The Style and Role of Judgments by Japanese Courts

How They are Written and Read

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I. INTRODUCTION

Among comparative law researchers, there is little dispute nowadays that comparing only legal texts, most typically statutory provisions, is far from sufficient. An observer must know the "law in action" before making meaningful comparisons among jurisdictions. Still, research on the "law in action" often focuses on how the law affects people's behavior, or conversely how that behavior affects the functioning of law and the judiciary. It is rarely addressed how the judiciary presents itself before the society (the general public). As a result, the style of court decisions, in particular how they are drafted by the judge and how they are read by colleague judges, legal academics, and ultimately the general public, has largely been ignored as a topic for comparative research.

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Both contexts of the topic are portrayed when examining the style of Japanese courts' judgments. On the one hand, due to the persistent belief that the concept of "case law" is unique to common law jurisdictions, the role of precedent in civil law jurisdictions has attracted academic interest only recently.[1] This viewpoint requires us to examine how judgments are read by lawyers (whether by other judges, private lawyers, or legal academics) in a particular jurisdiction. As will be closely examined below (in Section II), Japan is closer to common law jurisdictions than a typical civil law jurisdiction is thought to be, and Japan embraces the de facto binding power of case law precedent.[2]

On the other hand, how a judge can or should draft a judgment is an issue that has hardly been examined in comparative law scholarship. This is despite the groundbreaking work of Atiyah and Summers, which briefly raised the issue in presenting a conceptual framework of substantive legal reasoning as compared to formal legal reasoning, and which has been extended to compare some aspects of Japanese law.[3] Mainly focusing on the comparison and English and American law, Atiyah and Summers defined a substantive reason as "a moral, economic, political, institutional, or other social reason" and a formal reason as "a legally authoritative reason on which judges and others are empowered or required to base a decision or action", which usually "excludes from consideration, overrides, or at least diminishes the weight

1 See E. H. HONDIUS (ed.), Precedent and the Law (Bruxelles 2007); D. N. MCCORMICK/R. S. SUMMERS (eds.), Interpreting Precedents: A Comparative Study (Aldershot *et al.* 1997).

2 For an overview of the influence of the European civil law tradition on the modern Japanese legal system, but also other influences, see generally L. NOTTAGE, The Development of Comparative Law in Japan, in: Reimann/Zimmerman (eds.), The Oxford Handbook of Comparative Law (2nd edn., Oxford 2019) 201–227, with a version also at *https://ssrn.com/abstract=3276469*.

3 P. S. ATIYAH/ROBERT S. SUMMERS, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Oxford 1987). For studies extending their framework to Japan, see e.g. L. NOTTAGE, Form, Substance and Neo-Proceduralism in Comparative Contract Law: Law in Books and Law in Action in New Zealand, England, the US and Japan (Wellington, 2001) available at *http://researcharchive.vuw.ac.nz/handle/10063/778*. This thesis compares legal institutions in Japan (including the court system) and incorporates some of Nottage's articles comparing areas of Japanese contract law, as cited below; also incorporated is L. NOTTAGE, Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study, Victoria University of Wellington Law Review 27 (1) (1997) 59–97, and part of what became L. NOTTAGE, Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice, Indiana Journal of Global Legal Studies 14 (2008) 385–419.

of, any countervailing substantive reason arising at the point of decision or action".[4] In this respect, it is interesting to observe that the drafting skills necessary for a "good" judgment have been explicitly debated especially among Japanese judges. Those debates should be technically useful to other jurisdictions, in particular to those that have recently experienced a transition to a modern judicial system. Further, these debates also allow us to infer the role of the Japanese judiciary in society, in line with the argument of Atiyah and Summers that the orientation towards legal reasoning further reflects the "vision" of law that the general public holds.[5] As will be examined through the analyses of a few recent cases (section III. below), the Japanese courts are responsive to the new demands in contemporary society[6] and to attempts to be accommodative of them, yet courts remain conservative in the sense that such socially sensitive or controversial issues are addressed within an established legal framework.

Keeping these two contexts in mind, this article proceeds as follows. First, a precise description is offered about court judgments in Japan (II.). This includes the institutional setting of courts and case reporting, as well as the meaning given to the judgments, or the "case law", under Japanese law. The next section analyses the drafting methods adopted by Japanese courts and then examines the style of the Supreme Court's judgments through an analysis of recent decisions involving socially sensitive or controversial issues (III.). It is followed by an historical review about the different attitudes towards judgments (case law) held by judges as compared to legal academics in Japan (IV.). The concluding section will identify the unique (or hybrid) nature of Japanese law as regards court judgments and suggest some implications for other jurisdictions (V.).

This article primarily focuses on judgments of the highest court, namely the current Supreme Court and the Great Court of Judicature before the Second World War. Lower court judgments raise primarily the issue of finding facts correctly and solving individual disputes appropriately, as opposed to providing for generally applicable legal norms; consequently, they will be discussed in another article by the author. Furthermore, the examination focuses on civil cases, not criminal or administrative cases, owing to the author's specialization. However, the arguments are expected to be capable of generalization, or they should at least usefully frame future research in other fields of Japanese law.

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4 ATIYAH/SUMMERS, *supra* note 3, 1–2.

5 ATIYAH/SUMMERS, *supra* note 3, 411.

6 On the responsiveness of the Japanese judiciary to new social issues, see F.K. UPHAM, Law and Social Change in Postwar Japan (Cambridge 1987).

II. JUDGMENTS UNDER JAPANESE LAW

1. The Institutional Setting

To make precise comparisons of the approaches to judgments among different jurisdictions, one must start with the institutional setting of the court and of judges in the jurisdiction.

a) Judges

In Japan, the so-called career-judge system has been adopted.[7] While the Japanese Constitution provides only that the Cabinet appoints lower court judges from among the list of candidates named by the Supreme Court,[8] the Court Act provides that a judge at a lower court must have had ten years or more of experience as assistant judge, as judge at a summary court, as public prosecutor, as attorney, or in some other related profession.[9] To be appointed an assistant judge, one must have completed training at the Legal Training and Research Institute (LTRI).[10] Thus, in practice, a judge starts his or her career as an assistant judge at a district court after passing the bar exam and after completing the professional training program at the LTRI and passing another exam.[11] After five years of experience, an assistant judge can be nominated by the Supreme Court to exercise the power of a full-fledged judge,[12] a nomination which is made without exception in practice.

The Supreme Court is a limited exception to the career-judge system in Japan. The Constitution provides that the Chief Justice of the Supreme Court is nominated by the Cabinet and appointed by the Emperor,[13] and that

7 For an overview of the Japanese court system, see M. ABE/L. NOTTAGE, Japanese Law, in: Smits (ed.), Encyclopedia of Comparative Law (2nd ed., Cheltenham *et al.* 2012) 157–168; 'Courts in Japan' on the website of the Supreme Court, *https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf*. For a critical analysis of the career-judge system in Japan, see J.M. RAMSEYER, Second-Best Justice: The Virtues of Japanese Private Law (Chicago 2015) 206.

8 Art. 80 (1) Japanese Constitution; *Nihon-koku Kenpō,* 3.12.1946.

9 Art. 42 Courts Act; *Saiban-sho-hō*, Law No. 59/1947. The related professions are research official of the court, teacher with the LTRI, teacher with the Training and Research Institute for Court Officials, and professor or associate professor of a qualified university.

10 Art. 43 Courts Act.

11 See S. KOZUKA, "Closing the Gap" between Legal Education and Courtroom Practice in Japan: *Yōken Jijitsu* Teaching and the Role of the Judiciary, in: Harding/Hu/de Visser (eds.), Legal Education in Asia: From Imitation to Innovation (Boston 2018) 157, 159.

12 Art. 1 (1) Act on the Special Rules about the Power of Assistant Judges; *Hanji-hō no shokken no tokurei tō ni kansuru hōritsu*, Law No. 146/1948.

13 Art. 6 (2) Constitution.

the Justices are appointed by the Cabinet.[14] The number of Justices (other than the Chief Justice) shall be fourteen or less,[15] and at least ten among them must have twenty years or more of experience as president of the Appeals Court, judge, public prosecutor, attorney, or professor or associate professor of a qualified university.[16] Usually one or two of the Justices at the Supreme Court are non-lawyers, in many cases an ex-diplomat or ex-bureaucrat. As the number of Supreme Court Justices is only fifteen, there are several research officials serving at the Supreme Court to support the Justices through research and other activities.[17] Unlike law clerks in the United States' Supreme Court, the research officials are assigned to one of the chambers, not to an individual Justice.[18] In practice, they are career judges,[19] usually of middle age (around forty years old).

