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The Role of Courts in "Making" Law in Japan: The Communitarian Conservatism of Japanese Judges

John O. Haley

THE ROLE OF COURTS IN "MAKING" LAW IN JAPAN: THE COMMUNITARIAN CONSERVATISM OF JAPANESE JUDGES

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Abstract: Professor Haley is an outstanding international and comparative law scholars, widely credited with having popularized Japanese legal studies in the United States. In 1969, Haley received a fellowship from the University of Washington and was in one of the first classes to graduate from the Asian Law Program, now, the Asian Law Center. After working for several years in law firms in Japan, he joined the law faculty at the University of Washington, where he remained for nearly twenty-six years during which time he directed the Asian and Comparative Law Program. In June 2012, Professor Haley was awarded The Order of the Rising Sun (3rd Class) from the Emperor of Japan for his contribution to the discipline of Japanese law and education to Japanese legal professionals and academics. In honor of this achievement, the University of Washington School of Law and the Asian Law Center brought together distinguished scholars and Asian Law Center alumni to discuss the judiciary's increased role in Japan and Asia in two conferences. The following is Professor Haley's address at the University of Waseda, Japan, on October 22nd, 2012. In this speech, Professor Haley provides an overview of the role of legal precedent in Japan, both throughout its history and today.

I. INTRODUCTION

Courts in Japan have long played a central role in the formation and development of law. Much of the law in Japan has been and continues to be judge-made. Despite some scholarly dissension as to the theory of judicial precedent as a source of law, adherence to judicial precedent is well-established in law and practice, touching nearly all fields of Japanese law.[1] As early as 1922, for example, the title of the official compilation of *Daishin'in* (Great Court of Cassation) decisions was revised from a "record

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[†] As indicated in the cited works, the topic and the related research for this paper reflects the author's personal journey as a legal scholar whose primary focus for over four decades has been Japanese law. That journey began in 1969 as an LL.M. candidate in the Asian Law Program at the University of Washington. My master's research paper itself was a study of the law of secured transactions developed by the courts during the first half of the last century. *See* JOHN OWEN HALEY, NON-CODE SECURITY INTERESTS: A STUDY OF JAPANESE CASE LAW (1971), *available at* the Gallagher Law Library, University of Washington School of Law.

[1] *See, e.g.*, Takeyoshi Kawashima, *The Concept of Judicial Precedent in Japanese Law, in* IUS PRIVATUM GENTIUM: FESTSCHRIFT FÜR MAX RHEINSYTEIN ZUM 70. GEBURTSTAG AM 5. JULI 1969 87-99 (Ernst von Caemmerer, Soia Mentschikoff, and Konrad Zweigert, eds., 1969).

of judgments" *(hanketsuroku)* to a "collection of judicial precedents" (*hanreishū*).

At the outset, however, a fundamental proposition relevant for all legal orders needs to be emphasized. All legal systems adhere to judicial precedent to some degree. Were prior decisions by the highest courts in judicial hierarchies devoid of any precedential value, and thus courts below and even the highest court could ignore them when confronted with a seemingly identical case, judicial decisions would become the arbitrary judgments of individual judges. The result would be an intolerable lawlessness that would negate the viability of any legal order. Even in France—notorious for its civil code proscription against judges making law—judicial decisions by the Court of Cassation defined the law of delicts (tort), introduced the remedy of *astrainte*, and have consistently filled gaps left by codes and statutes. Moreover, French administrative law is almost solely the creation of adjudicatory decisions—i.e., judicial decisions—of the Council of State. What makes Japan exceptional is the extent to which the courts make law and adhere to precedent. To this we now turn.

II. HISTORICAL PERSPECTIVES OF JUDICIAL AND LEGAL PRECEDENT

A. Warrior Governance and Adjudication

From the twelfth century, the warrior rulers in Japan relied on adjudication as a primary means not only for enforcing legal rules but also for maintaining order. Through the process of adjudication, one of the most remarkable developments occurred—the transformation of the concept of *shiki*, which originally denoted an entitlement to imperial office, into a transferable proprietary "right" to the revenue for such office. As I have argued, "*Shiki* were thus conceptually transformed into a novel form of intangible, but still contingent property. This recognition of a transferable private claim to such revenues also represented a significant step in the development of a private law system."[2] This transformation was essentially the product of an adjudicatory process centered in the Bureau of Records (*Kirokujo*).[3] The first example of warrior legislation—the "formularies" of

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[2] John O. Haley, *Rivers and Rice: What Lawyers and Legal Historians Should Know about Medieval Japan*, 36 J. JAPANESE STUD. 313 329-31 (2010). For a provocative essay on some of the effects of this transformation, which enabled rights to produce (rice) not necessarily the land itself to be transferred, see Mikael Adolphson & J. Mark Ramseyer, *The Competitive Enforcement of Property Rights in Japan: The Role of Temples and Monasteries*, 71 J. ECON. BEHAV. & ORG. 660 (2009).

