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The Japanese Judicial System Phenomenon as a Base to Conduct Western Comparative Legal Research

Introduction

The problem of the relation between the executive and the judiciary in the Polish judicial system is not an early one and was mostly part of the tense discussion between the Polish Ministry of Justice and the National Council of the Judiciary of Poland – constitutional organ safeguarding the independence of courts and judges.

It is necessary to point out at this moment, that in the Polish judiciary system there are three types of courts[1]: common courts, which judges civil and penal cases *sensu largo*; administrative courts, which judges the legal grounding of administrative acts, and military courts, which judges the penal cases of soldiers. Due to the widest cognizance to judge, common courts are the most numerous in Poland. Article 8 of the Common Courts System Act of July 27, 2001 (further as the CCSA) states, that court administrative activity includes reassurance of providing necessary financial, technological and organisational means for courts to perform their judicial tasks and providing a necessary course of inner tenure. As the reassurance of providing the necessary means is supervised by the Minister of Justice, supervision of the courts inner tenure course is split between the Chief Justice (which is called "internal supervision") and the Minister of Justice (which is called "external supervision")[2]. Even if article 9b of the CCSA forbids extending the supervision of court administrative activity on decisions, which are strictly judicial and independent from the executive power decisions, there are subjects where this prohibition is bypassed in favor of the executive.

The arguments of both sides were even judged by the Constitutional Tribunal of Poland[3] but this conflict has no direct influence on the people protecting

[1] Excluding extraordinary courts, which are: the Supreme Court of Poland, the Supreme Administrative Court of Poland and the Constitutional Tribunal of Poland.

[2] Article 9 of the CCSA.

[3] In the sentence of January 15, 2009 (case signature K 45/07) the Constitutional Tribunal of Poland judged that the supervision system of the Minister of Justice regulated in CCSA is in line

their rights in courts. However it has led to open political war, which threatens the authority of the Polish judiciary and in fact the stability of the Polish legal system.

This situation opens discussion for lawyers about the future and form of the judiciary system in Poland. Naturally, it is a motive to provide comparative research on judicial systems with foreign systems. As for many legal researchers, an adequate, natural choice for a European country would be a comparison to the judicial system of France or Germany excluding countries based on the common law system. With such comparative material, choosing the Japanese legal system for comparison seems to be an exotic one, especially in the cultural matter.

On the other hand, John O. Haley and Wiley B. Rutledge stated: *Japanese judges are among the most honest, politically independent and professionally competent in the world today. Organized as an autonomous national bureaucracy, the judiciary comprises a small, largely self-regulating cadre of elite legal professionals who enjoy with reason an extraordinarily high level of public trust. (…) Coupled with a jurisprudential approach that favors certainty and consistency, the Japanese judiciary is by nearly all accounts cautiously conservative. Yet paradoxically, judges play an activist role in the development of legal norms, filling lacunae left by legislative and administrative inaction. With less irony than may appear at first glance, they have also become a target of criticism for failure to participate more fully in Japanese governance through progressive judicial policy making*[4]. With such a review of the Japanese judiciary system, it is not wise to even try comparing and understanding the basis of this system, including the cultural aspect of Japanese people.

Beginning of the Modern Japanese Judiciary – The Constitution of the Empire of Japan of 1886

The modern era of Japan began with the rule of Emperor Mutsuhito, posthumously known as Emperor Meiji. During his leadership, which took place from 1867 to 1912, the Japanese Empire was remoulded from a technologically backwards, feudal domain, based on the rule of the samurai cast and the Tokugawa Shogunate to a modern constitutional monarchy based upon governance like that in Western countries. This period is called the Meiji Restoration and from a legal point of research, it implemented the Constitution of the Empire of Japan of 1889

with the Constitution of Poland. The Tribunal stated, that the supervision system needs to be clarified, but in general, the rule of separation and balance between the legislative, the executive and the judiciary powers regulated in article 10 unit 1 of the Constitution of Poland does not allow for complete separation of judiciary from the executive supervision.

[4] Haley, Rutledge 2002 : 1.

(further as the Imperial Constitution) based on the Prussian Constitution of 1850[5] – the first Japanese and Asian constitution.