The career-judge system had been the rule since long before the Second World War. Though unsystematic political appointment was prevalent for two decades after the introduction of the Western judicial system, the Constitution of Courts Act was enacted in 1890 and provided that a judge (as well as a public prosecutor) must have passed the bar exam and completed traineeship at a court or a prosecutor's office by passing the second exam.[20] A judge was appointed by the Emperor and was given a lifelong position.[21] Later, in 1921, the retirement age of sixty-three for judges (sixty-five for the President of the Great Court of Judicature) was introduced. Justices at the Great Court of Judicature were required to have had ten or more career years as judge or ten or more years of experience as public prosecutor, law professor of a Imperial University, or attorney.[22] For judges at the Court of Appeals, the required amount of experience was five years.[23]

The Great Court of Judicature had a larger number of Justices than the current Supreme Court. It was divided into several divisions,[24] each with five (until 1913, seven) Justices.[25] According to research focusing on the

14 Art. 79 (1) Constitution.
15 Art. 5 (3) Courts Act.
16 Art. 41 (1) Courts Act.
17 Art. 57 Courts Act.
18 G. TABARU, *Saikōsai hanketsu no uragawa* [Behind the Scenes of Supreme Court Judgments], (Tōkyō 1965) 86–94.
19 See para. 3 of the Supplementary Provisions, Courts Act.
20 Art. 57 Constitution of the Courts Act (*Saiban-sho kōsei-hō*; repealed in 1947). For more details on the history of the establishment of the career-judge system, see KOZUKA, *supra* note 11, 161.
21 Art. 67 Constitution of the Courts Act.
22 Art. 70 Constitution of Courts Act.
23 Art. 69 Constitution of Courts Act.
24 Art. 43 (2) Constitution of Courts Act.

Taishō and Shōwa era (1912–1946), the number of divisions varied between three to eight.[26] Therefore, the total number of Justices at the Great Court of Judicature was between twenty and forty.

b) Court Decisions

The judge(s) rendering a decision must sign it.[27] This has been the rule since the Meiji period.[28] However, when more than one judge constitutes the panel hearing the case, it is not known who drafted the decision, and the process of reaching a verdict is not made public.[29] The only exception, introduced after the Second World War, is the case of a Supreme Court decision. Apparently transplanting the US system, a Justice's individual opinion, if any, must be indicated in the decision.[30] Still, the Justice who drafted the court opinion is not identified, except in a few early cases of the Supreme Court.[31]

However, the fact that judges signed their decisions does not mean that the judge or judges who rendered a specific decision were always identifiable to the public. Before the Second World War, the official case reporters (for decisions of the Great Court of Judicature) did not include the Justices' names.[32] As a result, the names of the Justices who rendered the decision were not readily available to the public unless a commercial journal published the same case with the names. This practice was changed after the

25 Art. 53 Constitution of Courts Act.

26 S. NISHIKAWA, *Taishō-, Shōwa-ki ni okeru kanbu saiban-kan no caria pasu bunseki* [The Analysis of the Career Path of Judges in Taishō and Shōwa Era], Meiji Daigaku Shakai Kagaku Kenkyū-sho Kiyō 50 (2) (2012) 249, 251.

27 Art. 157 (1) Rules of Civil Procedure; *Minji soshō kisoku,* Supreme Court Rules No. 5/1996.

28 See Art. 236, No. 5 (before amendments of 1926) and Art. 191 (1) (after amendments of 1926, valid until 1996) Civil Procedure Act of 1890; *Minji soshō-hō*, Law No. 109/1996.

29 Art. 75 Courts Act. This rule has led to the confidentiality of a verdict process when a lay judge participates in a criminal case (Art. 70 Act on Criminal Cases involving Lay Judges).

30 Art. 11 Courts Act.

31 Supreme Court, 23 June 1948, Keishū 2, 715; Supreme Court, 23 June 1948, Keishū 2, 722; Supreme Court, 23 June 1948, Keishū 2, 734.

32 The division that rendered the judgment was indicated for each judgment, and the names of the Justices who belonged to each division of the Great Court of Judicature were listed at the end of the official case reporter. Therefore, a careful reader could identify the Justices who sat on the Court and rendered the judgment. See T. ONO, *"Hanrei-shū" ni tsuite* [On the "Case Reporter"], Shoken Shōhō 18 (1969) 135, 161–162.

Second World War, and the official case reporter of the Supreme Court now publishes the names of the Justices.

c) The Official Case Reporter

Besides many commercial journals and online services that publish court decisions, there is currently the official case reporter for the Supreme Court. While the official title appears to be *Saikō saiban-sho hanrei-shū*, each issue is divided into a civil part and a criminal part and is treated as if the respective parts are independent publications. The part for civil cases has the title of *Saikō saiban-sho minji hanrei-shū* (Collection of Supreme Court Civil Cases), known by the abbreviation of *Minshū*. The official case reporter used to be published under the name of the *Hanrei Chōsa-kai* of the Supreme Court, but that entity was succeeded by the non-profit organization *Hōsō-kai* since 2011.

The official case reporters do not publish all the decisions rendered by the Supreme Court, but only such cases as are selected by the Case Committee. According to the Rules on the Case Committee,[33] the Supreme Court's Case Committee consists of seven or fewer Justices, assisted by research officials or other staff as secretariat members. The mandate of the Case Committee is to decide whether or not to publish a decision in the official case reporter.[34] The same system exists in Appeals Courts, though the official case reporter for Appeals Court decisions *(Kōtō saiban-sho hanrei-shū)* has since 2003 no longer been publicly available.[35]

For the decisions published in the official case reporter, the research official who worked on the case publishes a commentary in the journal *Hōsō Jihō*, also published by *Hōsō-kai*. After the commentaries on all the cases of the year appear in *Hōsō Jihō*, they are published as a bound annual *(Saikō saiban-sho hanrei kaisetsu) with* some updates. The practice started in 1954 as brief updates on recent Supreme Court decisions,[36] but it has developed into a thorough examination of disputed issues and background thoughts, with comprehensive references including precedents, academic writings, and other relevant materials, sometimes on foreign law as well.

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33 The Rules are not published, but they were disclosed at the request of a private lawyer, who has posted them on his website *https://yamanaka-bengoshi.jp*.

34 On the description of how the Case Committee operates, see TABARU, *supra* note 18, 86, though things might have changed since the mid-1960s.

35 M. ISHIKAWA/Y. FUJII/NORIKO MURAI, *Rigaru risāchi* [Legal Research] (3rd ed., Tōkyō 2008) 179.

36 See SAIKŌ SAIBAN-SHO CHŌSA KANSHITSU, *Saikō saiban-sho hanrei* [Decisions of the Supreme Court], Hōsō Jihō 6 (2) (1954) 159. Each decision is reported in two to three pages.

The court decisions are now available through the search system on the website of the Supreme Court.[37] Though the website disclaims that not all the decisions of the Supreme Court are available, decisions not published in the official case reporter can also be searched. In other words, the selection of cases available on the website is not identical to the Case Committee's selection of cases to be reported in the official reporters. Lower court decisions are also available in the same system. Interestingly, the Appeals Court cases available on the website seem to be those selected by the Case Committees of the Appeals Courts.

2. The Status of Precedent

a) Case Law as Understood by Judges

Under the Courts Act, a court decision is binding on the lower court in respect of the same case.[38] No other power is foreseen. However, it is now widely recognized that precedents have a certain meaning equivalent to the case law in common law jurisdictions. Institutionally, precedents (*hanrei*) are mentioned with regard to appeals to the Supreme Court in both civil and criminal matters. In civil matters, when the original decision is in contradiction with Supreme Court precedent (or precedent of the Great Court of Judicature or an Appeals Court when there is no precedent from the Supreme Court), a party may request the discretionary permission to appeal to the Supreme Court.[39] Likewise, in criminal matters, when the original decision is in contradiction with precedent of the Supreme Court, an appeal to the Supreme Court is allowed.[40] Furthermore, when the Supreme Court decides otherwise than it did previously, which means when the Supreme Court intends to overrule a precedent, the grand bench must be summoned.[41] All these provisions may suggest that a precedent has some meaning on later court decisions.