[3] *See* Cornelius J. Kiley, *The Imperial Court as a Legal Authority in the Kamakura Age*, *in* COURT AND BAKUFU IN JAPAN: ESSAYS IN KAMAKURA HISTORY 29 (Jeffrey P. Mass, ed., 1982).

the warrior rulers similarly reflected the significance of adjudication—presaging the role of the courts in modern Japan.

These formularies encompassed instructions to subordinates and future officials responsible for administration and the adjudication of disputes among the men-at-arms under *bakufu* jurisdiction. The most complete set were contained in the fifty-three article *Goseibai Shikimoku*, known in English as the *Jōei* formulary of 1232, with hundreds of supplemental orders. Its promulgation was an exercise in legitimization of a set of rules for the warrior class, with nationwide applicability. A century later, in 1336, the Ashikaga shogun issued a similar formulary, known as the the *Kenmu Shikimoku*, which had a legitimizing function.[4] Both contained admonitions and commands largely based on precedent and customary norms within the warrior community. Not until the sixteenth century did warrior rulers begin to legislate new rules, but even then, many reflected well-established judicial precedents.[5]

For evidence of the primary role of judicial decisions and precedent in the making of legal rules during the subsequent two-and-a-half centuries of Tokugawa rule (1603-1867), we need look no further than the multivolume series of Tokugawa legal precedents originally collected and published in Japanese in 1877 by the Ministry of Justice, under the title *Tokugawa Jidai Minji Kanrei Ruishū: Tokugawa Saiban Rei* (Collection of Civil Customs of the Tokugawa Era: Tokugawa Legal Precedents), subsequently translated into English and then edited by John Henry Wigmore under the auspices of the Kokusai Bunka Shinkokai. Although most of the original documents were destroyed during the Great Kanto Earthquake of 1923, the complete set was finally published by The University of Tokyo Press between 1969 and 1987. As manifest in the separate volumes on legal precedents in contract, property persons and procedure, judicial precedent was a fundamental feature of Japanese private law during the Tokugawa Era.

B. Meiji Era—Theory Reception and Gap-Filling

The role of the courts in defining the rules and principles of the civil code from its inception in the mid-1890s is also well known. As Professor Zentaro Kitagawa has described so eloquently as a second reception of

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[4] KENNETH A. GROSSBERG, THE LAWS OF THE MUROMACHI BAKUFU 8 (1981), *quoted in* JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 43 (1991).

[5] For a more detailed account of sixteenth century legislation throughout the country under the so-called *sengoku daimyo*, *see* HALEY, *supra* note 2, 47-49.

European law,[6] the courts construed provisions of the code borrowed explicitly from French and even English common law in order to conform to conceptual German theory. Less well-known were the decisions that reformulated the newly adopted private law rules of western law favoring ownership and individual property rights in ways that protected well-established community interests. Not only did the courts reformulate newly introduced western law rules arguably to conform to pre-existing norms governing community relationships, they also began to create entirely new legal institutions to ameliorate the effects of rules related to the *ie* system essentially newly constructed in 1898 in Book Four of the Civil Code. As detailed below, they also began to recognize new forms of secured transactions based in part on pre-existing commercial practices.

C. *Taisho and Early Showa Eras—Societal Needs and New Law*

As the Meiji era waned and the Taisho era commenced, Japan's newly established judiciary faced more challenges. Japan's political and economic reform efforts proved to be dramatically successful. The goals of industrialization and military prowess ushered in an era of world recognition. The defeat of the two neighboring empires first in the 1895 war against imperial China and then the war with imperial Russia in 1905 brought Japan into the club of world powers, theretofore exclusively Western.