With the cultural and political revolution of the Meiji Restoration came also a necessity to modernise the Japanese legal system. The Imperial Government chose to remold the domestic legal system based on French law. The French and British Empires were thought of as the greatest economic empires in the world at this time but the British common law system seemed to be far too complicated. After failed attempts to translate and directly implement French codes in the legal system, the Imperial Government invited French lawyer Georges Bousquet as a legal advisor. Bousquet arrived in Japan in 1872 and during his 4-year stay he created the French school of law, where Japanese lawyers studied aspects of French law[6]. In consequence, the early Japanese courts were judging cases based on the French or British law[7].

As mentioned earlier, instead of civil and penal law, which were based on French codes, the Imperial Constitution and judiciary system were based on a Prussian concept. The judiciary system was regulated in the 5th Chapter of the Imperial Constitution, "The Judicature". It was stated that the judicature was exercised by the Courts of Law according to law, in the name of the Emperor. The judges were appointed from among those who possessed proper qualifications and were guaranteed that they would not be deprived of their position, unless by way of a criminal sentence or disciplinary punishment. Trials and judgments of the Court were conducted publicly, with an exception if the case was prejudicial to peace and order or to the maintenance of public morality. The Imperial Constitution also regulated the special Court of Administrative Litigation, which had the sole cognizance to judge cases with aspects of illegal measures of the executive authorities. With the implementation of the Imperial Constitution, the Japanese judiciary was mostly influenced by German law. The Imperial Government invited German lawyer Otto Rudolph to prepare a project, a new law regulating court organisation that culminated with the implementation of the Court Organization Act of 1890[8]. In 1900 there were overall 303 imperial judiciary institutions: Cassation Bench (*Daishinin*), 7 Appeal Benches (*Kōsoin*), 99 Provincial Courts and 194 Magistrate Courts. The magistracy included 1,269 judges and their assistants, 422 prosecutors and their assistants and 3,363 lower tier officials[9].

The Imperial Constitution regulated, at first, accumulation of full power in the hands of the Emperor. Nevertheless the Japanese judiciary at this time was truly independent, which appeared in the case of the Ōtsu Incident on May 11 (O.S. April 29), 1891, a failed assassination attempt on Russian Crown Prince

[5] Suzuki, Karaś 2008: 83.
[6] Kość 2001: 78-79.
[7] Ibid: 83.
[8] Kość 2001: 83.
[9] Posner 1905: 48.

Nicholas. Nicholas was visiting foreign countries, which were or could potentially be under the cultural and economic influence of the Russian Empire. During his stay in Ōtsu, he was attacked and wounded by Sanzō Tsuda, an escorting policeman[10]. To avoid international scandal and war with the Russian Empire, the Imperial Government pressured the court, demanding the death penalty for the assassin. In response, Chief Justice of the Imperial Supreme Court of Japan, Kojima Iken said that the Constitution of the Empire of Japan guarantees the independence of the judiciary and the court would remain neutral judging only on the rules of Law and Penal Code even in the case of such a political and international matter. Eventually Sanzō Tsuda was found guilty and sentenced to life imprisonment, but he avoided the death penalty[11].

For Carl F. Goodman, implementation of the Western Legal System during the Meiji Restoration wasn't as good as it looked. Goodman states that the fundamental idea of the civil law or common law systems is the "Rule of Law", which carries with it the notion that the law has a life of its own and as such when it comes into place it must be obeyed. Both systems recognised that we are a country of laws and not of men. The law may, in some cases, be inequitable and even may appear ridiculous when applied to the facts of a particular case, but the law must nonetheless be followed. The "Rule of Law" also has at its root a respect for the "professionalism" of the law. Only those trained in the law are viewed as permitted to appear before the courts, to give legal advice or to serve as judges. The professionalism led to the new taxonomy of law categories: Rule of Professional Law, Rule of Political Law and Rule of Traditional Law. Following Ugo Mattei and his "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems", both the common law and civil law systems are placed firmly in the Professional Law camp because of their differentiation between the law on the one hand and politics, morality and religion on the other. Japanese law, however, is placed in the Traditional Law camp. At the time of the adoption of the Western Legal System, Japan had no legal professionals who could serve as either judges or lawyers. But Mattei noted that the comparatively small number of lawyers in Japan was offset by others such as mediators, conciliators, wise men and trusted seniors that could perform the same functions as those performed by lawyers in Western Professional Law systems. As for Traditional Law, society in Japan was a greater authority

[10] The motivations for Sanzō Tsuda's assassination attempt are not clear even today. Janusz Kutta in *Diaries of Nicholas II* mentioned the two most popular theories. The first one states that Sanzō Tsuda was in fact a religious fanatic, who was outraged by the bad behavior of the Crown Prince and his court in a temple. The second one states that Nicholas was flirting with the wife of a certain samurai, which outraged Sanzō. Nevertheless, Sanzō Tsuda testified during his trial that he thought that the Crown Prince was indeed a Russian spy, who was checking the Imperial defenses for the future war between Russia and Japan.