The recognized status of precedent is, however, not limited to the above. Despite the principle that a judge is guaranteed independence and is bound only by the Constitution and law,[42] both professional judges and academics affirm that precedents are a de facto source of law (*hōgen*, which is the translation of the German word *Rechtsquelle*). Such arguments started to

37 See the description of the system (in Japanese) at *https://www.courts.go.jp/app/picture/hanrei_help.html.*

38 Art. 4 Courts Act. The rule was the same before the Second World War, see Art. 48 Constitution of Courts Act.

39 Art. 318 (1) Civil Procedures Act.

40 Art. 405 No. 2 Criminal Procedures Act; *Keiji soshō-hō,* Law No. 131/1948.

41 Art. 10 No. 3 Courts Act.

42 Art. 76 (3) Constitution.

appear in 1920s. As seen below, a group of academics at the Tōkyō Imperial University launched a study of judgments by the Great Court of Judicature and considered the formation of case law. In 1936, a Justice of the Great Court of Judicature argued that repeated judgments on a certain issue will make citizens trust in the existence of a legal rule, which will give rise to the customary law.[43] He explicitly mentioned the common law concepts of "case law" and "judge-made law" (by inserting English terms) and regarded the Japanese courts' precedents, including those of lower courts, to be equivalent to them.[44]

More recent arguments of judges tend to emphasize the demand of equal treatment and predictability. According to them, justice requires that like cases are treated in a like manner.[45] Masami Ito, famous professor in Anglo-American law and Supreme Court Justice between 1980 and 1989, writes that career-judge Justices tend to follow a precedent even when they would hold otherwise if there were no precedent.[46] This may mean that an equivalent of *stare decisis* exists under Japanese law. Finally, the Supreme Court in 2013 referred to "the *de facto* binding power of a precedent" in rejecting the retrospective effect of a judgment.[47]

It is well understood that such (de facto) relevance of precedent does not apply to the whole of a judgment. Judges distinguish the main holding

43 M. KAJITA, *Hanrei no kinō to hanrei-shū no kankō* [The Role of the Precedents and the Publication of the Case Reporter], Hōsō-kai Zasshi 14 (4) (1936) 64.

44 KAJITA, *supra* note 43, 67–68.

45 T. NAKANO, *Hanrei to sono yomikata* [Precedents and the Manner to Read Them] (revised ed., Tōkyō 1986) 19–20; S. KANETSUKI, *Hanrei ni tsuite* [On precedents], Chuo Law Journal 12 (4) (2016) 3, 5. See also E. MATSUMOTO, Adjusting an "Imported" (or "Received") Law – An Approach from the "Precedent" in Japanese Law, in: Hondius, *supra* note 1, 323, 332–335. This emphasis on equal treatment and certainty also carries over into the approach of public prosecutors in criminal cases, and even government lawyers (including further some seconded judges) dealing with private law as well as public law cases involving the state: L. NOTTAGE/S. GREEN, Who Defends Japan? Government Lawyers and Judicial System Reform in Japan, Asian-Pacific Law and Policy Journal 13 (1) (2011) 129–173, abridged and updated in L. WOLFF/L. NOTTAGE/K. ANDERSON (eds.), Who Rules Japan? Popular Participation in the Japanese Legal Process (Cheltenham 2015) 63–107. RAMSEYER, *supra* note 7, has long emphasized the benefits of the relative predictability of the law in Japan (at least compared to the US) from an economic perspective. Yet this impulse is arguably driven by a broader conception of justice held by Japanese judges and legal professionals.

46 M. ITŌ, *Hanrei no sonchō* [Respecting Precedents], in: *Saiban-kan to Gakusha no Aida* (1993) 43, 50.

47 Supreme Court, 4 September 2013, Minshū 67, 1320. Note that Justice Kanetsuki, author of KANETSUKI, *supra* note 45, was a member of the panel.

(shuron), which is equivalent to *ratio decidendi* in common law, from *obiter dicta (bōron).* Only the main holding is considered to have the power as precedent. Which part of a judgment is the main holding is to be examined in each case, though there are arguments about the standard for identifying main holdings.

b) Case Law as Taught in the Classroom

Reflecting such recognition of the case law as precedent, teaching cases has become quite common in Japanese legal education. A publisher of law books, Yūhikaku, launched a series of teaching materials titled the *Hanrei 100-sen* (Collection of 100 cases) in 1960s. Now the series covers basic subjects, such as in *Minpō Hanrei 100-sen* on civil law and *Keihō hanrei 100-sen* on criminal law, but also more specific subjects, including *Kōtsū Jiko Hanrei 100-sen* on traffic accident cases, *Media hanrei 100-sen* on media law and *Iji-hō hanrei 100-sen* on medical law. *Hanrei 100-sen* is a well-known and popular publication in Japan.[48] Typically, a title in the series consists of one hundred sections, each section taking up one judgment and containing summarized facts, excerpts from the judgment, and comments reviewing the judgment's meaning in light of case law (by referring to other judgments before or after the judgment at issue). Each section is concise enough to be concluded in two pages. As compared to American casebooks, the uniqueness of *Hanrei 100-sen* exists in that the author summarizes the facts and in that the excerpts of the judgment are short. Apparently, it is not the aim of this publication to require that readers find the material facts and identify the part of the judgment relevant as precedent (main holdings or *ratio decidendi*).

Interestingly, the existing practice persisted after the launch of law schools in 2004, though the design of law schools was affected by those in the US. Indeed, several titles were published as "casebooks" to be used in law schools, containing longer excerpts of judgments than would a title in the *Hanrei 100-sen* series. Still, many of them do not demand that the reader identify the material facts. Facts are summarized by the authors, just as in *100-sen* titles. Then the reader is presented the part of the judgment that appears to constitute the "main holding". Among the four casebook titles published by Yūhikaku and the ten titles by Kōbundō, only three (both

48 See 'Preface' to M. BÄLZ/M. DERNAUER/C. HEATH/A. PETERSEN-PADBERG (eds.), Business Law in Japan – Cases and Comments (Alphen aan den Rijn 2012). Mikazuki, a famous professor in civil procedure law, wrote in 1982 that *Hanrei 100-sen* was a unique legal publication, unknown in other jurisdictions in the world (A. MIKAZUKI, *Hōgaku nyūmon* [Introduction to Law] (Tōkyō 1982) 47.

from Kōbundō) quote the decisions both on facts and legal reasoning, thus demanding that the reader identify material facts.[49]

III. The Reasoning of the Court in Japanese Judgments

1. The Drafting Style of Lower Court Judgments

In early days, the craft of drafting judgments was apparently left to individual judges. After a traineeship became mandatory under the Constitution of Courts Act of 1890, the trainees may have had an opportunity to learn such skills personally from their supervisors. Half a century after the modernization of the judicial system, however, a more systematic approach emerged.

A group of middle-aged judges made a survey of court decisions at the Legal Research Institute and published a collection of decisions in civil cases in 1940.[50] As an appendix to the publication, the group produced the Guidance for Drafting Decisions in Civil Cases.[51] When the Second World War was over, the collection of decisions and the Guidance were reprinted

49 Yūhikaku titles surveyed include: K. Takahashi (ed.), *Kēsu bukku kempō* [Casebook on the Constitution] (Tōkyō 2011); Y. Iwama *et al.* (eds.), *Kēsu bukku keihō* [Casebook on Criminal Law] (3rd ed., Tōkyō 2017); M. Inoue *et al.* (eds.), *Kēsu bukku keiji soshō-hō* [Casebook on Criminal Procedure Law] (5th ed., Tōkyō 2018); and T. Araki *et al.* (eds.), *Kēsu bukku rōdō-hō* [Casebook on Labor Law] (4th ed., Tōkyō 2015). In all of them, facts are summarized by the author, though the facts in the casebook on criminal procedure law include long passages, often taken from the original decisions. Kōbundō titles surveyed include: Y. Hasebe *et al.* (eds.), *Kēsu bukku kempō* [Casebook on the Constitution] (4th ed., Tōkyō 2013); O. Kasai *et al.* (eds.), *Kēsu bukku keihō* [Casebook on Criminal Law] (5th ed., Tōkyō 2015); S. Maruyama *et al*. (eds.), *Kēsu bukku kaisha-hō* [Casebook on Corporate Law] (5th ed., Tōkyō 2015); Y. Hasebe *et al.* (eds.), *Kēsu bukku minji soshō-hō* [Casebook on Civil Procedure Law] (4th ed., Tōkyō 2013); O. Kasai *et al.* (eds.), *Kēsu bukku keiji soshō-hō* [Casebook on Criminal Procedure Law] (3rd ed., Tōkyō 2012); K. Inaba *et al.* (eds.), *Kēsu bukku gyōsei-hō* [Casebook on Administrative Law] (6th ed., Tōkyō 2018); T. Kanai *et al.* (eds.), *Kēsu bukku dokusen kinshi-hō* [Casebook on the Anti-monopoly Act] (4th ed., Tōkyō 2019); H. Kaneko *et al.* (eds.), *Kēsu bukku sozei-hō* [Casebook on Tax Law] (5th ed., Tōkyō 2017); K. Sugeno (gen. ed.), *Kēsu bukku rōdō-hō* [Casebook on Labour Law] (8th ed., Tōkyō 2014); and N. Koizumi *et al.* (eds.), *Kēsu bukku chiteki zaisan-hō* [Casebook on Intellectual Property Law] (3rd ed., Tōkyō 2012). Only the casebooks on corporate law and criminal procedure quote the decisions both for facts and legal reasoning, while the one on the Anti-monopoly Act also quotes the decision on facts in many of the cases included. The casebooks on the Constitution even omit the facts intentionally and cull only excerpts discussing the legal reasoning. All the casebooks surveyed are in Japanese.