With such economic success came social tensions. As an increasing number of absentee landlords began to avoid well-established norms of community service, conflicts increased. As new legal rules that empowered individual proprietors and registered heads of households began to be exercised, those who were subordinated began to resist. Industrial pollution also began to appear. In the process, suits were brought and the courts had to decide between the enforcement of the new rules or their amelioration. Through various devices they began a long process of ameliorating the full impact of the rules, limiting newly codified individual rights to deny their full, community-disrupting effects.

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[6] *See* ZENTARO KITAGAWA, REZEPTION UND FORTBILDUNG DES EUROPÄISCHEN ZIVILRECHTS IN JAPAN (1970). For a brief English language account, *see* Zentaro Kitagawa, *Theory Reception: One Aspect of the Development of Japanese Civil Law Science*, 29 SHIHŌ 251 (1967), *translated in* 4 L. JAPAN: AN ANN. 1 (1970).

The role of the courts in response to tenancy and other land-related disputes is well known.[7] In case after case, decision after decision, the courts rejected proprietor and landlord claims that seemed indisputable under provisions of the Civil Code and the contested contracts. The courts resorted to various means, beginning with the introduction of the now-famous *reibun* doctrine that treated unwanted contract provisions as superfluous boilerplate that were construed to reflect the intent of the parties and thus had no enforceability.

The courts had also begun to recognize the "good faith" and "abuse of rights" principles as doctrinal means to avoid the strict application of otherwise applicable codified rules in cases in which judges in effect deemed pre-existing community interests or simple fairness among the parties to override the codified legal rules. For example, in one of the earliest cases to recognize the good faith principle, *Mukaiyama v. Yoshikawa*[8], the *Daishin'in* held that the "good faith" precluded the transfer of property subject to a security interest for nonpayment for an "insignificant" shortage.[9] The "abuse of rights" doctrine was apparently first applied in a late Meiji Period decision in *Sonoda v. Sonoda*[10], limiting the "absolute" authority of registered household heads to determine the residence of house members.

Arguably the most notable example of creative judicial law-making before World War II was the notion of a *naien* marriage. The recognition of a *naien* wife (albeit without the full rights of a legal spouse, especially in terms of succession) provided some legal protection to women between the time of a formal wedding ceremony and the newly required registration of the marriage, with the consent of the household head. The development began with a 1915 decision by the *Daishin'in*.[11] Although recognized in subsequent special statutes, such as the 1923 Factory Act, no recognition is afforded by Civil Code even as amended pursuant to postwar abolition of the *ie* system and other "democratization" reforms of the Occupation era.

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[7] *See, e.g.*, Hozumi Tadao, "Hōritsu kōi no 'kaishaku' no kōzō to kinō," [The Structure and Function of the 'Interpretation of Juristic Acts]. This classic study is published in two parts: 77 HŌGAKU KYŌKAI ZASSHI 603 (1961); and 78 HŌGAKU KYŌKAI ZASSHI 27 (1961). Published in English translation in: 3 L. JAPAN: AN ANN. 90 (trans. Rex Coleman, 1970); 5 L. JAPAN: AN ANN. 132 (trans. John O. Haley, 1972). *See also* John O. Haley, Japan's New Land and House Lease Law, in LAND ISSUES IN JAPAN: A POLICY FAILURE? 149 (John O. Haley & Kozo Yamamura, eds., 1992).

[8] Gr. Ct. Cass. Dec. 18, 1920, 26 MINROKU 1947 (Japan).

[9] For fuller discussion of the case, *see* JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW 162-63 (1980).

[10] Gr. Ct. Cass., June 20, 1901, 7 MINROKU (No. 6) 47 (Japan).

[11] Gr. Ct. Cass. 1915, 21 MINROKU 49, (Japan).

In my view, the judges in these and other cases chose a cautiously conservative approach. Fairness certainly appears to be a motivating factor, but what the judges may have considered to be a "just" outcome can be viewed as essentially a reaffirmation of traditional communitarian values. In most instances they arguably rejected legal rules that when enforced would allow their beneficiaries, whether landlords or household heads, to ignore established community norms and collective interests.

Judicial law-making and innovation did not disrupt commercial advances. In the area of secured transactions, for example, the court began to recognize various means of securing loans, more often than not, based on traditional practices. Once again, the court adopted an essentially conservative approach and confirmed community.