[11] Suzuki, Karaś 2008: 66.

by mediators than lawyers, adoption of Western Codes as a consequence of outside influence rather than indigenous change, the significance of homogeneity, group identity rather than individualism as a norm of society or the predominance of duties over rights. It doesn't mean that Traditional Law society do not have a law or legal institutions but the manner in which such institutions operate in such societies is fundamentally different from how they operate in Western/Professional law society. Carl F. Goodman stated at last that while Japanese law borrowed extensively from European Codes, the populous was unconcerned with this new legal order and the new rulers of Japan appear to have been unconcerned about the popular view of the law. It can be argued that there existed a fundamental disconnect between the new legal regime created by the Meiji oligarchs and interpreted by the Meiji courts and the realities of Japanese life in the cities and villages of Japan[12].

Nevertheless, the Meiji Constitution was written by the new government of Japan and presented to the Japanese people as a gift of the Emperor. Under the Constitution, power was supposed to reside in the Emperor and the institutions of civilian government were quite weak. Carl F. Goodman pointed out that one of the major shortcomings of the Meiji system was the limitation on the rights of the Japanese public rather than a limitation on the rights of the government. Although Article II of the Imperial Constitution was entitled Rights and Duties of Subjects, it really was a litany of duties rather than rights. Every right supposedly granted by the Constitution was in fact limited so that the government may, by legislative action or Imperial Order having the force of law, take away the supposed right. The Meiji reformers viewed the Western legal system they were adopting as a means of ordering all forms of interaction and a means by which the government could control all activities rather than a means of setting the populous free to order their own relations with the law as a fall back to cover provisions the parties had failed to provide for – and utilizing the law as a means of regulating government power. The Imperial Constitutions chapter regulating the Judicial Branch only strengthened this control[13].

Later the democratic elements of the Imperial Constitution, including the independence of the judiciary were gradually constricted. It began with the discussion about Tokyo University professor Minobe Tatsukichi's theory, that the Emperor, in light of the Imperial Constitution, is merely a public authority. Creating such a drastic theory in a country where the Emperor was in fact an incarnated god resulted in Minobe Tatsukichi resigning from his seat in the Imperial Parliament and work at Tokyo University. In the end, when Japan joined the Axis during World War II, all democratic elements of the Imperial Constitution were already constricted[14].

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[12] Goodman 2003: 20-24.

[13] Ibid: 28-29.

[14] Suzuki, Karaś 2008: 67-68.

Before the Second World War judges presented various even extreme political thoughts but it is supposed that they held them for themselves and avoided politics while making judgments. Nevertheless, the biggest problem of the pre-war Japanese judiciary was not political pressure or judges thoughts but administration supervision held by the Ministry of Justice over both judges and prosecutors. In consequence, the judiciary was identified as the same as the prosecution, which was criticised by attorneys, who saw such identification as improper. For judges themselves, the supervision of the Ministry of Justice cast doubt on their status, their lack of authority and was bound with the separation of the judiciary and prosecution postulate. In this situation, Supreme Court judges were lower in the hierarchy than the Minister of Justice and the prosecution had the decisive vote in appointing judges including the post of Chief Justice of the Supreme Court of Japan. This is why one of the first judiciary post-war reforms was gaining as much institutional autonomy as possible[15].

The Judiciary System in the Constitution of Japan of 1946

After the Second World War, the United States military authorities were determined to fundamentally change the Japanese Constitution. But before that, the Japanese themselves drafted several proposed constitutions, which were rejected, by the occupation authority as only a modification of the Meiji Constitution. The new constitution was drafted by Americans in six days and given to the Japanese who also commented on it and made some minor changes. Basically, the Japanese role was just to accept the new Constitution[16]. It is also said that Douglas MacArthur himself was involved in this process and thus some came to call the new Japanese Constitution the MacArthur Draft[17]. For the Judiciary Branch, it was the American drafters' intention to protect the rights of the Japanese people and to reinforce their own notions of a Rule of Law society[18].