50 Kozuka, *supra* note 11, 167–168.

51 *Minji hanketsu-gaki ni tsuite* [On Drafting Court Decisions in Civil Cases], reprinted as *Shihō kenshū-jo shiryō* 6 (1952, original in 1941).

and used as teaching material at the newly established LTRI. It is imagined that drafting skills became a systematically organized body of knowledge and was shared among the judges over time, as the judges influenced by these activities, in particular, those educated at the post-war LTRI, became senior in the career-judge system. Later, in 1958, the Guidance was developed into the Handbook of Drafting Decisions in Civil Cases for trainees at the LTRI.[52] The Handbook, now in its tenth edition and published by *Hōsō-kai*, is still used in classes at law schools as a textbook.

The Guidance (later the Handbook) describes that a decision is to be divided into seven sections: title (Judgment, Decision or Order), parties, introductory text (identification of the case), main text, facts, grounds, and the court.[53] The section on facts describes the facts supporting the decision, including the claim and arguments that the parties advanced in the court room as well as the list of evidence – and not such facts as the court finds to have taken place as a result of examination of the evidence.[54] The Guidance clarifies this point by using German terms in explaining that the "facts" here are *Tatbestand* (facts constituting the judgment) and not *Tatsache* (facts alleged) or *Sachverhalt* (factual situations). Furthermore, the section is to describe the facts (parties' arguments) as the court has understood them, and it is not to simply reproduce what the parties presented before the court. In other words, the parties' arguments must be turned into an organized argument *(geordnete Darstellung)* according to the relevant legal provision.[55] For this purpose, the claim of the plaintiff is to be described by identifying facts concerning the admissibility of the suit, facts concerning the conditions for the alleged right to be protected, facts concerning the preconditions for establishing the claim and other arguments in fact or law to sustain the suit.[56] The Handbook elaborates that the court must identify, and clarify in the event the claim is not sufficiently clear, the alleged facts that must be established to affirm the preconditions *(yōken jijitsu)* and that it must then request the defendant to either affirm or deny those alleged facts. Thus, the section on facts in a decision can be drafted by recording the arguments of both parties, organized according to *yōken jijitsu*.[57]

The drafting style of judgments was revisited in the early 1990s. Judges of four major courts, namely the Appeals Courts of Tōkyō and Ōsaka as

52 SHIHŌ KENSHŪ-JO (ed.), *Minji hanketsu kian no tebiki* [The Handbook for Drafting Court Decisions in Civil Cases] (10th ed., Tōkyō 2006).

53 *Minji hanketsu-gaki ni tsuite*, *supra* note 51, 11.

54 *Minji hanketsu-gaki ni tsuite, supra* note 51, 139–140.

55 *Minji hanketsu-gaki ni tsuite*, *supra* note 51, 130. Cf. SHIHŌ KENSHŪ-JO, *supra* note 52, 35.

56 *Minji hanketsu-gaki ni tsuite*, *supra* note 51, 135–136.

57 SHIHŌ KENSHŪ-JO, *supra* note 52, 36.

well as the District Courts of Tōkyō and Ōsaka, took the lead in jointly proposing a new style in 1990.[58] With further revisions added to the original proposal in a few years,[59] the "new style" *(shin-yōshiki)* judgment quickly prevailed. Interestingly, the Handbook, which has continuously been revised, does not replace the existing style with the new style, but only briefly mentions the latter as an alternative that a court can choose instead of the existing style.[60]

In the new style of judgment, the sections of facts and grounds are integrated into one section titled "facts and grounds". This structure allows the court to provide the overview of the case in the beginning by describing the "Facts not disputed", which is titled as "Facts given" in many recent judgments, followed by the identification of the "Issues disputed". Instead of restating the parties' arguments on all the legal requirements *(yōken jijitsu),* the judgment can focus on disputed issues. For undisputed issues, the court can simply record what both parties agree to treat as given (and the court accepts as such). The joint proposal claimed that the new style will be easier for lay people – the parties among others – to understand.[61] Without denying such an original intent, Judge Iehara in his article of 2015 argues that the new style closely reflects the procedure by focusing on the issues that the discourse before the court in fact concentrates on, whereas the traditional style is more concerned with the substantive law applicable to the case, trying to cover all the legal preconditions that must be considered before reaching a ruling on the case.[62] It is not a coincidence that the courts, since the mid-1980s, have been making efforts in identifying the truly disputed issues at an early stage of the proceedings and concentrating on such issues with the aim of reducing the time needed for litigation.

2. The Drafting Style of the Highest Court's Decisions

The establishment of a drafting style in the 1940s and 1950s as well as the introduction of the new style in the 1990s was targeted at lower court deci-

58 SAIKŌ SAIBAN-SHO JIMU SŌKYOKU (ed.), *Minji hanketsu-gaki no atarashii yōshiki ni tsuite* [On the New Style of Decisions in Civil Cases] (Tōkyō 1990).

59 TŌKYŌ KŌTŌ, CHIHŌ SAIBAN-SHO MINJI HANKETSU-GAKI KAIZEN I'INKAI, *Shin yōshiki ni-yoru minji hanketsu-gaki no arikata ni tsuite* [How Decisions in Civil Cases should be Drafted in the New Style], in: Saikō Saiban-sho Jimu Sōkyoku (sup.), *Minji soshō no un'ei kaizen kankei shiryō* [Materialien zur Verbesserung der zivilprozessualen Abläufe] (2) (Tōkyō 1994) 396.

60 SHIHO KENSHŪ-JO, *supra* note 52, 89.

61 SAIKŌ SAIBAN-SHO JIMU SŌKYOKU, *supra* note 58, 1–2.

62 N. IEHARA, *Minji hanketsu-gaki no arikata ni tsuite no ichi kōsatsu* [A Thought on How Decisions in Civil Cases should be Drafted], Tōkyō Daigaku Hōka Daigakuin Law Review 10 (2015) 66, 68.

sions. The style of the highest court's decision has developed independently, though in a possibly related manner.

The drafting style of the Great Court of Judicature appears to have been modelled after the judgments of the French *Cour de Cassation*.[63] Though not written in one sentence as in France, the judgment of the Great Court of Judicature quoted the grounds for appeal advanced by the party and responded to them one by one, just like the *Cour de Cassation* does in paragraphs starting with "*Attendu que* …". The facts of the case can be inferred only through the grounds for appeal. The style is seen in judgments that were reproduced in the official case reporter *Daishin-in hanketsu-roku* (Records of the Great Court of Judicature Cases, known by the abbreviation "*Minroku*" for civil cases) published until 1921.

A shift in case reporting occurred suddenly in 1922. *Minroku* ceased its publication and was replaced by the new case reporter series, *Daishin-in hanrei-shū* (Collection of the Great Court of Judicature Cases, known by the abbreviation *Minshū* for civil cases). While *Minroku* were published by Chūō University (formerly *Tōkyō Hōgaku-in*), the new *Minshū* were published by *Hōsō-kai*.[64] In the new series, summarized facts appeared preceding the judgment. Furthermore, the judgments were no longer reproduced in full, but only excerpts were reported. Apparently, the new case reporting style was closer to a German case reporter, which briefly summarizes the facts, followed by the excerpts as *"aus den Gründen"*. Still, the style of the judgment itself was not affected at this point. The facts in *Minshū* were not part of the judgment, instead being added when the case reporter was published.

In the new *Minshū* of the Supreme Court after the Second World War, the summary of facts disappeared.[65] The case reporter again reproduced the judgments only, and in full length. It is possibly the case that the new *Minshū* was modelled after case reporters in the US. The American influence, if any, did not, however, reach the drafting style of Supreme Court judgments, which remained as responses to the grounds of appeal, maintaining the (French-inspired) tradition existing since the Meiji period.

A gradual change emerged in the mid-1960s. In some cases, the Supreme Court began to describe the facts of the case as part of the judgment.[66] The

63 I. SUEHIRO, *Hanrei shiken* [A Personal View on the Precedents], Hōsōkai Zasshi 10 (1) (1935) 63, 68.

64 ONO, *supra* note 32, 142.

65 Ono conjectures that this disappearance of facts was one of the reasons why the research official's commentaries were launched in 1954 (see *supra* note 36). ONO, *supra* note 32, 163.

