

mation—and the existence of JUSEK (the lawyers' professional organization including judges sector) and so on, perform controlling function over arbitrary judicial administration. Thus the Swedish system gives us a very useful model for improving our present judicial administration. My book "Suēden no shihō" (Justice in Sweden), Tokyo, 1987 deals with these problems in detail.

I admit the above is too lengthy a note. But I firmly believe it is important for a true understanding of Japanese procedural system in action. No realistic thinker will deny that judges' attitude to conciliation have implicitly been influenced greatly by the General Secretariat's position on conciliation.

後 記

本稿は1997年8月にルンド大学で開催された北欧訴訟法学会 (Nordisk förening för processrätt) の会議において私が行った報告の原稿である。実は当初他の原稿 (翻訳) を提出することを編集担当にお約束していたのだが、それを延期しなければならぬ緊急の事情が生じたので、代わりに本稿を掲載させていただくことにした次第である。英文のチェックについては例によって伊藤和子弁護士および大田武氏お二方のご高配を賜わった (本誌前号12頁など参照)。記して心からの謝意を表す。(1998年5月)

the justices may not be qualified lawyers (art. 41 of the Court Law.)). To make matters worse, there is no professional organisation to protect judges' interest. As a result, judges' actual status today is much weaker than it was under the old system, since they enjoyed tenure until retirement age at that time. The Japan Federation of the Bar Associations and other voluntary lawyers groups (whose members are attorneys and legal scholars) have strongly criticised judicial administration of the Supreme Court without success.

It is nearly impossible to change art. 89 (1) of the Constitution, because amendments to the Constitution have been regarded as an "untouchable matter" in Japan, fearing they would cause the utmost serious national, political turmoil. For the past nearly a half century since its promulgation, the Japanese Constitution has not changed even one word.

The central agency for Judicial administration "Domstolsverket (DV)" in Sweden could be considered a counterpart of the General Secretariat of the Supreme Court in Japan, although it is a separate agency from the court system. (I believe there was a heated discussion concerning the establishment of DV in 1975.) Although I am not well versed in recent discussion about DV, I would like to mention the following points regarding the two institutions: Efficient judicial administration is necessary for the benefit of the public as well as judges and other court personnel. But such administration must not infringe the judiciary as a whole and an individual judge's independence and integrity. Thus the activity of such an agency should be subject to some form of democratic control and the procedure for appointing judges should be regulated by law in detail and a complaint procedure should be provided. All things considered, DV and judicial administration in Sweden are more highly regarded than the Japanese counterparts in terms of system and function. The composition of "styrelsen" (the management board) of DV, the decision making procedure in "tjänsteförslagsnämnden för domstolsväsendet" (the advisory committee for appointment to judgeship) -together with free access to public infor-

independence and integrity were not fully guaranteed. However, under the new system an unexpected problem has gradually been emerging as the General Secretariat of the Supreme Court has come as powerful as the Justice Minister and his aides were under the old system. High ranking officers in the General Secretariat are usually selected among young assistant judges during earlier stages of their judicial career and they work there for most of the remainder of their career. The Chief Justice and other Supreme Court justices are often selected from such officers. The present Chief Justice and his predecessor had been the Secretary general of the Supreme Court.

Judges enjoy constitutional security of their status (art. 76 (3), 78, 80 (2) of the Constitution), but the Constitution also limits judges' term of office to 10 years (art.80 (1) of the Constitution). The provision is based on an American idea of judicial philosophy of democracy, common in many of the states, which does not involve career judiciary system. (Although all federal judges are appointed with life tenure (there is no mandatory retirement age), they are generally practicing attorneys with 15-20 year (or more) experience.)

All judges except for the Supreme Court justices are reappointed every 10 years by the Cabinet based on the list of candidates drawn up by the Supreme Court (art. 80 (1) of the Constitution). The Cabinet usually unconditionally follows the nomination of the Supreme Court. If a judge wants to be reappointed, but the Supreme Court does not include him in the nomination list, he has no chance to be reappointed to judgeship. There is no system for seeking outside review. Although the list is submitted in the name of the Supreme Court and approved by the conference of all the justices, it is said that the General Secretariat prepares the list and justices who appointed from the judiciary (most of them are former high ranking officers of the General Secretariat) substantially influence the decision, because justices coming from outside the judiciary do not know much about such matters. (There are Chief Justice and 14 associate justices on the Japanese Supreme Court. Customarily five or six are selected from the judiciary, four or five from the bar and five from public prosecutors, law professors and others. Five of

Appendix A : Number of Judges, public prosecutors and attorneys

Judges(as at 4/1996)	2879 (including 665 assistant judges and 806 summary court judges—the latter is not required to be a qualified lawyer) *
Attorney-turned judges (excluding Justices of the Supreme Court as at 4/1997)	28**
Public prosecutors (as at 6/1996)	2127 (including 919 vice public prosecutors—they are not qualified lawyers)
Attorneys (as at 7/1997)	16405

* For qualified lawyers, see Kaneyoshi Hagiwara, *The Role of Lawyers in Japanese Society against the Background of Japanese Cultural Traditions*, SvJT 1992, p.244. Because of different retirement ages (full judges-65 years and summary court judges-70 years), some retired full judges want to continue as summary court judges although it is the lowest rank of judgeship. It is not rare for a former chief judge of the district court to work as a summary court judge.