With the new constitution full judiciary power was handed to the Supreme Court of Japan and in such inferior courts as are established by law. It became forbidden to establish any extraordinary tribunal or any organ or agency of the Executive handed with final judicial power. It guarantees to all judges independence in the exercise of their conscience and is bound only by the Constitution and the laws. Judges cannot be removed from their office except by public impeachment unless judicially declared mentally or physically incompetent to perform official

[15] Haley, Rutledge 2002: 15-19.
[16] Goodman 2003: 29-30.
[17] Suzuki, Karaś 2008: 71.
[18] Goodman 2003: 32.

duties. No disciplinary action against judges can be administered by any executive organ or agency. The Supreme Court became the court of last resort with power to determine the constitutionality of any law, order, regulation or official act. It was also vested with the rule-making power under which is determined the rules of procedure and of practice and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs, which extends over public prosecutors. The Supreme Court may delegate the power to make rules for inferior courts to such courts.

Under the Japanese Constitution of 1946, judges are appointed to hold office for a term of ten years with the privilege of reappointment. In case of the Supreme Court judges they are appointed and reviewed by the people at the first general election of members of the House of Representatives following their appointment and are reviewed again at the first general election of members of the House of Representatives after a lapse of ten years and in the same manner thereafter with the exception of Chief Judge, who is designated by the Cabinet and appointed by the Emperor. The judges of the inferior courts, however, are appointed by the Cabinet from a list of persons nominated by the Supreme Court. In the end, the judges of the inferior court are guaranteed to receive, at regular stated intervals, adequate compensation which cannot be decreased during their terms of office.

Japanese Courts Hierarchy

Japanese courts are organised in three tiers with the Supreme Court at the top, the High Court as an intermediate court and the District Court and Family Court as courts of the first instance[19]. Below the District Court, there are also the Summary Courts.

Summary Courts (*kan'i saibansho*) have jurisdiction over civil cases up to 900,000 yen[20] of disputed sum and minor criminal cases such as theft and embezzlement where a sentenced penalty differs only between fine and detention. Cases are heard by a single judge. Summary Court Judges do not need to have legal qualifications for this post so mostly court clerks, professional judges and public prosecutors who gained voluntary retirement age but who want to serve several years to gain mandatory retirement age are appointed for this post. Summary Court Judges are appointed *pro forma* by the council including Supreme Court of Japan judges or even General Prosecutor[21]. Right now there are 438 Summary Courts in Japan[22].

[19] Goodman 2003: 112.

[20] On June 6, 2016, according to the exchange rate of the National Bank of Poland it is about 31,994.10 PLN (3.5549 PLN for 100 JPY)

[21] Haley, Rutledge 2002: 2.

[22] The Supreme Court of Japan, *Overview of the Judicial System in Japan*.

District Courts (*chichō saibansho*) are main first instance courts in both civil or criminal cases and courts of appeal for Summary Courts civil cases. Usually, a single-judge or a three-judge panel presides over the trial. There are 50 District Courts functioning and 203 branches throughout the country[23].

Family Courts (*katei saibansho*) are specific, specialised courts in the matter of procedure and cases heard before them, which are domestic cases, hereditary cases and juvenile delinquency. Right now there are 50 Family Courts with 203 branches and 77 local offices of Family Courts[24] similar to District Courts. As Family Courts trials, similar to District Courts, are usually presided over by a single judge or three judge panel, most cases are solved with participation of counselors (*chōtei'in*) appointed by the General Secretariat of the Supreme Court from respected members of society or scientists, who usually do not have legal education, but sometimes they serve longer than most judges. With the exception of juvenile delinquency cases, hereditary cases or divisive domestic cases, Family Court procedure is based on mediation provided by counsellors and case parties to work out a settlement[25].

The third tier of courts in Japan are the 15 High Courts (*kōtō saibansho*) – 8 High Courts in Sapporo, Sendai, Tokyo, Nagoya, Osaka, Takamatsu, Hiroshima and Fukuoka; 6 branches in Akita, Kanazawa, Okayama, Matsue, Miyazaki and Naha and one High Court specialized in hearing intellectual property cases[26]. High Courts are serving an intermediate Court of Appeals, although High Courts have original jurisdiction of cases involving treason and certain Election Law cases. In appeals, parties may raise new issues and may introduce new evidence at the High Court level[27]. But High Courts are not the only Court of Appeals. From decisions, which were taken in Summary Courts, District Courts are serving as Court of Appeals. High Court is for them the Court of the third and final instance[28].

