

Chiba University Leading Research Promotion Program International Seminar (in English)

Taishinin(Supreme Court)’s Judicial Behavior in Corruption Cases: Hints for Integration of Judicial Behavior Studies with Free Society Studies

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Abstract: This is a research essay based on the transcript of the international seminar meeting entitled “Taishinin(Supreme Court)’s Judicial Behavior in Corruption Cases: Hints for Integration of Judicial Behavior Studies with Free Society Studies”. Dr. Wong Kambill (Ph.D. of Criminology, the University of Hong Kong) who was well versed in international human rights law, sociolegal studies and Japanese legal history, addressed hints and links for the integration of Judicial behavior studies and fair society studies. Then discussion was initiated by Professor Mizushima, and research ideas were exchanged afterwards among participants.

Moderator

•**Dr. Steve Liang Fang (Chiba University)**

Panelists

•**Dr. Kambill Wong**

•**Prof. Jiro Mizushima (Chiba University)**

•**Prof. Masaya Kobayashi (Chiba University)**

•**Prof. Hikari Ishido (Chiba University)**

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Organizer: Chiba University Global Fair Society Program

Introduction (by Dr. Fang)

This meeting is one of the serial seminars focusing on social fairness and wellbeing. The focus of our research group, **Chiba Studies on Global Fair Society** is centering on challenging and overcoming unfair practices on all scales, investigating issues such as gender inequality, widening income gaps, migration, and the collapse of regional and marginal communities, both in Japan and around the world. In doing so, we seek to identify the development, transformation, and limitations of existing welfare state models and provide empirical evidence for how a fair society can be achieved in the 21st century. Our special emphasis will be placed on “wellbeing” and values because fairness is intrinsically related to people's subjective judgement. Objective equality does not always guarantee a subjective feeling of fairness. The vision of a fair society should include both objective fairness and subjective sense of fairness. We are planning to broaden our networks of academics across the globe.

Today we will have Dr. Wong Kambill (Ph.D. of Criminology, the University of Hong Kong) who has been very instrumental with international human rights law, sociolegal studies and Japanese legal history. Dr. Wong got his Ph.D. degree in criminology from the University of Hong Kong and multiple degrees in social sciences, history, international marketing management, and a certificate in Japanese language. Dr. Wong had been a visiting scholar at Stanford for his research program, and he has multiple teaching experience in Hong Kong, Japan and Zhejiang, China. He has a multiple research interest in international human rights law, Japanese legal history, public order, social legal studies, and others. And recently, he is working on the integration of judicial behavior studies with fair society studies. Today Dr. Wong will share about the possibility to integrate judicial behaviors studies with fair society studies. Then Professor Mizushima will initiate the discussion so that other participants could join in and exchange research ideas afterwards.

Opening Remarks (by Prof. Mizushima)

Welcome to our seminar today. I'm a political scientist, and my main subject is European politics. My two books are recently translated into Chinese language which I heard that are also being sold in Hong Kong. Today, we are very happy that we have a chance to welcome Dr. Wong. As Steve has explained, at Chiba University, we are engaging in interdisciplinary research on fair society. Our members consist of philosophers of law, political philosophers, economists, and political scientists and so on. It is thus a truly interdisciplinary, multifaceted research project. I think Dr. Wong's topic is also truly interdisciplinary. As you would explain, your research topic should be integrated with different academic fields. Probably we may contribute something to your research. I expect that in the discussion session, we have different kinds of comments from different academic disciplines.

Taishinin(Supreme Court)'s Judicial Behavior in Corruption Cases: Hints for Integration of Judicial Behavior Studies with Free Society Studies (Presented by Dr. Wong)

In European Court of Human Rights, they use judicial activism to change the human rights culture in Europe which is inspiring me to study judicial behavior. I found John Locke, John Rawls and Immanuel Kant have one thing in common which is the environment for contracting. The outcome is Constitution. How to activate Constitution to change a society? This is the reason why I study judicial behavior. I believe there is a possibility to make use of judicial behavior studies to create a fair society. As to the term of judicial activism, I shall explain it later. Judicial activism is used to fight and consolidate common grounds in order to change our society.