** The figure only shows persons who were appointed based on the 1991 agreement, and does not include those who were appointed prior to the agreement or those who were appointed subsequent to but not based on the agreement.

Appendix B : An extract from Kaneyoshi Hagiwara, *Conciliation Procedure in Japanese and Swedish Courts*, in "Festschrift till Per Olof Bolding", Stockholm : Juristförlaget, 1992.

The personnel management of judges and other judicial administration responsibilities are handled by the Supreme Court. The Supreme Court is not only the highest appellate court but also has the power of judicial administration which used to belong to the Minister of Justice under the old Constitution. An overwhelmingly majority of judges welcomed this reform, because they felt that under the old system judges'

important to distinguish what parts can be transplanted, and that is not an easy task.

What should we proceduralists do in this global age which will inevitably lead to a necessity to harmonize or unify procedural laws? Professor Lindblom has recently written a remarkable article entitled "Rättssfärernas harmoni-Om arbetet på en enhetlig europeisk processrätt".⁽¹⁾ His paper is a good example of the endeavours of proceduralists in this age.

Japan does not belong to the EU and, moreover, it is a faraway country. However, distances mean nothing today. With this in mind, I shall endeavour to continue my comparative studies in the field of procedural law.

Note :

- (1) SvJT 1996 pp. 793 ff. See also his paper, Integrera mera, SvJT 1977 pp. 307 ff.

Point (3) is expected to greatly ease the burden of the Supreme Court. It reminds me of the 1971 Swedish reform on appeals to the Supreme Court (Högstodomstolen). As I said before, the working group suggested to limit the right to appeal for the second instance but was forced to give up the idea after meeting with strong opposition.

Point (4) resembles the Swedish FT-mål. The procedure applies to cases in which the claim value does not exceed ¥300,000. These proceedings anticipate a conclusion in one session and formal appeals are not permitted. A judge can render a decision for an installment settlement (maximum 3 years) and eventually release a debtor from interest in arrears.

Notes :

- (1) For a general explanation of the legislative process in Japan, see Hattori/Henderson, *op. cit.* (note 3 (5) *supra*), pp. 1-22-23 and literature cited therein.
- (2) See Hagiwara, *op. cit.* (note 3 (1) *supra*), pp. 181 ff.
- (3) The rulemaking power of the Supreme Court is granted by the Constitution (art. 77). This is a unique system adopted from Anglo-American law. Dando, *op. cit.* (note 3 (6) *supra*), p. 44, Hattori/Henderson, *op. cit.* (note 3 (5) *supra*), p. 3-20.
- (4) Hagiwara, *op. cit.* (note 3 (1) *supra*), pp. 187 ff.

5. Conclusion.

I recall a famous proceduralist in Japan once said that, compared to substantive laws, procedural laws have a technical nature and that is why it is quite easy to transplant in another country. I admit that there is some truth in what he said. However, some parts of procedural law are deeply rooted in the nation's history and culture so it is

- (3) Limits appeals to Supreme Court (introduces a kind of certiorari (prövningstillstånd) ; and
- (4) Introduces a special small claims procedure.

I should like to add a few words with respect to each of the above points.

Point (1) is the most serious matter discussed during the legislative process. One of the main reasons for the new legislation was to eliminate an infamous and pervaded practice called “Benron Ken Wakai” (conference for pleading and conciliation) ; a practice invented primarily for the purpose of easing the burden of the judges. I will not describe this practice here in detail because I have already written a paper on the subject for Scandinavian readers.⁽⁴⁾ However, even with the new Code, it will be extremely difficult to eliminate the practice without rooting out and rectifying the conditions which caused it to be born. In this respect, an eminent retired judge (former President of the High Court) recently expressed an opinion that without increasing the number of judges drastically, the new Code will not function well. I am inclined to agree with him.

Nevertheless, it can be said that the new Code is a step in the right direction because it contains some provisions similar to RB 42 kap., amended by lag 1987 : 448.

Point (2) does not appear to have been made strong enough. Under the new Code, parties to a suit are given the right to issue an interrogatory to the other party. However, the effect of this right is rather weak because the other party is not compelled to make a response, albeit a refusal to respond can be construed as a negative evidential fact. To what extent this new device functions will depend on how tactically attorneys apply it.

performance car leaving aside the matter of constructing the road on which it can be smoothly driven.

In any event, the legislative work was energetically pursued and, to be fair, it had a bright side which had been lacking in previous legislative work. From the early stage, the Justice Ministry solicited the opinions of various associations and interested persons, including not only the bar associations and faculties of law but also trade unions and civic groups, on matters concerning legislative work. This was similar to the Swedish "remiss". As a result, even associations which were skeptical of the effect of a new Code willingly submitted opinions and a draft of the new Code was finally prepared based on a study of the material obtained through such remiss like proceedings. It is often said that "a legislation is a product of compromise" and this would appear to be especially true with the new Code. The old Code was written in a literary style. The new Code is set out in colloquial style and a large part of it is simply an alteration of style with no change in meaning. In particular, subjects controversial to academic lawyers were left untouched. As a result, despite its new look, the new Code contains very few novelties.

