personnel process are disclosed to individual judges; however, it appears that judicial candidates will request disclosure before final personnel decisions are made. While the complaint procedure is stipulated in the new rule and individual judges are allowed to make a complaint about evaluations, such a complaint is treated as a mere individual opinion in the entire personnel process. The total number of complaints and requests for evaluation disclosure have not been made public. Some judges who requested disclosure may worry that even positive evaluations have little impact on the final outcome due to the absence of both transparency and effective redress procedures in the personnel process.

IV. Overall Impact on the Japanese Judiciary

The establishment of the JNCC in 2003 appeared to have introduced the system of merit selection of judges for the second time since the end of WWII.³⁵ Screening by the JNCC for the initial appointment and reappointment (instead of retention election) in many ways may resemble the judicial appointment method used in the U.S. state judicial system with merit selection. However, the appointment procedure of the lower court judges remains virtually unchanged. Contrary to the concept of the separation of powers between the Cabinet and the Supreme Court, in practice, the Court continues to maintain exclusive authority over the appointment of lower court judges, which then weakens the independent authority bestowed upon the JNCC. As a result, the JNCC recommendation on the appointment and reappointment of judges is almost identical to the nomination by the Supreme Court, and the appointment by the Japanese Cabinet.

Rulemaking for the judicial personnel evaluation in 2004 is seen as the formulation of what is called an open secret of the former informal practice of the personnel process. However, the result of personnel evaluation is for the purpose of judicial reappointment and has virtually no impact on equitable personnel management of the judiciary, contrary to the original intentions of the JSRC.

The JSRC's reforms on the system of appointment and

35. *Ii, supra* note 2, at 105.

personnel evaluation of judges tried to secure a steady supply of high-quality judges in response to public needs in order for them to carry out duties with judicial independence. In order to fulfill this end, the JSRC suggested proposals to introduce a transparent recruitment practice in pre-screening assistant judges from the rank of new LTRI graduates. It also recommended a new set of clearly delineated standards of evaluation by the JNCC, a new appointment procedure for the Supreme Court Justices, and a clear judicial personnel management system (e.g., the equitable nationwide rotation of judges at an interval of three years and appropriate acceleration of compensation for judges after twenty years of services).

Do these unclear practices reflect the unique nature of Japan's judges and court system? John Haley points out that two of the most significant features of the Japanese judiciary are its extraordinary record of integrity and its equally remarkable record of political independence.³⁶ On the other hand, Daniel H. Foote proposed that the ideology of "the nameless faceless judiciary" prevails in Japan, which attaches its importance to the uniformity of judiciary as a whole rather than independence of respective individual judges.³⁷ Then, should judicial independence and the unique qualities of individual judges be abandoned and sacrificed in exchange for supporting the long-standing judicial status quo with a seemingly functional Japanese court management system? This is a critical question that still needs an answer.

V. Conclusion

As we have seen, significant reforms of the judicial system proposed by the JSRC in the early 21st century could have established an important mechanism to introduce greater transparency and accountability into the closed nature of the judicial system and eliminated the *de facto* monopoly of judicial authority. Unfortunately, many JSRC proposals were systematically altered or removed in the process of rule-making and implementation. And as

36. See Haley, John O. (2008), *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 100 (Daniel H. Foote ed., 2008).

37. See DANIEL H. FOOTE, NA MO NAI KAO MO NAI SHIHOU: NIHON NO SAIBAN WA KAWARU NOKA [FACELESS NAMELESS JUDICIARY: WILL JAPANESE JUDICIARY CHANGE?] (2007).

a result, there remains virtually an unchanged system of institutional authority wielded by the Supreme Court and the judiciary as a whole.

The closed nature of the personnel process and the institutional structure of the judiciary failed to establish the separation of powers and a mechanism necessary to create an oversight system of checks and balances among different branches of the Japanese government.³⁸ The failure of effective judicial reforms in the judicial system led to the persistence of arbitrary judicial personnel management and the ideology of "the nameless faceless judiciary."

Recently, however, there have been some signs of changes initiated by some progressive jurists, although such changes have hardly addressed the necessity for a fundamental restructuring of the judge system. Nevertheless, a few active Supreme Court Justices have emerged in recent years, e.g., Shigeo Takii and Tokuji Izumi, whose rulings have injected new perspectives into previous traditional and conservative legal rulings.³⁹ Consequently, public attention to court rulings has been growing, especially after the introduction of the *Saiban-in* trial in 2009, in which three professional judges and six lay persons sit and adjudicate serious and violent criminal cases collaboratively.

One possible future scenario is that the initiation of further reforms on judicial appointment, evaluation systems, and personnel processes, as well as the new mechanism to relax judicial personnel management control by the Supreme Court can lead to an increased independence of individual judges in Japan. An alternative scenario is that such efforts to reform the judicial system may be largely meaningless, as evidenced by the failure to implement many significant proposals suggested by the JSRC in 2001. In either case,

38. Even the change of political power in 2009 from the Liberal Democratic Party (LDP) to Democratic Party of Japan (DPJ) did not seem to affect the way of judge appointment and judicial review.

39. See generally SHIGEO TAKII, SAIKOU SAIBANSHO WA KAWATTA KA: ICHI SAIBANKAN NO JIKO KENSHOU [HAS THE SUPREME COURT CHANGED? SELF-VERIFICATION BY ONE JUDGE] (2009). For example, the Supreme Court issued its ruling in 2005 that supported the Tokyo Metropolitan Government's decision to bar a South Korean civil servant from taking a managerial promotion examination. Both Justices Izumi and Takii opposed the majority decision, stating that the Japanese government never set any limits on jobs that resident aliens can hold and thus the Tokyo Metropolitan government's decision was irrational. See *Promotion Just for Japanese: Supreme Court: South Korean Civil Servant's Suit Fails*, JAPAN TIMES, Jan. 27, 2005, available at <http://www.japantimes.co.jp/text/nn20050127a1.html>.

we must stand face to face with the "demon" of the closed nature of the Japanese judiciary, the power and influence of which has the potential to penetrate into the implementation of the reform process in the future.