Now what European Court of Human Rights is now doing is very slow, but it is changing Europe. On a request for justice and fairness, when we talk about fair society, we always mention freedom, equality, well-being, and justice, but fairness is more important than justice. Most people wrongly regard fairness as subordinate to justice, but I believe this is incorrect. Will it be a means to re-design society? In case a country has not joined the European human rights law system, is there any chance for it to be changed into a fair society? It is not my intention to create welfare capitalism or laissez-faire capitalism. Laissez-faire capitalism is deemed to be failed. Why? After Lehman's Brothers, G7 was changed to G20 because there was a black hole of economic loss. The United States discovered it was very difficult to fill the black hole of money loss. So, they changed G7 to G20. Communism seems to be deemed to fail also after the downfall of the Soviet Union. Fairness is balancing justice to everybody. Unlike populism or patriotism, fairness is for everybody in a society. We need cooperation for everybody in a society for the social progress, and a better social environment. Everybody equally shares resources and opportunities. You have more money than me, but this is not opportunistic for fair society. Fair society allows somebody to be rich and if somebody is poor, the rich should share the rich with the poor, to the advantage of those vulnerable groups. So, I think we need judicial behavior for equity. This term of equity here is common law concept, not the concept of equity theory in the book of John Rawls. In *The Theory of Justice*, John Rawls also uses the term of equity. But the concept of equity in John Rawls's theory is about free contracting environment in order to arrive some principles which means if everybody agrees, we cooperate in harmony, and we share the benefits of social development. But this equity I mentioned is common law concept. Equity is the backbone of the common law jurisprudence. When I have a review of the anti-corruption law in Japan since Nihonshoki, I find Japanese law also has the concept of equity. We need judicial behavior for equity in order to ensure and promote fairness. Health equity or housing equity is example. I just mentioned fairness is more important than justice. For instance, if I give everybody here a pair of Nike shoes but the size is 40. This is fair but it makes no sense because foot of everybody is different. Another question is whether money can actualize your freedom? If a person who has not read something about fair society, he or she may answer that money is money. If I'm poor, then I cannot have well-being. Is there any relationship between freedom and well-being? In fact, money is freedom. Well-being, freedom, and equity are not separable. Three cannot separate from each other. I give you another example. I have freedom to go to Hong Kong if I have a passport. In case I have no money to buy air ticket, can I actualize my freedom? The answer is no. Wealth and money are similarly important. This is why we have to ensure a fair distribution of wealth. In a society, we talk about power. Government power should ensure the equity for Social Welfare Law, and how to enforce it because Social Welfare Law is a redistribution of wealth. I do not trust Hayek's theory of free society as a free economy. Because Hayek believes no market is secondary order. However, market itself does not have any authority. Market is existing in a system. Do we allow uneven distribution of wealth in fair society? Yes, we allow. In economic theory, we have Pareto Principle. Some people who are cleverer make 30% effort but make 80% results. It is worthwhile to give them more money. The problem is we have to take care of those poor people. A beggar is not only begging for money, but he is also begging for freedom. Without money, he cannot actualize his freedom. Without freedom, fair society cannot be achieved.

I try to link judicial behavior studies with fair society studies, because judiciary is for interpretation of law and legal reasoning. When I was in law school, we only studied the court ruling, and the rationale for court for this ruling. However, the background of all those Supreme Court justices in the US's constitutional court or US Supreme Court have different

socializations. They have their own ideology. Whenever new US Justices of Supreme Court are appointed, a lot of arguments out of US citizens' worry about their ideology. In court judgement, we cannot find how they think. How they think before they write down their judgments. Judicial behavior is trying to find out what is existing in their mind. Originally, judicial behavior study is a branch of political science. The earliest judicial behavior research is in the 1940s. A political science professor at Harvard University discovered it was a very interesting thing to find out the reasons why some Supreme Court justices of US voted very politically? They have a very strong political tendency to vote for or against something. They were not only following law but were also motivated by their own ideological preferences and other factors, which were unknown. This motivated him to conduct the first research on judicial behavior.

Judicial behavior is now a developing academic field. Political scientist is now joined by economists, psychologists, historians, legal academics, and even management studies. I find some overlapping areas between strategic management in MBA and strategic judicial behavior studies from the book of *The Strategic Analysis of Judicial Behavior*. One research discovered some US judges' ruling is a strategy to achieve something. This is not only to find this person guilty or not guilty, but he wants to have a strategy to achieve an objective, including his own personal goal. For example, in one research, the researcher discovered when the judge wanted to have promotion, he formulated a strategy through his court ruling in order to get promotion. In another research, a researcher tried to have newspaper clipping on a judge for 10 years and discovered a phenomenon. Whenever his contract was expiring, he avoided judgments on some very sensitive subjects such as abortion. He delayed such judgments until he got a new contract. I also find judicial behavior studies has overlapping area with organizational behavior studies in MBA. Two subjects are conducting research on the organizational culture, working culture, external, internal (Figure 1&2¹). How do they make such decisions? In judicial behavior studies, the final answer is how the judges make their judicial decisions. The judicial decisions are more than just court judgments. There is rationale behind.



Figure 1

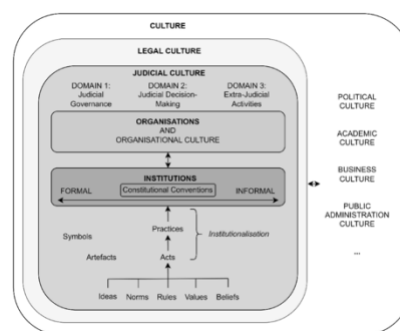


Figure 2

In judicial behavior studies, there are many models. In organizational behavior studies, you can find similar academic phenomena, such as Autocratic Model, Custodial Model, Supportive Model, Collegial Model and System Model. In my own opinion, Fair Society Studies should have sustainability because the society is changing. Now we have a new developing subject in Fair Society Studies, which is AI Fairness. How can we ensure AI is fair? AI should have fairness to everybody because we make decisions based on information. If AI gives us unfair information, the outcome will be very dangerous. How to ensure it? In judicial behavior, we also find the interface between technology and judicial behavior. How can we ensure no bias in AI? Bias will lead to discrimination. Discrimination apparently is against not only equality

¹ David Kosař, Katarína Šipulová and Marína Urbániková. *Informality and Courts: Uneasy Partnership*. *German Law Journal* 24(8), March 2024, 1239-1266.

but also dignity. When we talk about discrimination against somebody, the hidden agenda behind it is that you harm the dignity of another person. Fairness in AI has a very close relationship with social welfare being. If you allot money under social welfare law, it will seriously and adversely affect the redistribution of wealth. I just mentioned that a beggar is not only begging for money but also freedom. Without money, he cannot actualize his freedom. AI fairness means reducing biasness. Inclusivity of AI means designing AI for all. We need fair society to have AI design for all. It means the outcome of AI should be inclusive of everybody in society and ensure AI is fair to everybody in society.