Finally, at the top of the court hierarchy, there is the Supreme Court of Japan. It consists of 15 judges and either sits on a Grand Bench containing all 15 judges or a Petty Bench consisting of a five-judge panel. The Supreme Court is a court of errors and the panels are designed to have expertise in specific areas of the law so that cases involving those areas are sent to the appropriate panel. Petty Benches handle most cases and it is estimated that the Grand Bench handles only a few cases each year. A Grand Bench is required for cases wherein the Court declares a law, regulation, executive order or administrative decision unconstitutional and in some cases where the appellant makes such an argument. In cases where the

[23] The Supreme Court of Japan, *Overview of the Judicial System in Japan.*
[24] Ibidem.
[25] Haley, Rutledge 2002: 2-3.
[26] The Supreme Court of Japan, *Overview of the Judicial System in Japan*.
[27] Goodman 2003: 112.
[28] Kość 2001: 147-148.

Court reverses a previous decision, a Grand Bench is also required. Decisions of the Supreme Court are by majority vote and dissenting Justices may write dissenting opinions. Lower court decisions are also by majority vote but as dissenting opinions are not written all such decisions appear as if unanimous. The Supreme Court exercise "judicial power" and accordingly it can only handle cases or controversies brought by parties with standing and which do not present a "political question". Since 1998 of the Civil Code, the Supreme Court serves also as Court of Appeals in certain constitutional cases and in cases involving certain alleged procedural errors as set out in the Code[29].

But John O. Haley and Wiley B. Rutledge suggest that such judiciary organisation isn't flawless. Japan's 1,393 career judges and 621 assistant judges are spread very thinly throughout the nation. Some of the branch court positions are not filled, but no district court has fewer than 7 judges. The number assigned to each court varies in relationship to the district caseload. Not surprisingly, the Tokyo District Court is the largest. A third of the Tokyo District Court judges are assigned to the criminal division and two-thirds to the civil division. With less than half the number of judges, the Osaka District Court is still Japan's second largest court. The two courts handle more than half of all civil and criminal cases. However, neither Tokyo nor Osaka has the highest rate of litigation per capita. That honor goes to the Oita District Court in Kyushu, along with Tottori in the southwestern part of Honshu. These two regions have long had the highest litigation rates in Japan and have as a consequence nearly twice the number of judges relative to the district's population as courts in districts with significantly less litigation per capita, particularly the Tohoku region in northeastern Honshu. Haley and Rutledge pointed out that in 1990 the Oita District Court had fourteen judges in a district of 1.24 million persons. The Sendai District Court in comparison had nineteen judges in a district of 2.25 million persons. The Tottori District Court had seven judges in a district of 616,000 persons, while the Fukushima District Court also had seven judges for a district of 2.1 million persons. Similarly, the number of judges assigned to branch district courts varies from 23 for the Hachioji branch of the Tokyo District Court to the 35 branch district courts without a permanently assigned judge and the 77 branches with only one judge. Eight years later in 1998, the numbers were essentially the same[30].

Nevertheless, we can assume that this problem is solving itself with the exception of Family Courts. Supreme Court's of Japan "Statistical Tables. Civil and Criminal Cases Before the Supreme Court, High Courts, District Courts and Summary Courts of Japan" – in regard to civil cases[31] we can observe a gradual decrease of

[29] Goodman 2003: 112-113.

[30] Haley, Rutledge 2002: 3.

[31] According to a note in *Statistical Tables. Civil and Criminal Cases Before the Supreme Court, High Courts, District Courts and Summary Courts of Japan* – the statistics for civil and domestic relations cases show the number of cases; those for criminal cases show the number of persons

pending cases. For example in Summary Courts in 2010, 518,925 civil cases were commenced, 554,371 cases have ended and 106,090 were left pending, while in Summary Courts in 2014, 337,884 civil cases were commenced, 336,659 cases have ended and 71,725 civil cases have been left pending. In District Courts for instance, in 2010, 258,330 civil cases have been commenced, 261,391 cases have ended and 129,668 cases have been left pending. But in 2014 only 167,055 civil cases have been commenced, 166,456 cases have ended and 103,932 civil cases have been left pending. But the biggest surprise goes with a statistical table of Family Courts civil cases. In 2010, 815,052 cases have been commenced, 815,412 cases have ended and 105,090 have been left pending. However in 2014, in Family Courts 910,648 civil cases have been commenced, 910,264 cases have ended and 122,054 cases have been left pending[32].

"The Mental Factor".