One more thing I should like to mention is that certain provisions in the old Code have been transferred or relegated to the Supreme Court Rules of Civil Procedure. As a result, the new Code contains a total of 400 articles (excluding the supplementary provisions) while the Supreme Court Rules has 240 articles (also excluding the supplementary provisions).⁽³⁾

The following are said to be the focal points of the new Code :

- (1) Provides detailed and effective regulations on preparatory proceedings ;
- (2) Widens and strengthens evidence collection by parties ;

arbitrator but in Japan it is normally prohibited.

- (11) The Stockholm Chamber of Commerce, *Arbitration in Sweden*, 2nd ed., 1984 and Lars Heuman, *Current Issues in Swedish Arbitration*, Stockholm: Juristförlaget, 1991, Deventer: Kluwer, 1990, have all greatly contributed to Swedish Arbitration Law becoming well known in Japan.
- (12) In connection with the new legislative work, scholars and experts in this field are eagerly studying foreign arbitration laws. I, myself, translated a draft of the new Swedish Arbitration Act (SOU 1994: 81) and made some comments on it. For English literature of this draft, see the draft of the new Swedish Arbitration Act (attached to SOU 1994: 81) and Bengt Lindell. *Civil Procedure in Sweden*, the Hague. London. Boston: Kluwer, 1996, pp. 249 ff.

4. A brief description and critical observation of the new Japanese Code of Civil Procedure.

The new Code of Civil Procedure was promulgated on June 26, 1996 and will come into force on January 1, 1998. (For some reason, the official date of enforcement has not yet been decided but it is an open secret).

Legislative work on the new Code of Civil Procedure was suddenly commenced in 1990, to the surprise of a majority of lawyers.⁽¹⁾ Almost all lawyers had recognized that the practice under the present Code did not function well and something had to be done to reform the practice. However, Bar Associations and most lawyers considered that the most important thing to be done was to increase the number of judges and to institute certain other measures which were referred to as "Shiho Kaikaku" (Judicial Administration Reform).⁽²⁾ I, myself, was not happy about comprehensively reforming the present Code and criticized, metaphorically speaking, that the legislative work on the new Code was something akin to developing a high

- Luney, Jr., *The Judiciary : Its Organization and Status in the Parliamentary System*, in Perry R. Luney, Jr. and Kazuyuki Takahashi (eds.), *Japanese Constitutional Law*, Tokyo : University of Tokyo Press, 1993, p. 144. This article seems to be one of the best literatures dealing with the subject.
- (3) The tragedy of the judiciary in "Weimar Republic" reminds us of this. Although there were some judges who fought bravely for judicial independence, they were isolated cases and there did not exist a judicial culture to protect them.
 - (4) Most constitutional lawyers seem to have a negative attitude towards a jury system whose verdict binds the judges because Art. 76 (3) of the Japanese Constitution provides "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws."
 - (5) Takaaki Hattori/Dan Fenno Henderson (eds.), *Civil Procedure in Japan*, New York : Matthew Bender, 1983, p. 8-8.
 - (6) Shigemitsu Dando, *Japanese Law of Criminal Procedure* (trans. by B.J. Geroge, Jr.) N. J. : South Hackensack, 1965, p. 415.
 - (7) Hannu Tapani Klami, *Inadmissible? From legal evaluation of Evidence to Free Proof. A Case Study*, Vol. 22 (1994) *Quaderni camerti di studi romanistici* (International Survey of Roman Law) pp. 87 ff. This paper has been translated into Japanese by me. *Kanagawa Hogaku* (Kanagawa University Law Review) Vol. 30 pp. 1 ff. (1995).
 - (8) See Christian Diesen, *Lekmän som domare*, Stockholm : Juristförlaget, 1996, p. 383.
 - (9) Setsuo Miyazawa (trans. Frank G. Bennet Jr. with John O. Haley), *Policing in Japan. A study on Making Crime*, Albany : State University of New York Press, 1992, pp. 21-2, 161.
 - (10) In Sweden, arbitration is too popular and therefore many important disputes in business law often do not go to the judicial procedure and it is feared that this tendency may weaken legal security in the field of business law. See SOU 1994 : 81 *Ny lag om skiljeförfarende*. In relation to this matter, one main difference which should be noticed is that in Sweden it is quite common for a judge to work as an

For example, the Construction Business Law provides that there is a central arbitration committee in Tokyo and a local committee in each prefecture. A committee normally consists of three arbitrators; a lawyer who sits as a chairperson, an expert in administrative matters related to the construction business and a civil engineer.

The second is the emergence of arbitration institutions annexed to bar associations. This is a unique institution which originated some years ago in one of the Tokyo Bar Associations. (Under the Japan Federation of Bar Associations, there are 52 local bar associations; in principle, one in each prefecture with the exceptions being Tokyo which has 3 and Hokkaido which has 4).