Then we go back to judicial behavior. Is judicial behavior that simple? Judicial behavior nowadays is a semi-unexploited academic field. Somebody tried to develop it into quantitative number, in order to use number for the analysis. But number itself is meaningless. Number needs interpretation. I just mentioned, there are many models in judicial behavior studies. The most common models are attitudinal model, strategic model, and legal model. These models depend on the extent of autonomy. Autonomy does not mean person because in fair society, we always mention personal autonomy to decide the style of living. But this is not the meaning here. It is about judicial activism. Contradistinction to judicial activism is judicial restraint. When you read the judgments of European Court of Human Rights, you will find a lot of judicial activism. The judicial behavior pattern is always introducing something new into Europe, trying to use court ruling to change European society. The pattern of judicial behavior is very clear. Judicial restraint is different. The court is unwieldy to change society. If I follow the same old ruling and have not handed down new ruling, I have not done anything wrong. My superior, the upper court will usually not punish me.

Now we talked about a Japanese example of Dandō Shigemitsu. Dandō Shigemitsu is a famous judge outside Japan. I think he is the most famous Japanese jurist and legal studies scholar in this field. He is a typical example for judicial behavior of judicial activism. He is widely known for his lifelong opposition to capital punishment. He is the author of *Shikei Haishiron*, calling death penalty the “irredeemable criminal punishment”. According to the UN Human Rights Commission, death penalty is not against human rights law. But long death row is because waiting for execution is inhuman. This is Dando’s most famous judicial activism in order to change Japanese judicial behavior. In the Kansai Airport case, he supported the minority group. This is exactly identical to the approach of John Rawls in his book *A Theory of Justice*. It means everybody should have fairness and the society should treat everybody fairly. The most important is that judgment should be supported by national instead of a small group of people. When we talk about fair society, the spirit of fairness in it is not new. For example, World Fair Play Day on 6th of September is originally from Olympics. In case we want to have optimum effect of judicial behavior, we need co-ordination between judicial behavior and legislative behavior.

In John Rawls’s theory, we need a multicultural society because we respect each culture, which influences thinking. Mainstream culture covers legal culture, but we do not know the legal culture in the mind of every judge. We can only sense it from the court judgment. This is why one way to discover judicial behavior is checking the terms used by judges in each judgment. I found one judgment of Taishinin that the judge used the terms *giri ninjo* 義理人情 for criminalization. “Because the appellant is in breach of *giri ninjo* 義理人情, I (Taishinin justice) have to punish you.” This is a very moralistic approach. This is the overlapping area between the mainstream culture and legal value in judicial behavior. Judicial activism to integrate values of a society is very important. Moshin Hamid said that capitalism is like the law of the jungle with a few rules. Thomas Friedman said that capitalism makes people unequally rich while

communism tries to make people unequally poor. So, we have to find another way which is neither jungle theory of capitalism nor communism. An example is global fair trade of coffee. Global culture and justice are there. We should expand it to global fair society.

Here is a question, judicial behavior integrates with legislative behavior and international human rights law. Is this a shortcut to fair society? It seems this is likely. According to the UN Human Development Index, Denmark, Sweden, Holland and Switzerland have very high GDP per capita, far better the US. They simultaneously have an outstanding social welfare system for redistribution of wealth.

Another example is in the 1990s. US mass media reported Nike and the subcontractors employed child labor. Do you know the cost of one Nike basketball? Nike basketball made in Pakistan is merely one US dollar, because they employed child labor. Nike's contractor in Indonesia did the same. US pressure groups forced Nike to eliminate child labor or slave labor from production line. This is market-drive social justice.

Business studies also changes business value or social value. A business can be set up to introduce value to society. In case we integrate into our mainstream culture and daily life, it may influence the judiciary. Michael Porter, a business professor of Harvard, introduced the concept of "creating shared value (CSV)", which requires a business firm should introduce value through business, just like market-drive justice of fair-trade coffee. The purpose of cooperation is not only for profitability, but they also drive the next wave of innovation and productivity growth of global value of fairness. In addition to societal value, economic value, we need "creating shared value". We can introduce the concept of fair society and the first way through shared value. And the short cut for social shared value, in my own opinion is judicial behavior of Supreme Court.