In order to provide comparative legal research, we cannot avoid including something that can be called "The Mental Factor". For this term, we have to include the philosophical and cultural grounding of certain social or national aspects of existence. In the case of legal research "The Mental Factor" is important if we assume that the Law on the highest, constitutional tier is an effect of the social agreement between citizens and its rulers. As for Japan, Antoni Kość states that from a formal point of view the Japanese law system is not different from the European law system but the biggest difference is in how this system works. In European countries, most disputes are solved in the frame of the law system, while in Japan most quarrels are solved outside of the legal system. To understand this phenomenon it is essential to understand not only law in books but also the law in action[33].

In the European law system "Law" is understood from the objective point of view (*ius obiectivum*) and subjective point of view (*ius subiectivum*). This means that "Law" is always protecting justified affairs of individuals. In Japan, "Law" (*ho* or *horitsu*) only means a set of legal rules, and because of the *ho* character's meaning, it is associated with court, justice and penalty. Justice was always executed by the ruling class, so for Japanese people the term "Law" had a far from positive meaning and was never linked with individual entitlements. The concept of subjective law (*kenri*) was artificially created in 1868 when Japanese lawyers didn't understand well enough the European spirit of law. With this meaning (Chinese

accused other than in summary proceedings before the summary courts; and those for juvenile cases show the number of juveniles. This is why I presented only statistics of civil cases in the article.

[32] The Supreme Court of Japan, *Statistical Tables. Civil and Criminal Cases Before the Supreme Court, High Courts, District Courts and Summary Courts of Japan.*

[33] Kość 2001: 171.

character *ken* means "strength" and *ri* means "affair") the average Japanese citizen doesn't associate *kenri* with its individual entitlement but rather with selfishness. Antoni Kość expressed the belief that even now after over 100 years of European Law reception, the average Japanese people don't associate law in acts concerning his or her individual entitlements[34].

In fact, the average Japanese "Law" as a means of state execution is rather "unwanted". Honest Japanese people will never "use" Law and won't see the protection of his individual affairs in court, because of the "shame" involved, which Western people don't understand. Defence of individual entitlements in civil courts not mentioning criminal cases is shameful for Japanese people. Mostly then, quarrels are dealt with through dialogue, which will take place as long as it's needed to achieve mutual reconciliation. The Japanese concept of "shame" is based on *giri* rules, moral duties. *Giri* is a particular obligation to another person in a way regulated by tradition "long ago". This "duty" varies depending on the situation and relation. For example, "duties" included as *giri* in the relation between parents and children, student and teacher or seller and buyer will vary. By accepting *giri* relation there is no mean of force execution of it from a person, who is obliged. The person entitled from *giri* must wait because the one obliged must willingly execute his obligation. If someone will not perform his *giri* obligation in the way expected by tradition and society, he or she will be presumed as unworthy of the honor. *Giri* duties are regulated not by the state but are sanctioned by honor. Someone who neglected his *giri* duty has "lost his face" in the eyes of society. The only shame is holding men from immoral behavior or breaking *giri* rules, which means that *giri* are a kind of moral constraint, manifesting itself as a consequence of immoral actions, a shame. *Giri* rules are a contradiction to the law in acts, but in fact, *giri* "regulates" relations between members of society and not relations between citizen and state[35].

The Existence of Separate Constitutional Court institution as a Research Example

By analysing differences between the Japanese Judicial system and the Western Judicial system, legal researchers may conduct discussions, which conclusions may benefit the Western Judicial system or even both systems. For example, is it truly necessary to maintain Constitutional Courts as separate and independent institutions rather than to give competence of judicial review to the highest court in the judicial hierarchy?

[34] Kość 2001: 172.
[35] Ibid: 174-179.

As mentioned earlier the Supreme Court of Japan not only hold the competence of the court of appeal from the High Courts of Japan verdicts but also is responsible for judicial administration and serves as "the Constitutional Court" with the sole competence of judicial review. Judicial review as one of the basic institutions of modern democratic systems allows for reviewing the constitutional validity of legislative acts. In most Western Countries judicial review competence is given to separate the Constitutional Courts analysing constitutionality of legal acts based on the basic right guaranteed by the Constitution. In Japan, however, it was given to the Supreme Court and in short judicial review, the procedure is based on factual circumstances of certain cases.