These arbitration institution proceedings involve a sort of combination of legal advice, compromise, mediation and arbitration. In most cases, there are no arbitration agreements beforehand and the parties are advised to make one during the course of negotiations to reach a voluntary settlement. After the arbitration agreement has been made, the dispute is eventually resolved by mediation or arbitration.

At present, 10 local bar associations have established such institutions and more are expected to follow suit.

Notes :

- (1) Kaneyoshi Hagiwara, Conciliation Procedure in Japanese and Swedish courts, in "Festschrift till Par Olof Bolding", Stockholm: Juristförlaget, 1992.
- (2) Professor Luney states "Judicial independence is threatened by the Supreme Court's bureaucratic control over the promotion and appointment process. The Supreme Court is subject to political pressure because its justices are appointed by the Cabinet and the number of lower court judges are controlled by the Diet." Perry R.

videotaped. Therefore, it is very questionable whether the suspect's right to silence during investigation is being observed as required by law.⁽⁹⁾

(5) Issues concerning Arbitration Law (*skiljerättliga frågor*) :

Two specific issues are dealt with under this topic. However, rather than delving into such issues, I believe it would be of more interest to you if I presented a general description of arbitration in Japan.⁽¹⁰⁾

Arbitration is provided for in the old Code of Civil Procedure and the provisions have not been changed since enactment in 1890 which, in itself, evidences that the arbitration institution has not been very popular in Japan. The situation in Japan is therefore just the opposite of what it is in Sweden.⁽¹¹⁾ The new Code of Civil Procedure enacted last year will come into force next year but the part of the old Code concerning arbitration will remain unchanged for the time being. (Only the title of the Code has changed. It is now called, in English, the Law Concerning General Pressing Services and Arbitration).

The Justice Ministry appears set to commence legislative work on the new separate Code of Arbitration and a group of academic lawyers has already prepared a draft of a proposed new Code.⁽¹²⁾

Needless to say, arbitration agreements are widely used in international business transactions and disputes. In contrast, arbitration agreements have seldom been used in domestic contracts and disputes in Japan although the number of cases of such agreements being used is gradually increasing. In this respect, I should like to mention two phenomena.

The first is that certain special legislations concerning labour disputes and construction, etc., provide for arbitration institutions.

rejected reform and the courts of the first instance are still dominated by rather young judges. To make matters worse, a shortage of judges has resulted in most cases being heard by a single judge. This worries me very much because in the trial of the first instance fact finding is far more important than application of law and, by its nature, fact finding is not something that can be taught in legal education but a skill which can be acquired only through experience in life.⁽⁷⁾ Therefore, if it is not possible to hear cases by collegial court, it would be advisable to form a panel with a single judge and lay judges. In this sense, the Swedish criminal courts have a much better system. (see RB 1 : 3b)

Finally, I would like to emphasize that the combination of a single judge trial and a limitation or simplification of the appeal proceedings will pose a serious danger to legal security.⁽⁸⁾

(4) Suspects' and accuseds' right to remain silent (Misstänkt/
tilltalads rätt till tystnad i Nordisk rätt) :

Article 38 (1) of the Japanese Constitution protects suspects and accused persons from being compelled to testify against themselves and Article 319 of the Code of Criminal Procedure provides the same more extensively in detail. In other words, the right of the suspect or accused to remain silent is effectively protected by law and, at least in court, this right has been strictly observed.

However, does this hold true even during the investigation stages? There is data which would appear to shed some doubts. Almost all detained suspects make a confession but some withdraw it during trial claiming that it was not made voluntarily. Third parties, including defense lawyers, are not allowed to be present at the questioning of suspects and his statements are not accurately recorded or

court trials and conciliations. They are appointed by the court from among knowledgeable and experienced citizens.

In the family court, there are "Kaji Chotei Iin" (family court mediators) and "Katei Saibansho Sanyoin" (family court commissioners) and they are, respectively, counterparts of civil court mediators and judicial commissioners.

(3) Leave to Appeal for the second Instance (Prövningstillstånd i andra instans) :

This matter was discussed in the early stages of legislative work on the new Code of Civil Procedure. The working group of the subcommittee of the Legislative Commission of Inquiry on Civil Procedural Law suggested to limit the right to appeal for the second instance but was forced to give up the idea after meeting with strong opposition from the bar associations.

In Japan, the appeal structure is not the same for civil and criminal cases. In civil cases the appeal procedure is regarded as a continuation of the trial of the first instance (called "Zokushin").⁽⁵⁾ On the other hand, the appeal procedure in criminal cases is a review of the case based mainly on the evidence submitted in the trial of the first instance (called "Jigoshin").⁽⁶⁾

In either case, and especially in the latter, it is most important for the cases to be fully examined and tried at the court of the first instance so the judges there should be well experienced. This point was stressed at the time the new Code of Criminal Procedure came into force, no doubt influenced by the American idea of administration of justice. At that time, even some prestigious judges of the High Courts willingly transferred to the district courts.