Judicial activism loosely interprets extensive interpretation and applies Constitution. Why did I emphasize Constitution? John Rawls also emphasized Constitution. The reason is very clear that Constitution is the mother of all laws. All laws should follow it. For example, when you read the court judgments on homosexuality and same-sex marriage in Japan, some courts agree, but some courts disagree. Because their ideologies are different. We usually do not want judicial restraint hindering introducing fair society values into the mainstream culture and to the mutual benefits of everybody. Legal value in judicial behavior can be changed, thereby leading to social change and consequentially change in legislative behavior. Same sex marriage is now named civil union in some common law countries. Nonetheless, death penalty in the cultural relativism of Islam is very difficult to change because punishments are written in Quran. So what can make the changes toward a fair society? We can make use of mainstream culture to change the mind of Supreme Court upon their judicial behavior in legal reasoning of constitutional cases. In case mainstream culture has a very strong outcry to change something with nationals' support. Usually, according to research, Supreme Court judges will follow. But sometimes they follow quickly, sometimes they follow very slowly. Their judicial behavior can consolidate legal consciousness. We cannot expect everybody in a society to go to law school for legal studies, but we can change their legal consciousness (*hō-ishiki*). Also, ruling can bind junior court to follow. Senior court thereby extends their legal effectiveness and efficiency.

We need mutual reinforcement between mainstream culture and judicial culture. This is why we need sustainability for long-term development. To build social trust and legitimacy of law enforcement, people must believe that justice is fair and equally applied to all. How to convince them? This is a long-term development. Maybe we need to introduce fair society studies into first-year syllabus of university students. In fact, I discovered London School of Economics is offering a 15-week semester course of fair society.

In Latin there is law term of *de novo* for judicial review. In case fair society is the mainstream culture, the judge can conduct judicial review of the existing law. Before Pacific War, Taishinin did not have the power of judicial review. After the law reform during the Occupation period, today's Japanese Supreme Court has power for judicial review. If a legislation is unfair to today's society, they can declare it to be invalid.

Jeremy Bentham had the idea that the greatest happiness to the greatest number is the foundation of morals and legislation. Fair society means fairness to everybody, thereby ensuring mutual cooperation in harmony. International human rights law requires us to take care of the minority group. For example, if you read the book written by the American scholars before 1970s, they treat Japanese society as a society in harmony. In early 1980s, Japanese government signed Convention against Discrimination. They signed the whole Convention against Discrimination except one article because of *Burakumin*, which is the marginalized social group in the Japanese caste system.

Next question is how do justice upon judicial decision-making? Judicial behavior studies basically have legal model, attitudinal model and rational choice model. No matter what judicial behavior pattern or model, the outcome is affecting policy. Because court does not have power to enforce its ruling. It depends on the government to enforce its ruling. In fact, court is a policy-maker. Most people overlook that court is powerless to enforce its judgment. In the principal-agent hierarchical model of judicial behavior, upper court can review the judicial decision of junior courts. It means once the Supreme Court makes a judgment, junior courts have no say. This is why I mentioned shortcut for quick achievement of fair society is mighty constitutional court case. Before constitutional court case, we have to integrate fair society values into the mainstream society. Judicial behavior can also ratify some social unfairness.

I mentioned that personally I do not like quantitative research method for fair society studies and judicial behavior studies. For instance, if the poverty line is 10,000 yen but I have 10,001 yen, does it mean I am not poor? This is the pitfall of quantitative research. You have to be very careful. Another typical judicial behavior pattern is very strange to people outside Japan. It is hard to understand why wrongful conviction cases happened again and again. *Hakamada Case* is well-known in Hong Kong. How can Japanese court detain an innocent person for 60 years? This judicial behavior is very strange. I talked about it with a retired senior Japanese prosecutor in Stanford. He said Japanese judges tended to trust prosecutors. We can trace the origin of this organizational culture with judicial behavior studies. I just mentioned overlapping area between organizational behavior in business studies and organizational behavior in judicial behavior studies. We can trace it back to the Meiji era. Other than Taishinin, both judiciary and prosecution were under Minister of Justice of similar working culture and organizational behavior. This is a historical institutionalist model. They just follow the practice.

Another well-known Japanese court case in Hong Kong is *Sayama Case*. The appellant had been of murder. One reason we believe that he is a *burakumin*. Another serious organization behavior in Japanese criminal justice system is the trust in self-written confession. We do not know whether the prosecutor had used violent means to force a suspect to confess.

Judicial behavior also has interface with technology. In *Ashikaga Case*, the accused was convicted and acquitted by DNA test. It looks very strange and unfair to people outside Japan. The structural problem in the perspective of historical institutionalist model, is that traditionally judges believe in and trust self-conviction as a matter of criminal justice culture. In the term of Robert Merton, it is a matter of cultural conformity.

The problem is, who judges the judge who judges wrong? In Japan, the formation of social groups for monitoring it is taking place. In case a judgment infringes against fair society values in the mainstream culture, such social groups may exert pressure through mass media.

Now we refer to Figure 2. Mainstream culture means political culture, academic culture, business culture, public administration culture. My idea is introducing fair society studies into first year syllabus of university education. Such mainstream cultural values can exert pressure on legal culture. The second layer at the top is mainstream culture. It will interact with legal culture. Legal culture will have direct impact on judicial culture during court's judicial decision-making. See ideas, norms, rules, values, beliefs at the bottom. If all these about fair societies are integrated into mainstream culture, it means the court should change its judicial behavior in order to be consistent with the outcry of nationals.