As any system has its pros and cons, for Japanese judicial review a lack of separate Constitutional Court is linked with thesis, that judicial review in Japan is not working correctly and even failed. It was pointed out by David S. Law in his article "Why Has Judicial Review Failed in Japan?" that the Supreme Court of Japan during its over 60 years of existence struck down only eight laws on constitutional grounds, earning its reputation as "the most conservative and cautious in the world" with respect to the exercise of judicial review. David S. Law pointed many explanations including cultural, political, historical and even institutional factors of this situation, criticising judicial review system in Japan held by the Supreme Court. In conclusion, David S. Law pointed out that decades of dominance of Japanese politics by the right-of-center parties has shaped the behavior of the Supreme Court of Japan. The Supreme Court of Japan is also heavily dependent upon a hierarchical bureaucracy and as a bureaucratic organisation, the Japanese judiciary is ill-suited not simply by temperament, but by design, to challenge the government on matters of policy. In fact, the hierarchically organised judiciary is more suited to implement policies rather than solve conflicts[36].

In 2004, with many other constitutional amendments, the Liberal Democratic Party of Japan introduced a proposition for creating a separate Constitutional Court of Japan, similar to the Federal Constitutional Court of Germany. The new Constitutional Court would have the power of reviewing the constitutionality of legislation based upon reference by the Cabinet or one-third of the members of the House of Representatives or the House of Councilors, the power of reviewing constitutional questions and the power of reviewing the constitutional judgments of the Supreme Court based upon petition from the parties. The new Constitutional Court would be granted legal binding effect to an unconstitutional judgment for all the agencies and departments of the national government as well as local governments[37].

Nevertheless, Shigenori Matsui expressed a skeptical approach to this idea, as a solution for the Supreme Court of Japan's judicial passivism. First of all, Matsui

[36] Law 2011: 1426-1428, 1462-1463.
[37] Matsui 2011: 1416.

pointed, that the current judicial passivism is not caused by the institutional design of judicial review. Secondly, Matsui agreed that introduction of a Constitutional Court would surely make it much easier for citizens to challenge the constitutionality of legislation and other governmental acts, especially if they are allowed to file suits directly in the Constitutional Court when their right and liberties are infringed. Even so, the Constitutional Court might reject all these challenges by paying the same kind of deference to the Diet as the Supreme Court in which case the same judicial passivism will continue. That is why it is important to appoint judges who would be more willing to scrutinise legislation and governmental actions and are more willing to strike them down. But with the power of selection to the Diet, it is likely that judges to the Constitutional Court will be selected from those, who share a similar political ideology. For example, if the judges are selected by the opposition parties, then judges will possibly be engaged in a more active judicial review against the majority in the Diet. And lastly, the existing judicial review system in Japan requires the existence of an actual case or controversy in order to decide a constitutional question, has some merit compared with the Constitutional Court system. It allows the court to review the constitutionality of legislation and other governmental actions in light of specific factual situations and allows judges to decide constitutional questions in light of a sincere and robust dialogue between two adversarial parties. However the Constitutional Court will decide the constitutionality without any specific case or controversy based upon the text of the statute in its totality and such a review would be difficult and may lose sight of the problems, which might appear only after the statute is actually applied in a specific case. This advantage is in Matsui's opinion undesirable to abandon in exchange for easy access to the courts[38].

Every one of Matsui's concerns are, in fact, living within the Constitutional Tribunal of Poland organisation. Since the latest political events with the rule of the right-wing party Law and Justice holding a majority in the Sejm, the Senate and with the President being from the same political party, the latest appointments of new Tribunal judges has opened a discussion about is really the Tribunal free of political influence. But it needs to be mentioned that the latest majority, the Citizens Platform has appointed several Constitutional Tribunal judges, some of which were appointed "in future" because of the incoming elections to the Sejm and the Senate. This appointment was struck down by the Tribunal itself in the case of "future" judges. Opposing the Japanese judicial review system, the Constitutional Tribunal of Poland decides the constitutionality of legal acts in two situations. Before promulgation of the law, the President of Poland may initiate the judicial review procedure if there is a controversy in its constitutionality. Secondly, an interested party, citizen or even government institution, may sue an act to

[38] Shigenori 2011: 1416-1419.

the Constitutional Tribunal for control if the disputed act is compatible with the Constitution or not. The Tribunal's constitutional decision is taken based not on the case but on values and rights guaranteed and protected by the Constitution.

Of course answering such important questions is a matter of deeper and accurate legal culture studies but it gives legal researchers a great opportunity. Judicial review system in Japan has functioned for over 60 years so it gives us the possibility for a non-judgmental comparison of positive and negative features, of having or not separate Constitutional Court institution.