However, the deep-rooted career judge system has stubbornly

citizens only through attorneys (while the situation in Sweden and other Scandinavian countries may be somewhat different from that in Japan). On the other hand, the attorneys can defend the citizens' rights and obtain justice for them only through the courts. In this way, the bench and bar are inseparable partners so the judiciary must have confidence in the bar and the bar in the judiciary. Without such mutual confidence, the confidence of the citizens cannot be gained and it follows that judicial independence and free legal profession will only be a castle in the air.

(2) **Lay Judges** (Lekmannadomare) :

Japan has neither a jury nor a lay judge system, although the matter is presently the subject of a heated discussion.

However, we did have a limited jury system at one time (1928-43) and, in a broad sense, we do have a kind of citizen's participation in criminal as well as civil justice. The jury verdict under the said system did not have binding effect on the judge and there is serious doubt as to whether the introduction of an Anglo-American style jury system is possible under the present Constitution.⁽⁴⁾

"Kensatsu Shinsakai" (the Inquest of Prosecution) is an organ that reviews, on request of the injured, the prosecutor's decision not to prosecute. The members of this organ are selected from among citizens who have voting rights. If, after review, the organ decides that the case should be prosecuted, it accordingly informs the prosecutor but the prosecutor is not bound to comply with such decision.

"Minji Chotei Iin" (civil court mediators) and "Shiho Iin" (judicial commissioners) are laymen and the former work as members of a mediation committee annexed to the courts (district courts and summary courts) and the latter work as a kind of advisors at summary

my paper dedicated to the late Professor Per Olf Bolding who was one of my oldest and best friends.⁽¹⁾ Several years have elapsed since then but as the situation today remains almost the same, I am attaching to the end of this report an extract of the relevant portion of my paper (pp. 185-7, note (7)) for your reference.

There has, however, been a slight change. Over the past several years, Japanese politics have altered drastically and the Liberal Democratic Party (LDP) which had been in power independently for over 40 years was, for a time, deposed. The LDP has now again returned to power but as a coalition government. Such a political atmosphere has inevitably exerted a certain influence over the selection of Supreme Court Justices. For example, two liberal minded practicing attorneys were recently appointed Supreme Court Justices. Needless to say, judicial independence does not function in a vacuum. Therefore, in my view, the present political situation is rather welcome for judicial independence.⁽²⁾ (In this respect, the independence of administrative authorities and similarities of administrative procedure with judicial procedure in Sweden have greatly contributed to the independence of judiciary because many judges work for a time in the administration.)

To guarantee the independence of the judiciary, I believe a judicial and administrative culture or, in other words, an atmosphere surrounding courts and judges, is extremely important. This would more or less apply to any country and especially to a group oriented society like Japan.⁽³⁾

Finally, I should like to mention that confidence of the citizens in the judiciary is the very source of its authority. The bar associations and lawyers obviously have more intimate contact with the citizens than the courts as the courts normally can communicate with the

(notarie). This judge was hearing a case which involved a difficult legal problem. He ordered relevant literature from a German bookstore and postponed judgment on the case until he had an opportunity to read it. (At the time, it must have taken several months). This incident has been related as a sort of touching episode but I would hesitate to take such a view unconditionally because it seems to me he had no consideration for the parties to the suit who were most probably waiting for a speedy judgment.

- (12) There was a movement in parliament to introduce the lay judge system in the Supreme Court (Högsta domstolen) and the Supreme Administrative Court (Regeringsrätten). See Thelin, *op. cit.*, p. 204.
- (13) The title in Japanese "Sueden no sanshin seido" published in 1996. It contains an interview with Docent Diesen and some essence of his study (later published as "Lekmän som domare", Stockholm: Juristförlaget, 1996). The judgments were translated by me.
- (14) There seems to be two main reasons for the jury oriented school. One is that Japan has experienced a kind of jury system for a short period before World War II (see note 3 (2) *infra*). The other is that the German type lay judge system was understood as being the typical one and misunderstood as a puppet manipulated by professional judges.
- (15) Another group of attorneys visited Denmark and studied Danish lay judges (dommaend) and jury system in April, this year (1997). I have heard that the group got great help especially from Professor Eva Smith.

3. Comments on the Conference Topics.

(1) Judicial Administration (Domstolsadministration) :

—Focussing upon Judicial Independence—

Since this topic is quite extensive, for the convenience of presentation I would like to focus on judicial independence which is the most important issue in the field of judicial administration.