I just mentioned some social groups in Japan are monitoring judicial behavior. The Innocence Project Japan is a pressure group on a mission to help secure a society without wrongful conviction. In the case of fair society, can we do the same? I think most Japanese universities can contribute to it, at least at the first-year level, to develop freshmen's ideas, norms and legal values.

Now I proceed to Taishinin. Why do I take Taishinin as the subject of my research? In judicial behavior studies, historical institutionalist model is popular. Today's Japanese Supreme Court and legal culture are different from that in prewar Japanese judiciary. America introduced American common law system to change Japanese judiciary during the Occupation period. Taishinin had no power for judicial review. You can see the importance of judicial behavior studies when it comes to the selection of judges. In the history of Taishinin, there was no female judges. This is the prewar mainstream culture in a male-dominated society. I just mentioned, judiciary always reflects mainstream culture, so there was no female judge. But all Taishinin judges had a very special family background. They were born in samurai families and had childhood socialization through strict conduct and disciplines.

The first female judge was Mibuchi Yoshiko in post-war era. Mibuchi supported and urged the Japanese government to have executive measures to assist and support the A-bomb victims. We can see gender also has impact on judicial behavior, especially the issues of abortion or domestic violence. The feeling or the reaction of a male judge is different from attitude of a female judge toward domestic violence or abortion. Another example. Akane Tomoko becomes the first Japanese judge elected to Head of International Criminal Court. This could be a good subject for judicial behavior research and understanding the role of female judge in global fair society and global justice. No matter justice or fairness, this is for the promotion of common good. Fair society studies from popularism or patriotism. Fair society is addressing everybody, not limited to a group.

Next, let us look at the strategic model. I mentioned some judges use judicial behavior or judicial process in order to achieve something. Now I take the case of Abe Sada as an example. Abe Sada was a prostitute. According to Taishinin, the prostitution itself was a criminal offense. But if I worked as prostitute to settle debt, it was legal in civil litigation. Taishinin's judicial behavior in this regard was self-contradictory. In prewar Japan, some Japanese interest groups had strong material interest in prostitution as an unavoidable evil for business and entertainment. Some raise objections because of underage girls and immorality. That means Taishinin's self-contradictory judicial behaviors was a strategy to balance two interest groups. You want to criminalize prostitution, or you want to make money from it. Taishinin set a balance. If you work as a prostitution in order to settle debt. It was fine. This is mainstream culture. You could follow the mainstream culture although it was self-contradictory.

Another case of two teacher in Fukuoka who accepted cheap banquet bribe, on average each meal was cheaper than the market price of 22 eggs. It means that if you treat me a meal at McDonald's, you should be found guilty. You had no way to exonerate because you are teacher in breach of social trust. Teacher should set a moral model. This is judicial behavior re-

enforcing mainstream morality. Another problem is power. According to Nakane Chie that Japan is a vertical society. Taishinin had to protect the purity of power in prewar social structure of state polity. A breach of social trust is a criminal breach of Emperor's trust of delegation of power.

I found it very interesting to read Article 23 of Meiji Constitution, which stipulated "no law, no crime and no penalty". In Taishinin's judicial behavior, as long as this requirement was met, they could refuse appeal. This "strict liability model" was like punishment for illegal parking. Taishinin did not care about your intention. As long as you have illegal parking, you have to pay the fixed penalty ticket. To Taishinin, corruption or bribery was abusing power delegated from Emperor to all Japanese civil servants. No matter the value of bribe was the price of 22 eggs or something of very cheap value.

There are a lot of other Taishinin judgments on corruption cases. After Great Kanto Earthquake, two grand corruption cases happened at Tokyo City Assembly, of which there was unchecked discretionary power. One case was about the removal of fish market from Nihonbashi to Tsujiki with bribing assembly members for more compensation from public funds. The other one was that Keisei Railway Company bribed Tokyo Assembly members for a license to extend railway network. The extension was actually good for public interest and city development. In these two cases, Taishinin was very strict. After the expiry of appointment term, assembly members had neither status nor official duty in Tokyo City Assembly. Prima facie, such assembly member had no power for official duty. Even so, Taishinin refused the appeal. In common law jurisdiction, I find it very strange. The assembly member was *ultra vires* that he did not have power to be abused for private gain.

Before Second World War, Japanese police structure was divided into judicial police and administrative police. Judicial police had no power to do the job of administrative police and vice versa. No matter judicial police or administrative police, both had unclear duty under "public order". Duty of public order was unspecific. Taishinin ruled that once you had the status of police, you should behave yourself. This is a very moralistic behavior for the protection of government power.

Another Taishinin judgment is about sex bribery. One police constable in Osaka accepted sex and banquet bribe, but acceptance took place outside the scope of his official duty of judicial police. He was convicted as long as he was police. The type of police was irrelevant to Taishinin's legal reasoning. Language discourse is a way for judicial behavior research. In terms of language discourse, I find some wordings are exactly identical to that in Emperor's Imperial Rescript. It sounds like Taishinin speaking on behalf of Emperor for rationalization of its judicial behavior of strict liability.