D. Postwar "Activism"

Some may view such law-making by judges in Japan to reflect a progressive "activism" at variance with a presumptively more "conservative' societal consensus. Frank K. Upham, for example, points to postwar judicial decisions in employment, divorce, and protection against discrimination as examples of a "'liberal' direction" that he views as contrary to the "prevailing consensus of Japanese society."[12] I would counter by reiterating that, in my view, the examples of judicial law-making Upham discusses are more appropriately understood as a product of a communitarian conservatism and related concern for consistency, certainty, and consensus. My disagreement with Upham's characterization seems in any event to be more a matter of semantics and perspective than substance.

Decisions that may indeed reflect "progressive" values in the United States and Western Europe need to be understood in their Japanese context. The outcomes in the Taisho and early Showa era cases were fully compatible with increasingly collectivist views that supported the expansion of mandatory conciliation in family and tenancy disputes to avoid the application of legal rules in the new Civil Code favored by those who sought enforcement and more "liberal," rule-of-law outcomes.[13] The cases Upham cites may be similarly appraised. With the notable exception of the

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[12] Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493, 1494 (2011).

[13] For a detailed examination of the efforts to substitute formal conciliation (chōtei) for trials (soshō) in the late Taisho and early Showa periods, *see* John Owen Haley, *The Politics of Informal Justice: The Japanese Experience, 1922-1942, in* 2 THE POLITICS OF INFORMAL JUSTICE, COMPARATIVE STUDIES 125-47 (Richard L. Abel, ed.,1982).

decisions related to employment discrimination of women (in which the courts applied rules on gender equality that were inserted into the Civil Code by Occupation authorities pursuant to new constitutional mandates of article 24,)[14] the cases Upham views as "liberal" involved attempts at unilateral termination of on-going relationships in employment or marriage. Hence these cases are best understood, as I have previously argued, as examples of a long-standing judicial hostility to unilateral expulsion of a member from a community—whether a village, a family, a marriage, a firm, or a tenancy relationship—and related affirmation of community consensus and cohesion.[15]

Similarly, the long line of cases that require cause for termination of labor contracts with rejection of "at-will" labor contracts despite language of 1947 labor statute can be viewed as examples of judicial "activism," as phrased by Dan Foote, but with the aim of social stability rather than progressive change[16] or perhaps as a manifestation of what in the context of criminal law Foote has termed the "benevolent paternalism" of judges as well as prosecutors and the police.[17]

Although I question the accuracy of the "activism" label, at least, as that term is understood in a U.S. context but applied to Japan, few would dispute the creativity and legal significance of a vast number of postwar decisions in which, as in the Meiji era, the courts sought to define legal rules and principles set out in Occupation era statutes borrowed from the United States and the new postwar constitution. The cases involving women's rights under the postwar amendments to the Civil Code, noted by Upham, provide excellent examples of judicial enforcement of codified rules.

But what of judicial law-making? Several prominent examples stand out. The first is in the area of antitrust law. In 1947, the Diet enacted the so-called Antimonopoly Law.[18] The statute reflects the work of a U.S. lawyer, Lester Salwin, who unquestionably combined the substantive prohibitions of the U.S. Sherman Act and the Federal Trade Commission Act but without

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[14] *See* ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK 111-20 (1976). For details on the provisions of Article 24 related to gender equality in the postwar Constitution by the woman responsible for their drafting and inclusion, *see* BEATE SIROTA GORDON, THE ONLY WOMAN IN THE ROOM: A MEMOIR (1999).

[15] HALEY, THE SPIRIT OF JAPANESE LAW, *supra* note 9, at 123-55.

16 Dan H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability*, 43 UCLA L. REV. 635, 642 (1996).

[17] *See* Dan H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992).

[18] Shiteki dokusen no kinshi oyobi kōsei torihiki ni kansuru hōritsu [Formally, the Law Concerning the Prohibition of Private Monopolies and the Preservation of Fair Trade], Law No. 54 of 1947.

the dual enforcement features of U.S. law divided between the Department of Justice under the Sherman Act and the Federal Trade Commission ("FTC") under the FTC Act. A key provision in the Japanese statute is Article 19, which prohibits, as amended, "unfair business practices" but a violation of which does not incur criminal sanctions as provided for violations of the two other substantive prohibitions of Article 3 ("private monopolization" and unreasonable restraints of trade). The provisions of Article 19 and Article 3 track the prohibitions of the two U.S. statutes. Inasmuch as the FTC does not have criminal enforcement authority, the prohibition of "unfair methods of completion," in the FTC Act, the source of Article 19, does not carry criminal penalties.