I have expounded on the independence of the judiciary in Japan in

- ket informerar, September 1996 (Specialnummer). The latter includes Professor Kjell Å Modéer's very informative article entitled "Blott Sverige svenska jurister har..." Om rättshistoria och jämförande rättskulturforskning."
- (6) JO is an abbreviation for "Justitieombudsmannen, Riksdagens ombudsmän", and JK is an abbreviation for "Justitie kanslern" (a high ranking legal officer whose functions are similar to an Attorney-General).
- (7) Stieg Strömholm (ed.), *An Introduction to Swedish Law*, 2nd ed., Stockholm: Norstedts, 1988, p. 41.
- (8) SvJT 1997 pp. 405 ff. As far as I know, her view on the matter first appeared in her book, *Tvistemål*, Uppsala: Liber, 1990, p. 8. For a critical opinion of her view, see Lars Eklycke, Anm. av Ulla Jacobson, *Lagbok i straffprocess*. SvJT 1996 pp. 875 ff.
- (9) In the Japanese judiciary, it is generally regarded as useful for judges to have experience in dealing with both civil and criminal trials. A highly respected criminal judge (the late Mr. Shotaro Miyake), in his book "Saiban no sho" (A book for Judges and Judgments), Tokyo: Makino Shoten, 1942, stated that to be a good criminal judge, one should have sufficient experience with civil trials. *id.* pp. 133, 252. A friend of mine, who is an experienced judge, has told me that the opposite is also true.
- (10) Per Olof Ekelöf and Robert Boman, *Rättegång IV*, 6th ed., Stockholm: Norstedts, 1992 pp. 26 ff., Ekelöf (with Robert Boman), *Rättsmedeln*, 9th ed., Uppsala: Iustus, 1992, p. 52, Lars Welamson, *Rättegång VI*, 3rd ed., Stockholm: Norstedts, 1994, p. 85, Peter Fitger, *Norstedts laghandböcker Rättegångsbalken II 3*, Stockholm: Norstedts, pp. 35: 67-8.
- (11) For an outline of Japanese legal history, see Kaneyoshi Hagiwara, *The Role of Lawyers in Japanese Society against the Background of Japanese Cultural Traditions*, SvJT 1992, pp. 244 ff.

There is an interesting episode about a certain judge who later become a Justice of the Supreme Court, and who was famous for his scholastic knowledge on the German doctrine of civil procedure. Luckily, I had a chance to meet him once when I was a legal trainee

were examined for Japanese readers in my book "Sueden no Shiho" (Justice in Sweden), Tokyo : Kobundo, 1986.

- (2) RF is an abbreviation for "Regeringsformen" which is the first Swedish fundamental law. This kind of explanatory note is not necessary for the audience at the Conference but are being inserted for the convenience of foreign readers. The same shall apply hereinafter.
- (3) Lennart Lundquist, *Förvaltningen i det politisk systemet*, 2nd ed. Malmö, Studentlitteratur, 1981, p. 35, Hans Ragnemalm, *Förvaltningsprocessrättens grunder*, 7th ed. Stockholm : Juristförlaget, 1992, especially pp. 101-2, and the same, *Administrative Justice in Sweden*, Stockholm : Juristförlaget, 1991, pp. 53-4. I have translated and published a Japanese version of Ragnemalm's *Förvaltningsprocessrättens grunder*, 7th ed. (Tokyo : Shinzansha, 1996) The book also contains a translation of *Förvaltningslagen* (1986 : 223) and *Förvaltningsprocesslagen* (1971 : 291).
- (4) The Anglo-American system of appointment of judges is much better than a career system, particularly from the point of view of the judiciary's independence. However, it is difficult to realize such a system without changing many related systems. Perhaps the Norwegian system (which can be seen as a modification of the Anglo-American system, even though the system originated in Norway) would be a good model to pursue. Sweden seems have tried once to accomplish this goal (see SOU 1974 : 96) but with no succes.
Such endeavours have a long hisotry in Japan. Especially after World War II, the bar associations have continuously contended that the Anglo-American system should be adopted and even the judiciary has not been reluctant to have a certain number of judges from the ranks of attorneys. In 1991, the Supreme Court and Japan Federation of Bar Associations concluded an agreement to promote appointment of judges from among attorneys but for various reasons, only a few attorneys have become judges (see Appendix A).
- (5) See e. g. Krister Thelin, *Behöver domstolsväsendet reformera?* *Juridisk tidskrift (JT)* 1992-93. pp. 203 ff., and *Rättskultur och rättspolitik*—diskussion i Stockholm den 21 maj 1996, *Domstolsver-*

nämnd (män) system, is one evidence which manifests the historical continuity of RB. In the 1970-80's, this system has been strengthened to a great degree. In this sense, it is worthy to take up the matter separately from above (4).⁽¹²⁾

In Japan, today, participation by laymen in the judicial process is the subject of a heated discussion and recently the Supreme Court dispatched a judge to Sweden to study the nämnd (män) system and a study group of Tokyo based attorneys also visited here for the same purpose. The visit by the group of attorneys, in particular produced remarkable results and they authored a book concerning the Swedish nämnd (män) in action, which included stenographic recordings and judgments of two actual cases they had heard.⁽¹³⁾

Until recently, there were two different schools of thought among lawyers and citizens concerning participation of citizens in the judicial process; namely, "a jury oriented school" and "a lay judge oriented school" and the majority were proponents of the former. It should be mentioned here that the Swedish nämnd (män) system was not very well known at the time despite the books and papers I published on the subject. But the above mentioned book by the attorneys brought the matter to the attention of a much wider audience and, as a result, the number of people who now favour the introduction of a Swedish nämnd (män) like lay judge system is increasing remarkably.⁽¹⁴⁾⁽¹⁵⁾

Notes :

- (1) See especially SOU 1974: 96 Öppnare dommarbana, SOU 1987: Domarbanan Utbildning och meritvärdering, and Lotti Ryberg, Domarekarriären, Stockholm: Juristförlaget, 1988.