Discussion and Q&A

Prof. Mizushima

Thank you for Dr. Wong's insightful and comprehensive presentation. His lecture here today would make great contributions to enrich our understanding of fair society. And at the same time, I was a little bit shocked about the idea that fairness could also mean that everyone is equally poor and equally miserable, but it is fair. And it is also encouraging for us that you propose that we would make university curriculum, which has some studies on fair society.

I would like to make a comment on your presentation, especially about judicial activism and restraint. The example about European Court of Human Rights is quite interesting. I would like to make a comment about independence of judiciary. It is the autonomy of judicial power. It is widely said and agreed that the independence of judiciary is quite essential for the healthy working of judicial power. If judicial power is totally dependent on the political power, they

would not be able to judge differently from political orientation of the governing powers, governing parties, or other strong political forces. The independence of judiciary is quite important. This is true.

However, on the other hand, the autonomy of judiciary would have a negative aspect. And in that, especially in the judicial system in Japan, I think we can see the negative side of independence of digital power. In my view, they have institutional conservatism. That institutional conservatism is protected by their independence. It does not mean that they are politically conservatives, but it means that they are institutionally conservative. They are in many cases inward looking within the bureaucratic system and, in general, they are quite reluctant to correct the errors of past judgments like *Hakamada Case*. It took too many years to correct the error incredibly. But it was made possible because of the independence of their judicial power. So, no political power can be ordered to correct the *Hakamada Case*. So, it took too many years. And they are in general not so enthusiastic to adapt to the new trends in society and economy, as you pointed out. It is quite contrary to the attitudes, user activism, as they have shown in European Court of Human Rights. They are quite enthusiastic to make a change in the society in Europe. But in Japan, the Japanese judicial system is not so enthusiastic to change Japanese society. I thought their nature inward looking within the bureaucratic system. In Japan, judges don't like to make unique judgments, which would be different from the prevailing view in the judiciary system. Partly because they are thinking of their promotion or partly because they want to conform to the general trends within the bureaucracy. I cannot see the inside of their thinking, but it seems they are quite institutionally conservative. This is not the result of the political pressure from outside. It is just because they are independent.

Another background we have to see is that in Japanese judicial system, the judges are appointed internally, except in Supreme Court. If they want promotion, they have to follow other precedents. And even in the Supreme Court, the appointment of judges is practically allocated to a couple of categories from lawyers, judges or academics. It is not written but it is practically a rule. So, it means that new people from the outside world cannot enter the Supreme Court. Even someone who has much legal knowledges, they can't enter the world of the judges. Seeing from this uniqueness in Japanese judiciary, it can be argued that Japanese judicial power has had achieved high autonomy. And theoretically, the independence of judiciary is quite important. However, they are working negatively against introducing new trends or correcting past errors. In that sense, in the current world, everything is changing. And I'm quite afraid that the judicial system in Japan would be quite negative because they cannot introduce new trends into their rulings. They are quite conservative. So, moral discrepancies between the rulings and the realities of the new society are found. In conclusion, the independence of judiciary is not always a good thing. What do you think about?

Dr. Wong

Personally, I speak in the perspective of judicial behaviour studies. It is a historical institutionalist model. As I mentioned, cultural control is an informal social control. This is criminological thinking. Just like Japanese culture is very strict and even stricter than written law. In case, the ideas, values, beliefs, and the laws of fair society can be a part of the mainstream culture, I believe Japanese judiciary or Japanese Diet, the legislative behaviour may interact with me. But I am very polite to say that Japan is a very slow follower just like the anti-discrimination convention. It waited until 1980s to pay attention to the *Burakumin*. This is why I mentioned whether we should introduce fair society studies into first year university syllabus. In the Chinese University of Hong Kong, a professor also taught something like it, but he supposes to be leftist liberal himself, not rightist liberalist.

Just imagine the concept of fair society such as *giri ninjo* 義理人情, to which court has to follow, as what I read in Taishinin's judgment. *Giri ninjo* is in mainstream culture, judiciary culture, and even the organizational culture of representative in Japanese Diet, they have to react to mainstream legal consciousness. We may not want to have laissez-faire capitalism or communism. We want to try something to be fair to everybody, to share the fruit of economic development, and social development. So that everybody can have cooperation for social development in harmony. Everybody also can live his or her own style of living. This is very important and not unrealistic. This is happening in Sweden, Denmark, Poland, Switzerland. These are democratic constitutional countries and now able to work a fair society with a good social welfare system. Some people have wrong concept that social welfare makes people become lazy. The fact is that it depends on culture and the mindset of people, and whether they are willing to co-operate. I don't think John Rawls is wrong. What he said is happening nowadays. I believe that Japan is very special that once a behaviour becomes a rule, Japanese tend not to have new rule to replace it. Last week I read the book about a Japanese CEO who said Japan had slow economic development in the past few decades because the society was very reckoning with the internet and globalization. Some Japanese businessmen were not quick to react to internet or globalization. Their mindset was very slow to change and had unwillingness to change. They thought this was good yesterday, so they continued it and was not innovative. Here is a different example of Singapore. They applied English to develop very quickly in international trade to jump on the wagon of globalization, subsequent to internet and global change. and everything.