66 Though an exhaustive survey has yet to be made, a few early examples can be found in: Supreme Court, 4 October 1966, Minshū 20, 1565; and Supreme Court, 1 December 1966, Minshū 20, 2036.

new attempts initially appeared to be made in only one or two chambers, but they gradually prevailed in all the chambers for over a decade. In the 1980s, it became rather the exception to respond only to the grounds of the appeal without summarizing the facts of the case.[67] Likewise, the new style of judgments for lower courts appears to have affected the Supreme Court over time. In some recent judgments of the Supreme Court, a brief overview of the case is given at the beginning under the title "undisputed facts" or "summary of the facts".[68] Given that there are always several Justices in the Supreme Court who served as lower court judges under the career-judge system, and given that the research officials at the Supreme Court are appointed from a pool of middle-aged judges, it is no surprise that the developments in the drafting style for lower court decisions have had an impact on the Supreme Court with a lag of a couple of decades.

3. Reasoning in Supreme Court Judgments

It is not possible to make a conclusive evaluation of the reasoning adopted by the Supreme Court without a comprehensive study of its judgments, which the present author cannot undertake within the limits of this paper. Instead, this section identifies four recent judgments of the Supreme Court for the purpose of examining the approaches employed in them. Each of the four cases deals with socially salient or controversial issues and cannot be solved exclusively by a technical application of the law.

a) The Purposive Construction of the Law

The Supreme Court decision of 10 December 2013 concerns the presumption that a child has been born in wedlock when the husband had previously changed gender status pursuant to the Act on the Special Rules for the Gender Status of People with Gender Identity Disorder (hereinafter "GID Act").[69] The GID Act, enacted in 2003, allows a person with a Gender Identity Disorder to apply for a decision of the family court declaring a change of the applicant's gender from the previously assigned sex.[70] Once such a decision is made, the person is treated as having the changed gender under the Civil Code and other laws. In the case at issue, one of the plaintiffs had her gender changed to male pursuant to the GID Act and then married a

67 As an example of the established drafting style, Supreme Court, 19 January 1981, Minshū 35, 1.

68 See, for example, Supreme Court, 4 September 2013, *supra* note 47.

69 Supreme Court, 10 December 2013, Minshū 67, 1847.

70 Art. 3 GID Act; *Sei-dōitsu-sei shōgai-sha no seibetsu no toriatsukai no tokurei ni kansuru hōritsu*, Law No. 111/2003.

woman (the other plaintiff). The couple decided to have a child by artificial insemination. While the Civil Code presumes that a child conceived by a wife during marriage is the child of her husband,[71] the mayor of the ward, as the administrator of the family register, failed to apply the presumption and registered the child as being the mother's child, but with an unknown father (i.e. the "father" column was left blank) – and thus not as a child of the couple. The couple requested that the family register be corrected to record the child as the couple's child.

The Supreme Court judgment, which is rather brief (the court opinion totaling four pages), held that the presumption of being a child of the husband applies when the husband is a person who has had his gender changed to male pursuant to the GID Act. In its reasoning, the Supreme Court stated that it would be unreasonable if the presumption of a child being born in wedlock, which is the primary outcome of marriage, should be denied while at the same time allowing a person who has changed his or her gender to legally marry. This is notwithstanding the fact that the precedents of the Supreme Court have held that the presumption is inapplicable if it was apparent that the couple had no chance of having had sexual intercourse because the marriage was in fact broken or because the spouses lived far apart from each other. The supplementary opinion of Justice Terada elaborates that the marriage under the current Civil Code is not merely the authentication of a couple but that it has as its main element the treatment of their child as a "child born in wedlock".

In this judgment, the Supreme Court respected the purpose of the GID Act and adopted an interpretation of a Civil Code provision as is in accord with it. In terms of reasoning, this approach can be seen as purposive interpretation. When a new idea is introduced by the legislation, the Supreme Court is responsive enough to interpret other laws so as to accommodate such a new idea and does not try to limit the impact of the new idea to the specific and underlying legislation.

The research official's commentary describes the background facts, such as the legislative history of the GID Act and the use of artificial insemination in Japan, reviews the academic views on the issue addressed in the Supreme Court judgment, and examines the precedents excluding the presumption of a child as being born in wedlock.[72] All these indicate that the brief judgment of the Supreme Court is, in fact, based on the extensive and thorough survey prepared by the research official.

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71 Art. 772 Civil Code; *Minpō*, Law No. 89/1896.

72 Commentary on Case No. 23 (by Research Official Yamaji), *Saikō saiban-sho hanrei kaisetsu minji-hen: Heisei 25-nendo* [The Commentaries on Supreme Court Decisions on Civil Cases: 2013] (Tōkyō 2016) 605.

b) Exploring the Purpose of a Law through the Legislative History

In its judgment of 6 December 2017, the Supreme Court faced a claim that the viewer's fee system for the public broadcasting entity (*Nippon Hōsō Kyōkai*: NHK) was unconstitutional.[73] The Broadcasting Act provides that a person who installs a device that can receive the NHK broadcast must conclude a contract with the latter. There is no provision as to what steps can be taken when the person having installed a device does not agree to conclude a contract with NHK. Unlike in European countries, there are five national networks of commercial broadcasting companies in Japan.[74] As a result, viewers who (allegedly) watches only commercial broadcaster's programs and not those of NHK tend to complain about paying the viewer's fee to NHK by concluding a contract with the latter. NHK raised suit, demanding that a viewer who refused to conclude a contract to pay the viewer's fee, arguing that a contract is deemed to have been concluded once NHK makes a corresponding request to a viewer who has installed a television set. Alternatively, NHK demanded that the court issue a judgment that replaces the viewer's consent to the contract.[75] The Supreme Court considered the case in the setting of the grand bench because the constitutionality of the Broadcasting Act was disputed.[76]

The reasoning of the Supreme Court provided an exceptionally long "summarized facts" section (10 pages), in which the Supreme Court reviewed the history of the regulation of the broadcasting service before the Second World War and also the re-incorporation of NHK as done by transforming the pre-War *Nihon Hōsō Kyōkai* under the Broadcasting Act of 1950; it then overviewed the statutory framework concerning NHK under the current Broadcasting Act and outlined the viewer's contract. In doing so, the Supreme Court noted that, prior to the Second World War, the installment of a radio receiver was subject to the government's permission, which entailed the obligation to conclude a contract with the NHK's predecessor, and it observed further that broadcasting was censored in those days. These facts imply that abolishing permission as a prerequisite for installing a radio receiver (later a television set) and establishing the con-

73 Supreme Court, 6 December 2017, Minshū 71, 1817. On the situation before the Supreme Court decision, R.E. RODRIGUEZ SAMUDIO, Development and Current Issues with the NHK Receiving Fee System, ZJapanR/J.Japan.L. 46 (2018) 215.

74 On the background, see S. KOZUKA, Plurality in the Broadcasting Sector: An agency cost analysis of the regulation in Japan, Asian Journal of Comparative Law 5 (2010) 53.

75 Art. 414 Civil Code.

76 Commentary on the Case No. 26 (by Research Official Tokami), Hōsō Jihō 71 (9) (2019) 1925, 1974.

tractual regulation of the relationship between the viewer and NHK under the Broadcasting Act were outcomes of post-War democratization. Having so reviewed the historical background and institutional setting of the broadcasting law, the Supreme Court held that the current regime, whereby the NHK is financed by viewer's fees, aims at ensuring the people's right to know and contributing to the development of sound democracy – and that there should thus be some measure to enforce conclusion of a viewer contract. The Supreme Court then took note of the fact that a mechanism under which a court's judgment could replace an obligor's consent so as to secure the conclusion of a contract already existed under the Civil Code and the Code of Civil Procedure (re-codified in the Civil Enforcement Act in 1981) when the Broadcasting Act was enacted in 1950; based on this fact the Court surmised that the legislature intended use of this mechanism for securing the conclusion of a viewer's contract.