SOU 1974: 96 and related discussions (including remiss opinions)

law.

As I mentioned above, the present Code of Criminal Procedure in Japan was styled after the American idea of procedural law. Although in the field of civil procedure the fundamental structure has remained the same, the form of examination of witness has been drastically changed. We have adopted the Anglo-American like cross examination system in both civil and criminal trials and, in spite of many years of practice, it still does not function well. Against this background, the Swedish mixture is extremely interesting and informative to us Japanese lawyers.

(4) Historical Continuity :

RB is perhaps one of the rare procedural codes which retains old traditions going back to the thirteenth century. Its historical continuity is truly amazing to us when we consider it was only about a hundred years ago that Japan adopted a Western style legal system to revise the unequal treaties concluded with Western countries by the old Tokugawa Government and, naturally, procedural law formed a part of such a system. As a result, our prior legal history has lost all meaning in terms of administration and interpretation of law.⁽¹¹⁾

Because of Japan's completely different historical background, the historical continuity of RB is something to be envied by Japanese lawyers. Needless to say, the Japanese legal culture up to the end of the Tokugawa era may still retain a strong influence on the Japanese attitude towards law and courts. However, this is another matter.

(5) The Degree of Participation by Laymen in the Judicial Process :

Participation by laymen in the judicial process, namely the

the old Code which was styled after the German law. On the other hand, except for some revisions made under the influence of American procedural philosophy, the Code of Civil Procedure which is based on the German law remains fundamentally unchanged.

As a result of the above, familiarizing oneself with criminal procedural law has not been an easy task, especially for attorneys, and it could very well have a negative effect on the interests of defendants and suspects. To aggravate the situation, scholars of each law are completely independent. One specializing in civil procedure pays almost no attention to the rules of criminal procedure and its doctrine and the same is true in reverse with scholars specializing in criminal procedure.

The unified procedural rules adopted by Sweden are therefore extremely attractive. While it is almost impossible to completely change our present system, I believe at least in the field of law of evidence it should be possible to establish reasonably unified theory.

(3) Mixed Elements of the Continental and Anglo-American systems :

RB contains some Anglo-American elements particularly in the part which deals with Evidence (Part Three [Tredje Avdelningen Om bevisning]). In this respect, the point worthy of note is RB 36 : 17 which provides that the form of examination of a witness should in principle be cross-examination but prior thereto a witness should be asked to give a narrative type statement. This is a remarkable mixture of the Anglo-American and German (art. 396 of ZPO) methods of examination. The rule of the best evidence (principen om det bästa bevismaterialet-see, RB 35 : 8, 50 : 23, etc.)⁽¹⁰⁾ is another example which clearly shows this characteristic of Swedish procedural

would appear to hinge entirely on the personality of the individual judges.

(2) Unified Rules of Civil and Criminal Procedures :

The Swedish Code of Procedure contains rules governing civil as well as criminal cases. This is a unique legislation; perhaps except for the Finnish and Danish Codes of procedure, such a procedural legislation does not exist in any other Western country. How is such a system evaluated? As far as I know, most Swedish lawyers seem to be proud of it but there are some people with a critical view. In this respect, I should touch on the strong criticism voiced by Professor Jacobsson. She recently clarified in her paper, "Dags för skillsmässa mellan strffprocess och civilprocess" a detailed negative view on the unified procedural system adopted by RB.⁽⁸⁾

Although I have no desire to actively participate in this controversy, I should like to express my views (or to be exact my feelings) as a Japanese lawyer.

I feel the system has its merits; my evaluation evolves mainly from my experience as a judge and as an attorney. Judges are quite often transferred from a civil court to a criminal court, and vice versa.⁽⁹⁾ Also, in a small local court, judges cannot specialize in civil or criminal cases but must deal with both. Attorneys specializing in criminal cases are rare as they mostly rely on civil cases for their main sources of income and they only occasionally deal with criminal cases as a private or public defence counsel. In view of this, it would be very convenient for lawyers and judges if procedural rules were the same or as similar as possible for both civil and criminal cases.

After World War II, Japan's new Code of Criminal Procedure, based entirely on the American idea of procedural law, superseded

I consider it is a matter which should be thought out in earnest.

Although it is very difficult for a foreign observer like myself to accurately grasp the true situation in Sweden, it is my hope and belief that liberal access to public documents and a well functioning JO and JK⁽⁶⁾ and other institutions related to legal security (rättssäkerhet) will to a great degree guarantee the fairness and integrity of the judiciary and administration in Sweden.