I want to emphasize that law is always unclear. For example, in the criminal law of Hong Kong, you always find the words "reasonable" and "unreasonable". What is reasonable? What is unreasonable? No definition. Law gives the power of interpretation to the judges. They interpret it according to the court case nature. Just like when I have a review of the anti-corruption law in Japanese history in the past 1500 years, I found similar phenomenon of legislative behaviour. Judges conducted legal reasoning according to Japanese equity *dori* (道). It gave them interpretation power according to the circumstances of each case. But Japanese judge in the murder case *Sayama Jiken* was very unyielding. However, judicial behaviour of court in the final appeal of Hasegawa Case is very impressive. The judge warned the prosecutor not to appeal in view of poor evidence. In case prosecutor wants to appeal, what does it mean? It means an act challenging bottom line of justice and the whole judicial system.

Personally, I love Japanese culture but not its business practice. We have to think globally, act locally. Think globally, act locally is not my slogan. This is a slogan in the TV commercial of Hong Kong Bank.

Prof. Li

My research is environmental economics and there's some collaboration with my research studies. Especially, you talk about the judicial behavior and the different choices between profitability or justice. So, different people or different culture may think or choose certain actions in a different way. You talk about the cases in Japan and in Hong Kong or other countries like Europe. And you also mentioned that European countries are more proactive to try to do activism, which is really good, especially in the context of climate change or environmental protection. So, law related to that area has many things to do with European countries, which I really appreciate.

You talk about issues about how to judge people and their different concepts. And especially you talk about the top-down approach and bottom-up approach. For example, the market can

drive some changes. Problem can not only be problem but can also be a chance to make society change. In today's society, it is a turning point to make balance between environmental protection and economic development. I believe your expertise, especially in the area of law playing a very important role in today's society. In the future, we all can work together and do collaboration on research in any other format. And as Professor Mizushima said that your proposal about the new curriculum is really fantastic, especially in the genre of fair society. I do agree with the point that ensuring equity is really important, which is also the concept of Professor Mizushima's project. But ensuring fairness and equity sometimes is a dilemma in reality. For example, for food security, ensuring the minimum access to food is really important, which is the concept of equity and fairness. But sometimes it is very difficult.

How do you define the actual fairness? I do agree with the fact that ensuring environment is good and ensuring all people, not only the rich, but also the poor, capable of access to the basic food and water, or healthcare service, which is critically important. In another way, if you have opportunity to people for free decision-making, it turns out to be some people become rich and some people become poor. I do agree if people have more money, it should help those poor in general for the sake to make a better society. But it's not necessary to me that he himself owns services or all kind of the return should be equally provided. In that sense, take innovation as an example, there would be no incentive for those regions to work hard. How do you balance all these issues?

Dr. Wong

Justice is in fact very moralistic. When we talk about the legitimacy of government, we are using morality to say it is legitimate. This is a moralistic matter. You are moralistically correct or not. There is no absolute unchangeable morality in culture. This is mentioned in my PowerPoint slides.

First of all, law is not static. Take green politics as an example. 30 years ago, French Greenpeace was globally unpopular. French government set a bomb to the ship of Greenpeace, trying to explode it. Green politics was annoying and disgusting to some governments. Greenpeace politics is now globally accepted with legitimacy. Everybody even agrees, for example, animal rights. In Hong Kong, torturing a cat, a pet or a dog, police can arrest the offender and take him to court. But 30 years ago, people disregarded animal right. We should take care of human rights first. Now, animal rights are also protected by criminal law. This is why I said that when something is integrated into mainstream culture, legislative behavior and judicial behavior will be changed consequentially. Japan is usually very slow to react to change of legal culture in comparison with European countries, because European countries have been under the impact of European Court of Human Rights. We read a lot of its good court rulings. Europe is not under a single culture but multicultural. But this does not hamper the evolution of a single human rights law culture.

Personally, I believe fair society is 90% the first way to call people to work in harmony for social development. It is addressing to everybody and more individualistic. When you study international human rights law, you find a universal UN system, regional European system, American system, and African system. They have different human right cultures and stages of social development. In comparison with human rights law, I prefer making use of human rights law to attain fair society. In case of no human rights law court, what should we do? I read John Rawls, John Locke, and the social contract theory. Japanese judicial system does not traditionally have no equity. *Dori* is the Japanese equity. Judicial activism of Japanese court can motivate gradual social change toward Japanese fair society.

Fairness is more important than justice. This PowerPoint slide is the famous say of a US Supreme Court judge. He prefers fairness to justice. Fairness is more important than justice. Fair society studies may not be suitable for high school students, but very suitable for introduction to university students. They can integrate into sociology, economics, psychology. Well-being is psychological and biosocial. When I try to analyze judicial behavior with reference to freedom, I ask myself: "what is freedom?" Freedom is very abstract, but there are two interactions. One is my personal feeling. I am free, I am not free. The other one is external influence on me. In terms of interacted interior, exterior, psychophysical feelings, I say I am free or not. I love Thai culture. When I see the Buddhist in Thailand, it seems they are very poor. In terms of their psychological well-being, they may be very rich. They walk along the streets for begging. They are trying to sense their psychological well-being.