The Supreme Court's approach here was to identify the appropriate legal mechanism through an exploration of the purpose of the law. While the Supreme Court elaborated on the relevant history, it was not with the aim of finding the answer to the specific question at issue (how conclusion of a viewer's contract can be secured) in the legislative material. The historical background was especially important given that the enactment of the Broadcasting Act was part of democratization efforts undertaken after the Second World War. The judgment is, after all, based on substantive appropriateness in light of the purpose of the relevant law. Besides further detailing the legislative history, the research official's commentary, comprising over sixty pages with fifty-seven footnotes, makes reference to the financing system for public broadcasting entities in other countries, indicating that the Supreme Court checked the appropriateness of the judgment against foreign law as well, though not explicitly mentioned in the judgment.

c) Analogous Extension of the Statutory Framework in View of Equity

In a judgment from 1 March 2016, the Supreme Court dealt with a tragic accident in which a man of ninety-one years, who had suffered from dementia over seven years, stepped onto the railway tracks and was killed by a train.[77] The train company sued the wife and son of the old man for their failure to monitor the behavior of the man, claiming compensation for damages arising from the resulting disruption in the operation of train service. The legal issue involved was the liability of a person who owes a duty to supervise an individual who cannot himself be liable as tortfeasor under the Civil Code on account of his age or mental disability.[78]

77 Supreme Court, 1 March 2016, Minshū 70, 681. On this case, F. NAGANO, Haftung für Handlungen von Familienmitgliedern, ZJapanR/J.Japan.L. 46 (2018) 19.

The Supreme Court first rejected the argument that the spouse of a person with mental disorder has a legal duty to supervise this individual, noting that a guardian's duty to monitor a person with a mental disorder had been abolished in 1999 and that the duty to live together with, cooperate with and support one's spouse under the Civil Code does not establish a duty to monitor a spouse.[79] However, the Supreme Court did not stop with such formal reasoning and held that, in an analogical application to supervisor liability, a person can nonetheless have a legal duty to monitor an individual such that he or she is legally liable for any tortious conduct committed by an individual who is incapable of being found liable. In so holding, the Supreme Court pointed to the Court's judgment of 1983 as precedent,[80] though that judgment, in fact, rejected the defendant's liability "by analogy". Then the Supreme Court presented a balancing test to determine whether it would be reasonable, in view of equity, to attribute to the defendant liability based on the behavior of a person with a mental disorder, considering such elements as the relationship with the person to be supervised, the degree of daily contacts and the extent of actual engagement with this person, any problematic conditions suffered by this person, and any responses to such problems actually made. After reviewing the facts of the case, the Supreme Court concluded that neither the wife nor the son of the old man with dementia were to be held liable "by analogy". It becomes apparent that the Supreme Court's approach – affirming "by analogy" equity-based liability – was grounded on substantive considerations.

The research official's commentary,[81] totaling over sixty pages with ninety-five footnotes, reveals that the judgment was based on extensive research on the current situation of people with dementia in Japan, a comparative analysis of liability for the acts of an incapable person, academic views on "persons with a legal duty to monitor" dating back in Meiji period, and changes in the law on monitoring people with mental disorders. As regards the application "by analogy" of supervisor liability, the research official's commentary suggests two possible approaches, a balancing test and an attribution test (with a note that the two approaches are not mutually exclusive); the commentary then reviews lower court decisions before and after the Supreme Court judgment of 1983. The judgment of the Court itself does not articulate these background thoughts and underlying research, but the

78 Art. 714 Civil Code.

79 Art. 752 Civil Code.

80 Supreme Court, 24 February 1983, Hanrei Jihō 1076 (1983) 58.

81 Commentary on Case No. 75 (by Research Official Yamaji), *Saikō saiban-sho hanrei kaisetsu minji-hen: Heisei 28-nendo* [The Commentaries on Supreme Court Decisions on Civil Cases: 2016) (Tōkyō 2019) 159.

research official's commentary, read together with the judgment, convinces one that the substantive approach of the judgment is well thought out.

d) Balancing Test to Address a Novel Issue

The last judgment to be taken up is the decision on the plaintiff's action against Google claiming "the right to be forgotten".[82] The plaintiff had been fined for having sexual intercourse with a minor in 2011. The fact was reported in some media, reports which were copied on several websites. The applicant, having subsequently married and had a child, initiated an injunctive procedure requesting that Google' search engine not display those websites based on a search entering his name and the name of the prefecture where he lived. The Appeals Court rejected the claim, against which the applicant appealed.

Despite the applicant having based his claim on the "right to be forgotten", the Supreme Court carefully avoided employing that term and identified instead that the applicant's right to privacy was at issue. After having held that the display of the search results constitutes the speech of the search engine provider and that internet searches are a key infrastructure component for the flow of information in modern society, the Supreme Court presented a new balancing test. According to the Court, the test must balance the interest in not having the reports displayed in the search results against the reason for displaying them. The elements to be considered include: the nature and content of the fact searched; the extent to which the privacy-related fact in respect of the applicant will be distributed and the level of privacy harm that will ensue from the search results being displayed; the social status of and the impact on the searched person; the purpose and significance of the reports; and the circumstances prevailing in society when the reports were made and any changes since then. The Supreme Court then held that an order prohibiting display of the search results should be issued only when the interest in not displaying the result clearly prevails. Applying such a balancing test to the case, the Supreme Court, after recognizing that having sexual intercourse with a minor is heavily condemned in society as sexual exploitation and abuse of a minor, held that the search result in this case was still a matter of public concern and denied the plaintiff's request.

The judgment shows that the Supreme Court is responsive enough to the newly emerged interest as to create a balancing test in the absence of any

82 Supreme Court, 31 January 2017, Minshū 71, 63. This case is commented on in B. ZELLER/L. TRAKMAN/R. WALTERS/S. D. ROSADI, The Right to be Forgotten – the EU and Asia-Pacific Experience (Australia, Indonesia, Japan and Singapore), European Human Rights Law Review 1 (2019) 23, 35.

statutory framework that is directly applicable. Interestingly, the judgment itself is silent about where the test was derived from. However, the research official's commentary explains that the test is framed in accord with the existing test for enjoining traditional print media based on the harm to privacy,[83] with the commentary including a survey of academic writings on the subject.[84] The commentary also mentions that avoiding the use of the term "right to be forgotten" was intentional, given that the term did not raise a new issue not covered by the traditional concept of privacy.

These approaches, while not diminishing the Court's responsiveness, reveal that the Supreme Court adopts a conservative approach, looking to retain an existing framework as much as possible. In other words, the Supreme Court of Japan appears to respect both substantive and formal reasoning to more or less the same extent.

IV. The Contest over Case Law

1. The Official Reporter and the Courts' Control over How Precedents are Read

As mentioned above, the recognition of precedents as a (de facto) source of law emerged before the Second World War. When the Great Court of Judicature launched a new official case reporter series *(Minshū),* the Case Review Committee was established to consider the judgments of the Great Court of Judicature, which apparently was the predecessor to the current Case Committee of the Supreme Court.[85] The initiatives originated from Kiichiro Hiranuma, who became the President of the Great Court of Judicature in 1921. Hiranuma then introduced the Guidelines to be used by the Case Committee in considering cases; these sought to: avoid a too formalistic application of law, place greater emphasis on the law's purpose; ensure a balancing of legal logic with social norms by respecting moral rules and economic principles; and harmonize the judgments in civil and criminal cases.[86] It appears that Hiranuma, through review of the Great Court of

83 The balancing test for print media was adopted by the Supreme Court, 11 June 1986, Minshū 40, 872; Supreme Court, 8 February 1994, Minshū 48, 149.

84 Commentary on Case No. 3 (by RO Takahara), Hōsō Jihō 71 (11) (2019) 2489.

85 S. Okawa, *Daishin-in (minji) hanrei-shū no hensan to daishin-in hanrei shinsa-kai* [The Editing of the Collection of the Great Court of Judicature (Civil) Cases and the Case Review Committee of the Great Court of Judicature], Ritsumeikan Hōgaku 256 (1997) 1351; K. Kimura, *"Daishin-in hanrei shinsa-kai" shōron* [An Essay on the "Case Review Committee of the Great Court of Judicature"], Ritsumeikan Hōgaku 339/340 (2011) 77; Matsumoto, *supra* note 45, 332.

86 Okawa, *supra* note 85, 1355.

Judicature's judgments by the Case Review Committee, tried to lead the judgments in a certain direction.[87]

The actual role of the Case Review Committee was to select the cases to be reported in *Minshū* and to approve the parts of the judgment to be extracted as well as the "facts" to be included in the report. It may have been intended to select such judgments as were in line with the Guidelines so that the Justices of the Great Court of Judicature (and probably the judges of lower courts as well) could know which decisions to follow. Okawa points out that at times the Case Review Committee accepted consultation about a specific case from the Division in charge.[88]

Hiranuma, the man who took the initiative to introduce these reforms in the working method of the Justices at the Great Court of Judicature, joined the Ministry of Justice after graduating from the Tōkyō Imperial University, serving first as judge until 1898.[89] (Before the Second World War, both judges and prosecutors belonged to the Ministry of Justice.) Then, Hiranuma became prosecutor, climbing up the ladder to become Attorney General in 1912.[90] During his years at the Ministry of Justice, he worked on the introduction of the jury system.[91] Additionally, he was also engaged in the issuance of the Peace Preservation Ordinance *(Chian iji-rei)* in 1923, which was later enacted as the Peace Preservation Law *(Chian iji-hō)*.[92] Both of these activities need to be understood against Taishō Democracy movements.[93] The Taishō era (1912 to 1926) saw changes in the Japanese society as a result of both economic developments occurring since around 1900 and the social turmoil resulting therefrom.[94] The political scientist Mitani argues that there was also the American impact after the First World War. Just as the Taishō era began, Japan witnessed the emergence of the United States' liberal democratic society as a huge political and economic power. It

87 Though the source of inspiration for Hiranuma's initiative is not known, the system created as a result looks similar to the practice in Germany. See R. ALEXY/R. DREIER, Precedent in the Federal Republic of Germany, in: McCormick/Summers, *supra* note 1, 17, 22–23.