Conclusion

In summary, we may wonder what real influence the reception of the Western legal system had in Japan. From a social point of view, the Western Law System wasn't fully implemented because even now Japanese people are settling their disputes in a way of reconciliation rather than court quarrel.

From the foreign affairs angle, the Japanese Empire became a modern industrial country equal to 19th-century Western economies. Using an example from early Middle Age Europe, rulers were willingly baptised to become a part of Christian culture, which granted both political and economical benefits. Similarly for Japan, implementation of the Western legal system made it part of the Western culture "family" in means of political structure, economy and industry. The reception itself had less influence on Japanese society, which still follows traditional and moral *giri* rules. Nevertheless, even with such cultural differences between Western countries and Japan, there are no logical obstacles to conducting comparative legal research on a constitutional or state organisation tier. Even if Japanese people tend to avoid courts and law in acts to settle their quarrels outside the system according to *giri* rules it is only an exception in a matter of social behavior. As such it is safe to assume that *giri* rules have no substantial influence on the functionality of Japan's state institutions such as courts and the whole judiciary system[39].

Discussing the lack of social change in Japanese society relating to reforms of the judiciary system, Yasuhei Taniguchi expressed the belief that no social change can be brought about by a single agent because it is a more complicated phenomenon than that. Even if the reform of a court system could be considered as one of the major causes of a particular social change, it is difficult to distinguish cause and results. In fact, Yasuhei pointed out three factors, which are limiting the Social Impact of the Post-War judiciary. Firstly, the judicial machinery cannot be set in motion without someone to do so, because the court is the respondent rather than an initiator. Yasuhei stated that the Japanese do resort to the court, but they must

[39] Kość 2001: 173-174.

overcome at least three barriers. The first barrier is that the Japanese do not like to bring a lawsuit because of the psychological barrier, which was explained earlier. The second barrier is economic – the availability of money and time needed to go to court. The third barrier is the availability of proper legal service, which is essential in difficult cases, such as socially influential cases normally involving novel questions of law and complicated questions of fact. For that, there is a need for imaginative and energetic legal service to engage such purposes. Secondly, the judicial machinery can work only according to the law, so if there is no procedure to attain an objective, no relief can be attempted. Thirdly, the judicial proceeding is intended, as a rule, to affect only the parties to it. If so, any social change cannot be expected from it, because a social change is something that affects everybody in a society[40].

Court action as such can have little if any, social impact. Nevertheless, Yasuhei explained that there could be some effect from a court proceeding upon others, even upon the society in general. It occurs when a provision of law is declared unconstitutional; it is likely to be deleted voluntarily by the legislature[41].

The Japanese judiciary is not only independent from executive power but it also has public trust, being the base for judges' authority. Judges are more trustworthy even than religious institutions, parliament or public administration, but less trustworthy than police officers and prosecutors. John O. Riley and Wiley B. Rutledge expressed the belief that judges assigned the task of administering Japan's judicial bureaucracy share the deep responsibility to maintain judicial integrity and competence. They also share the concern that the judiciary itself can suffer were the public ever to perceive that judges are freely deciding cases out of partisan preference of any extreme personal ideological bias at odds with what they would themselves consider the "sense of society". For Japanese judicial independence, there is little if any threat to existing so long as they control the process for appointment and promotion of career judges[42]. Such phenomenon should be researched with the expanding deterioration of the public's trust towards courts in Poland.

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[40] Yasuhei, Taniguchi 1984: 33-35.

[41] Ibid: 35.

[42] Haley, Rutledge 2002: 21-30.

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論文の日本語レジュメ

西洋比較司法研究の基盤としての日本司法制度の事象

本論文の目的は、行政からの独立のみならず公的な信頼も獲得し、裁判官の権威の元となっている、日本の司法制度を紹介することである。裁判官は宗教組織や国会、行政機関よりも高い信頼性を持っているが、警察官や検事に比べると信頼性が劣る。また、司法制度そのものが損害を受ける可能性があるという懸念が共有されている。それは、裁判官が「社会の良識」と自認するのとは異なり、民衆は裁判官達が個人的なイデオロギー的偏見により党派を優遇し自由に判決を下すと理解していることを指す。日本の司法制度の独立に目を向けると、裁判官の指名や昇進のために訴訟手続きがコントロールされる場合の脅迫の存在はわずかである。このような事象は、ポーランドの裁判所に対する民衆の信頼が悪化の一途をたどる状況と比較し研究されるべきである。

Key Words: 日本、裁判所、裁判官、司法制度、権威、法律、憲法、歴史