In any event, I must say that the Swedish administrative system is difficult to understand for foreigners and therefore cannot be adopted without some risks. It is often said that the Swedish ombudsman is the most popular item exported from Sweden but, apart from the Nordic countries, the ombudsman in other countries can be said to be something different to that of Sweden.⁽⁷⁾

There is a recent tendency of the Supreme Court in Japan to dispatch some relatively young judges to the Justice Ministry as well as other government offices. Because these judges have to become prosecutors (namely administrators), this is called "Hanken Koryu" (personnel exchange between judges and prosecutors- "han" is short for hanji or judge, "ken" is short for kenji or prosecutor and "koryu" means exchange). It is not fully clear what the real intention of the Supreme Court is but opinion is divided as to its merits. Some legal scholars and attorneys are critical of such a system on the ground that the mentality of the judges will become administration oriented and eventually seriously harm the judiciary's integrity. Some of the judgments rendered by such judges after their return to the judiciary unfortunately seem to bear out this criticism. However, there are also some judges who seem to have acquired more insight and a critical mind from their experience in the administration.

In the final analysis, what effect "Hanken Koryu" will have

In my view, there are at least five main points which warrant attention :

- (1) Unique system of training and appointing judges ;
- (2) Unified rules for civil and criminal procedures ;
- (3) Mixed elements of Continental and Anglo-American systems ;
- (4) Historical continuity ; and
- (5) The degree of participation by laymen in the judicial process.

(1) Unique system of training and appointing judges :

Sweden has a career judge system like Germany, France and the other Continental law countries but it is very different in that before appointment as a full judge there is a long waiting or preparatory period during which most would-be full judges (assessorer and fiskaler) work in different fields of administration and others.⁽¹⁾ Swedish administrative authorities occupy a position of independence which closely resembles that of the court of law in the performance of its functions under the Constitution (RF 11 : 7)⁽²⁾ (As far as I know, such a unique system exists only in Sweden and Finland). Furthermore, administrative procedure in Sweden is very similar to judicial procedure.⁽³⁾ Therefore, if the system works well, would-be full judges will have the opportunity to acquire various useful knowledge and experience for judgeship without losing their judicial spirit. It is a rather open career judge system which is much better than the completely closed career system adopted by Germany and France.⁽⁴⁾

However, the system could turn into a sort of two edged sword. The worst scenario would be for prospective full judges to lose their judicial spirit and nurture a sense of identity with the administration which would eventually seriously impair the administration of justice. I know that this is a criticism that does exist, even in Sweden,⁽⁵⁾ and

* The manuscript of my report at the Conference of Nordic Association on procedural Law (Nordisk förening för proceesrätt) held on August 20-22, 1997 in Lund, Sweden.

- (1) "Procedural Law" can imply both a narrow and broad scope of application. For example, the Swedish Code of Civil and Criminal Procedure (Rättegångsbalken, hereafter referred to as RB) contains not only procedural rules but also some rules on the courts organization, public prosecutors and attorneys, etc., while the Japanese Code of Civil Procedure and Code of Criminal Procedure do not contain such rules. Such rules are separately provided in the Court Law, the Public Prosecutors Law and the Attorneys Law. The scope of procedural law in RB is broad while in the Japanese Codes it has a more narrow application. The Conference topics concern procedural law in a wide sence such as the independence of the judiciary and lay judges.

After the end of World War II, a new legal discipline called "SAIBAN HO" (Law on Judicial Administration) began to develop in Japan and now numerous faculties of law have a course on the subject. I, myself, teach it at the Faculty of Law, Kanagawa University and I also authored a book entitled "SAIBANHO NO KANGAEKATA" (Views on the Law on Judicial Administration). Although the contents of my book are not necessarily the same as the works of other scholars on the subject, this discipline deals mainly with contitutional provisions on the judiciary, judicial process in general, appointment and training of judges, leagal profession, leagal education and legal aid, partly overlapping with procedural law.

2. What are the characteristics of Swedish Procedual Law and judicial administration viewed from a Japanese perspective?

What I consider to be the special characteristics of Swedish procedural law and judicial administration might be somewhat different to the thoughts of Swedish or Scandinavian Lawyers. Be that as it may, I feel a frank exchange of opinions will serve to promote our mutual understanding.

論 說

Swedish Procedural Law viewed from a Japanese
Perspective*

Kaneyoshi Hagiwara

Contents :

1. Introduction.
2. What are the characteristics of Swedish Procedural Law and judicial administration viewed from a Japanese perspective?
3. Comments on the Conference topics.
4. A brief description and critical observation of the new Japanese Code of Civil Procedure.
5. Conclusion.

Appendix A : Number of Judges, public prosecutors and attorneys

Appendix B : An extract from Kaneyoshi Hagiwara, Conciliation Procedure in Japanese and Swedish Courts, in "Festschrift till Per Olof Bolding", Stockholm: Juristförbundet, 1992.

1. Introduction.

In this report, I would like to address three interrelated subjects ; namely (a) certain fundamental characteristics of Swedish procedural law and judicial administration⁽¹⁾ which, in my opinion, is of interest to Japanese lawyers ; (b) my personal view on the conference topics based on my comparative study of Swedish and Japanese procedural laws ; and (c) a brief description and critical observation of the new Japanese Code of Civil Procedure as compared to its Swedish counterpart. It would please me greatly if my report could contribute something useful or informative to the audience at the Conference.

Notes :