88 OKAWA, *supra* note 85, 1367–1369.

89 A. HAGIHARA, *Hiranuma Kiichiro to kindai nihon* [Kiichiro Hiranuma and Modern Japan], (Kyōtō Daigaku Gakujutsu Shuppan-kai 2016) 25.

90 HAGIHARA, *supra* note 89, 62.

91 HAGIHARA, *supra* note 89, 88–89.

92 HAGIHARA, *supra* note 89, 111.

93 For Taishō Democracy in the context of liberalism in Japan before the Second World War, see G.A. HOSTON, The State, Modernity, and the Fate of Liberalism in Prewar Japan, Journal of Asian Studies 51 (2) (1992) 287.

94 D. VANOVERBEKE, Community and State in the Japanese Farm Village: Farm Tenancy Conciliation (1924–1938) (Leuven 2004) 14–15.

was, after all, the United States' participation in the Allied Powers that brought an end to the devastating (First) World War and that dismantled the old global order in Europe.[95] Furthermore, socialism and anarchism were gaining support in some parts of society.[96]

It seems obvious that the combination of the introduction of the jury system and the enactment of the Peace Preservation Ordinance was the strategy chosen by government elites to respond to these circumstances. While responsive to the social changes and accommodative of the demands for democracy, the response was, ultimately, conservative in trying to hinder the new developments from becoming subversive to the government. Hiranuma's initiatives after becoming the President of the Great Court of Judicature were based on the same approach. He encouraged the court to be responsive and accommodative, but such responses needed to be consistent across courts and not individualistically made by each judge. On the side of legal studies, the free-law movement, advocating the pursuit of "living law" and allowing deviation from a statutory text, had already been introduced by some academics.[97] The Guidelines for the Case Review Committee were the response to such new thoughts.

Hiranuma quit the Great Court of Judicature after only two years. However, his initiatives were not bound to his person. In 1926, the Ministry of Justice established the Legal Research Committee within the Ministry, which developed into the Legal Research Institute (LRI) in 1939 (the predecessor to the later LTRI).[98] Judicial elites continued efforts to be responsive and accommodative of the social demands in order to maintain individuals' trust in the judiciary. It was probably not a coincidence that the study of judgment drafting skills was conducted as a research project of the LRI. Two decades ago, young judges shared Hiranuma's view from two decades earlier that the courts should be flexible in the interpretation of law in order to be responsive to social demands, but that they should remain conservative in preserving the statutory framework and rejecting the radical free-law approach.[99] The emphasis on the statutory framework developed

95 T. MITANI, *Taishō demokuracī ron* [The study of Taishō Democracy], (3rd ed., Tōkyō 2013) 18–24.

96 See MITANI, *supra* note 95, 28–32; HIRAHARA, *supra* note 89, 93–100.

97 L. Nottage, Tracing Trajectories in Contract Law Theory: Form in Anglo-American Law, Substance in Japan and the United States, Yonsei Law Journal 4 (2) (2013) 175, 210.

98 KOZUKA, *supra* note 11, 168–169.

99 This observation coincides with Nottage's finding that the approach of Japanese law to unfair contracts shows a substantive orientation, but that the development of standards is still slow. L. Nottage, Form and Substance in US, English, New Zealand and Japanese Law: A framework for better comparisons of developments in the

into treating *yōken jijitsu* (facts to be proven) as the key concept in legal training at the LTRI after the Second World War.

2. *Academic Case Comments as Creating Pluralist Platforms for Understanding Case Law*

Just as the Great Court of Judicature recognized the significance of precedents, an academic initiative to affirm the concept of "case law" also emerged. Izutarō Suehiro, professor of civil law at Tōkyō Imperial University, formed a group within the law faculty to study the judgments of the Court and to publish case comments. In the preface to the first volume of the case comments, Suehiro and his colleagues declared that the "time to debate whether precedents are a legal source or not is already gone."[100] The initiative of studying judgments derived from experiences of Suehiro.[101] Having been prevented from travelling to Europe due to the First World War, Suehiro unintendedly stayed in the US, where he came across the concept of case law. After the war was over, he travelled to Europe and was impressed by the idea of "living law" as raised by the Austrian legal sociologist Eugen Ehrlich. Based on these experiences, the above-mentioned preface demanded that legal doctrine be tested against the study of real life.

Curiously, the Great Court of Judicature's launch of *Minshū* was not welcomed by this group. They complained that *Minshū* published only excerpts of the grounds for appeal and of judgments. To them, this made it difficult to grasp the facts of each case, which used to be possible through careful reading of the grounds for appeal in *Minroku*.[102] Furthermore, they criticized that *Minshū* collected smaller number of judgments than the previous *Minroku*. Five years later, the group led by Suehiro cited a survey by an unknown researcher documenting that the 1927 *Minshū* published 115 judgments, whereas 377 judgments of the Great Court of Judicature were published in a commercial case reporter, *Hōritsu Shinbun*, with 98 judgments overlapping.[103] They argued that the number implied too selective an attitude by the Case Committee in choosing the cases to be reported in

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law of unfair contracts, Victoria University of Wellington Law Review 26 (1996) 247, 269.

100 Preface to *Hanrei mimpō: Taishō 10-nendo* [Cases on Civil Law in 1921] (Tōkyō 1923).

101 On the role of Suehiro in advancing the private law studies in Japan, see NOTTAGE, *supra* note 97, 210–211.

102 Preface to *Hanrei minpō: Taishō 11-nendo* [Cases in Civil Law in 1922] (Tōkyō 1924).

103 Preface to *Hanrei Minji-hō: Shōwa 2-nendo* [Cases in Civil Law in 1927] (Tōkyō 1929).

Minshū. In fact, according to a recent study, the first volume of *Minshū* totaled 879 pages and published 143 judgments rendered in 1922, while the last volume (vol. 27) of *Minroku* totalled 2,244 pages and published 294 judgments from 1921. The same study surveyed the original texts of the Great Court of Judicature's judgments over a decade and identified that only less than ten percent of all judgments rendered were published in *Minshū* every year.[104]

Apparently, Suehiro was interested in the fact patterns to which the law was applied. His interest in the "living law" could have led to the free-law approach, pursuing equitable solutions by deviating from the text of law, where it is found appropriate. However, while sociological study became popular around the 1940s, in particular after the Second World War, the free-law approach did not become mainstream among academic lawyers in Japan.[105] Wagatsuma, who was a junior member among Suehiro's group and who became an authority in civil law at Tōkyō University in later years, argued that the study of law should not fail to always consider the ideals guiding the (private) law, various social factors relating to the law, and the construction of applicable legal texts.[106] In using the terms of Atiyah and Summers,[107] Wagatsuma demanded that both substantive and formal reasoning be considered at the same time and that the substantive reasoning consider both the moral and social (economic, political, institutional, or other social) aspects. His approach sounds closer to the responsive but conservative interpretation of law that the courts have pursued since 1920s.

Suehiro's insistence to heed to the facts of the case was also related to an understanding of how case law forms.[108] He argued that what constituted case law was decisions in relation to the facts of a case, not the general statement about the law made in the judgment. Suehiro further emphasized that case law could be identified only by looking back in later years, appar-

104 The results: 4 out of 98 judgments rendered in May 1922, 9 out of 114 judgments rendered in November 1925, 5 out of 101 judgments rendered in March 1928, 4 out of 177 judgments rendered in September 1930, 12 out of 384 judgments rendered in May 1931, 18 out of 301 judgments rendered in July 1933, and 18 out of 291 judgments rendered in April 1935. K. KIMURA, *Daishin-in minji hanrei-shū (minshū) ni okeru hanketsu tōsai kijun ni tsuite* [On the criteria for reporting judgments in the Collection of Civil Cases of the Great Court of Judicature (Minshū)], Ritsumeikan Hōgaku 352 (2013) 150.