When we talk about social contracting, we commonly refer Immanuel Kant, John Locke, and John Rawls. The social contract for fair society is a biosocial contract for a harmonious cooperative fair society of emphasis on equality, freedom, well-being. The ultimate outcome is for happy collective survival. Unfortunately, fair society studies seldom mention right to life. Right to life is the most basic. Without right to life, we cannot enjoy anything. I don't know why no fair society book mentions right to life for sustainable collective survival. Fair society is not an overnight social change. Just like the evolution of animal rights and green politics.

Justice in fair society and judicial behavior is what we want. This is not justice theory. Justice should have practicality in fair society and judicial behavior. See today's welfare capitalism in Sweden and Denmark. Sometimes it is termed welfare democratic country. I believe Sweden and Denmark maybe the model for evolution to a "fairer society" in view of their good social redistribution of wealth.

Dr. Alfonso

I've been watching the news these days about the protests against immigration policies in Los Angeles. And I must clarify my expertise is not in laws at all, but I reflected about the power that judges may have in situations like what is happening now in Los Angeles. And I thought, if there is a way in which judges can take really quick decisions to ensure security. I read and watched the news that the California Governor requested a new demand to block Trump's deployment of the National Guard and Marines in the protest against the immigration policies. But a district judge allowed Trump's administration to give a response to the governor's demand days later. Is there a way to block the presidential discussion that are very controversial?

Dr. Wong

It reminds me of a seminar in Stanford in 2005. In that year, Arizona introduced a law that whenever you go out, you have to carry your identity card or a driving license. I asked the speaker one question that why California had not introduced similar system. The speaker told me that California needed illegal immigrant to work underground to have cheap labor. In the NHK news today, it mentioned LA police seldom checked illegal immigrant. This is why residents got very angry because this is against the spirit of common law. Common law concept is that every home is your castle. Without court order, you cannot enter my home. Now, the National Guard was deployed to enter. But some illegal immigrants just wanted to have better resources and opportunities for well-being in the perspective of fair society. They thus think the host country treated them very unfairly. It seems the violent action was for the reputation of the personal charm of Donald Trump. Fair society should not have connection with personal charm and not strictness of religion. We respect religion, but fair society could not be dominated by one religion.

The Governor of California is a very open-minded person. This case will likely be a court case at the US Supreme Court because of the constitutional issue. US President cannot bypass the governor. The most horrible is that Donald Trump said he would deploy 700 Marine Corps. In criminology, it is escalation of crime.

Prof. Kobayashi

I'm very interested in your idea of fair society, which consists of four dimensions. I'm more interested in not only fair and justice but also well-being. I wonder if your idea is original ideas or that you borrow this conception from some researchers. That's one question. And my second question is, I think that your fair society idea is quite related to justice, but also you suggested that in the field of justice, fairness is prior to justice. Can you explain how to relate your ideas of fair society with justice and fairness, especially fairness?

Dr. Wong

Justice is relevant to international human rights law. In South America, they also have The Inter-American Court of Human Rights based in San José, Costa Rica, but not as active as European Court of Human Rights. Probably because of multicultural issues. This inspired me to conduct research in order to ascertain the possibility of using judicial activism to improve our society. Actually, this is a cultural strategy.

As I mentioned, it takes time. First of all, you have to improve the mainstream culture, tomorrow's judge is today's student. When today's judges were students, they had not studied fair society. In case tomorrow's judges have studied fair society, it may have impacts on their ideology. This is attitudinal model in judicial behavior studies. When I try to understand the background of Taishinin judges, surprisingly, I discover most of them had early education in samurai families. Family is the most important social institution for socialization. It provided traditional Japanese strict training in conduct and discipline. Another example is the first female judge in Japan. There was a TV program about her. She has an international background. I try to check her background upon my judicial behavior research on her socialization process and open-mindedness. Her father was an international banker in Singapore.

Go back to your question. What inspired me to think about all these? In case of no human rights nor court, what should we do? I borrowed the idea from John Rawls, John Locke and Emmanuel Kant. They talked about constitution. Constitution is the mother of all laws. As the Mexican Professor just asked me, what is being followed next in the LA riot case? The next is likely US constitutional court case. Few American Presidents deployed National Guard and even threatened send Marine Corps to a state with neither order nor consultation with Californian Governor. The second question is... I forget second question. Will you repeat the second question?

How could judicial behavior ensure well-being? In Hong Kong, we have a slang of "I want to be the son of Li Kar-Shing", who is the wealthiest billionaire in Hong Kong. How can we ensure well-being with judicial behavior? Well-being may be irrelevant to materialism. See Buddhism. I just mentioned the Buddhists in Thailand. This is very interesting. See the movie of Kurosawa Akira. His movie *Ikiru* is outstanding. A civil servant got a lump sum of money upon retirement. But he wants to do something for his own well-being. He builds a small playground for children in slum area. Materialism is immaterial in his sense of well-being. What I learned from the experience of Sweden and Denmark is that youth have good sense of well-being with social welfare law of mutual trust in the government. Danish themselves also do not abuse social welfare law. In Hong Kong, we always argue, you give money to the poor, why didn't you give money to me? Mutual trust is very important. We have to trust the government is fair and such

fairness is for everybody equally. With sense of material well-being and psychological well-being, social violence seldom happens in Sweden and Denmark. They live very happily. It reinforces the sense of fairness to everybody through education, the opportunity for upward social movement in the social ladder.