105 See E. HOSHINO, *Nihon mimpō-gaku akushi (2)* [The History of Civil Law Studies in Japan], Hōgaku Kyōshitsu 9 (1981) 14.

106 G. RAHN, Rechtsdenken und Rechtsauffassung in Japan (Munich 1990) 152–155. See also NOTTAGE, s*upra* note 97, 211.

107 See ATIYAH/SUMMERS, *supra* note 3, 1.

108 SUEHIRO, *supra* note 63, 64–66.

ently following the American approach to case law. In his view, if the Case Review Committee of the Great Court of Judicature intended to determine which judgments should constitute case law, it was not the right approach. At least in the mid-1930s, the last part of Suehiro's view was shared by judges. The Court's Justice Kajita, in his article of 1936, denied that a judgment's publication (or non-publication) in *Minshū* implied its importance in constituting case law.[109] Still, the facts of the case continued to be summarized before the judgment was published in *Minshū*. The practice disappeared for a while after the Second World War, when the new *Minshū* series for the Supreme Court stopped adding the facts to reported judgments. However, the facts summarized by the Supreme Court itself reappeared as part of the judgment in the mid-1960s.

The uniqueness of *Hanrei 100-sen*, though launched a few decades later, may be understood in this context. As noted above, in *Hanrei 100-sen*, academic authors summarize the facts and then provide comments on the case law, including the judgment subject to comment. In such a manner, academic authors have the opportunity to construct their understanding of the case law, through their reading of the court's holding in relation to the facts of the case (though, in fact, the author often quotes the facts summarized by the court). It was a way for academics to contest control in the formation of case law, expressing dissatisfaction with the court trying to identify case law on its own. Such a contest never arises in common law jurisdictions, where the case law means a casuistic (case by case) approach to the formation of law, rather than deriving from a requirement of consistency across courts.

V. CONCLUSION

While Japanese law studies in Western languages have cited many court decisions, a thorough examination of the court's reasoning has not been undertaken. When legal reasoning and the role of precedent became the subject of comparative study in the 1980s and 1990s, Japanese law hardly attracted attention. To fill this gap, this article has examined both how judgments are written by the courts and how they are published and read. The findings are reproduced below:

First, Japanese law does acknowledge precedents. More importantly, its approach towards precedent (case law) is closer to the common law than is typical for civil law jurisdictions. To Japanese judges, precedents are (at least de facto) binding and not merely authority to refer to.

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109 KAJITA, *supra* note 43, 58.

Secondly, such a similarity with the common law does not mean that the foundation for respecting precedent is the same. Rather, Japanese judges' view about the binding force of precedent is based on the desire for consistency across the courts. This logically leads to an orientation whereby courts establish a common understanding about where the "case law" stands. In response, academics tend to present their understanding of the case law. The contest over the understanding of case law commenced in the 1920s – when there was for the first time a recognition of precedent's relevance – and has continued ever since.

Thirdly, since before the Second World War, judges in Japan have made efforts to develop the skills necessary for drafting judgments. These efforts have been made not individually or personally but in an organized manner, recently through traineeship at the LTRI, and also partly through education at law schools. The shared style appears to affect the coordinated approach in legal reasoning as well. The courts are responsive to newly emerging issues, accommodative of the people behind them, and orientated towards substantive reasoning. But at the same time, the courts are conservative in respecting the legal framework. These approaches originated in legal elites' response to social turmoil and demands for democracy in the Taishō era, and it has prevailed over time, partly supported by mainstream legal academics, at least in private law.

The depiction of legal reasoning and precedent in Japanese law indicates in the end that Japan is an eclectic hybrid of various legal traditions. The important part is probably not that fact itself, but rather how various elements are mixed.

SUMMARY

The style of court decisions in Japan reflects the unique and hybrid nature of Japanese law. Institutionally, the name of the judge drafting a decision is not disclosed under the career-judge system of the civil law tradition. Still, unlike in a typical civil law jurisdiction, judges treat precedents as binding, with the result that precedents are considered as a de facto source of law. Whereas the doctrine of stare decisis does not exist as an inherent element of the Japanese legal system, the recognition of case law in such a manner is based on the belief of judges in the equal treatment of people under the law.

The style of court decisions is quite well-established. This is because of the efforts that Japanese judges have made to improve their drafting skills since early twentieth century. Such skills are now incorporated into the training system at the Legal Training and Research Institute and, to some extent, in the education at law schools as well. The reasoning style features flexibility in the

interpretation of legal texts, resulting in the responsiveness of the judiciary to newly emerging voices in society, but it also emphasizes the formal framework of law, leading to the conservative approach of the Japanese judiciary.

Both the establishment of the drafting style and the coexistence of flexibility and formality in reasoning have their historical origin in the Taishō era (1912-1926). It was a time of rapid and radical changes in Japanese society. The Great Court of Judicature, intending to be responsive to such changes, set up the Case Review Committee under the leadership of its President Kiichiro Hiranuma, and it mandated that legal interpretation should be flexible and court decisions unified. Academics were, however, critical of the new initiatives, finding there to be an undisrable risk in having the judiciary (alone) identify what constitutes "case law". It was in this context that the academics emphasized the significance of their studies of court decisions as a means to ensure plurality in identifying case law. Sometime later, such academic approaches produced the unique teaching material of "100 cases" (Hanrei 100-sen).

ZUSAMMENFASSUNG

Der Stil, in dem japanische Gerichte ihre Urteile abfassen, ist Ausdruck der besonderen hybriden Natur des japanischen Rechts. Im institutionellen Kontext des Berufsrichtertums in der Tradition des Civil Law wird der Name des Richters, welcher die Entscheidung verfasst hat, üblicherweise nicht veröffentlicht. Dennoch sehen japanische Richter – anders als in der Tradition des Civil Law üblich – Präzedenzentscheidungen als bindend an, was dazu führt, dass Gerichtsentscheidungen in Japan als zumindest faktische Rechtsquellen qualifiziert werden. Auch wenn die „stare decisis"-Doktrin des Common Law dem japanischen Rechtssystem als eigenständige Institution unbekannt ist, erfolgt gleichwohl eine Berücksichtigung von Präjudizien aufgrund der Auffassung japanischer Richter, dass dies aus dem Grundsatz der Gleichbehandlung der Bürger vor dem Gesetz geboten sei.

Der Stil japanischer Gerichtsurteile ist seit langem fest etabliert. Dies ist das Ergebnis der seit Anfang des 20. Jahrhunderts zu beobachtenden Bemühungen japanischer Richter, ihre Fähigkeiten zum Absetzen von Urteilen zu verbessern. Das Einüben entsprechender Fertigkeiten ist Teil des Trainings am zentralen Referendarausbildungsinstitut und teilweise auch der Ausbildung in den Law Schools. Die Art und Weise der Begründung von Urteilen lässt zum einen den Grad von Flexibilität in der Interpretation gesetzlicher Texte erkennen, welcher es den Richtern erlaubt, auf neue Strömungen in der japanischen Gesellschaft einzugehen. Zum anderen ist aber gleichzeitig auch die Beachtung der formalen Vorgaben des rechtlichen Rahmens beobachten, welche der Grund für die konservative Vorgehensweise der japanischen Richter ist.

Beides, der fest etablierte Urteilsstil und die Koexistenz von Flexibilität und Formalität in den Urteilsbegründungen, haben ihren Ursprung in der Taishō-Zeit (1912–1926). Dies war die Zeit rascher und tiefgreifender Umbrüche in der japanischen Gesellschaft. Um darauf angemessen reagieren zu können, setzte der japanische Reichgerichtshof das sog. „Case Review Committee" unter der Leitung des Gerichtspräsidenten Kiichiro Hiranuma ein und stellte den Grundsatz auf, dass rechtliche Interpretationen flexibel zu handhaben und Gerichtsentscheidungen zu vereinheitlichen seien. Rechtswissenschaftler sahen diese Initiative kritisch, da sie befürchteten, dass die Richterschaft dies nutzen könne, um die relevanten Präjudizien nach ihrem Belieben zu qualifizieren. Aus diesem Zusammenhang heraus entstand die Bedeutung, welche die Rechtswissenschaft seither der Analyse von Gerichtsentscheidungen beimisst, um auf diese Weise eine ausreichende Pluralität bei der Etablierung der Präjudizien sicherzustellen. Dieser Ansatz in der Rechtswissenschaft führte einige Zeit später zur Entstehung der so nur in Japan zu findenden Unterrichtmaterialien in Form der Fallsammlungen „100 Entscheidungen" (Hanrei 100-sen).

(Die Redaktion)