This makes some sense inasmuch as "unfair methods of competition" also covers conduct prohibited (and criminalized) in the Sherman Act. The apparent anomaly of the combination of these prohibitions in the Japanese statute was, however, very early and creatively resolved by the courts. In 1953, in the *Asahi Newspaper* case,[19] the Tokyo High Court construed the Article 19 prohibition of "unfair business practices" (without criminal penalty) to apply solely to vertical restraints of trade thereby excluding all horizontal restraints among competitors, which was covered (and criminalized) in Article 3.[20]

In company law, another piece of Occupation law reform for which Lester Salwin was again initially responsible,[21] Dan Puchniak and Masafumi Nakahigashi point out a more recent example of judicial creativity. Early critics of the introduction of U.S. (Illinois) company law in Japan noted the lack of a "supporting body of ... flexible case law" to guide judges in interpreting newly provided rules on shareholder rights and remedies.[22] At least today, U.S. case law seems to provide some guidance. In a recently published *Festschrift* honoring Harald Baum, Puchniak and Nakahigashi

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[19] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 9, 1953, 4 KŌSEI TORIHIKI I'INKAI SHINKETSUSHŪ 145 (Japan).

[20] *See* John O. Haley, *Marketing and Antitrust in Japan*, 2 HASTINGS INT'L & COMP. L. REV. 51, 53 (1979). For fuller discussion of the development of competition law in Japan and other leading cases, *see* JOHN O. HALEY, ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY-YEARS, 1947-1998 (2001).

[21] *See* Lester N. Salwin, *The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals*, 50 GEO. L.J. 478 (1962).

[22] *See* Thomas L. Blakemore & Makoto Yazawa, *Japanese Commercial Code Revisions*, 2 AM. J. COMP. L. 12, 23 (1954).

comment on a 2010 Supreme Court decision[23] that creatively introduced the business judgment rule in shareholder derivative actions.[24]

In one area of law at least, prewar precedents have prevailed in the face of Occupation reforms. Despite the constitutional abolition of the Administrative Court and the related prewar limitations on judicial review, the newly established Supreme Court early confirmed the continued efficacy of a narrow construction of the administrative actions under the German-based, prewar notion of "administrative acts" as the only reviewable form of administrative action.[25] The case continues to be the ruling precedent.[26]

In no area of law have the courts been more cautious and conservative than in the area of constitutional law. Yet the role of the courts remains the same. They have continued to develop bedrock rules and principles for governance and citizen rights. Two examples stand out. The first relates to Article 9. The 1959 decision in *Sakata v. Japan*,[27] better known as the *Sunakawa* case, remains the controlling precedent. In that case the Court held that the political branch had the authority to determine the scope of the prohibitions of Article 9 unless the action in question presented a manifest violation of the provision. It has remained the controlling precedent for over a half century.

The malapportionment cases similarly illustrate tensions between deference to precedent as well as the political branch and the constitutional mandates of political equality. The 1964 Grand Bench decision in *Koshiyama v. Chairman, Tokyo Metropolitan Election Supervision Commission*[28] is the landmark precedent. For the first time the Court held that the issue of apportionment for, in this case, House of Councillors elections was justiciable but affirmed that the alleged malapportionment of voters in urban versus rural districts was not so egregious to constitute a violation of the constitutional guarantee of equality under Article 14(1) and other provisions of the postwar constitution. Subsequent decisions, beginning with the 1976 *Kurokawa* case,[29] in which the Court has held House of Representatives' districting to be unconstitutional, neither

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[23] The *Apamanshop* case, HANREI TAIMUZU (No. 2010) 50 (2010), *see also* http://www.courts.go.jp/hanrei/pdf/20100715143943.pdf.

[24] Dan W. Puchniak & Masafumi Nakahigashi, *Case No. 21, Comment, in* BUSINESS LAW IN JAPAN—CASES AND COMMENTS 215, 215 (Moritz Bälz et al, eds., 2012).

[25] Sup. Ct., G.B. 1961,15 MINSHŪ 467 (Japan).

26 *See* cases and discussion in John O. Haley, *Japanese Administrative Law: An Introduction*, 19 L. JAPAN: AN ANN. 9 (1986).

[27] Sup. Ct., G.B. 1959, 13 KEISHŪ 3225 (Japan).

[28] Sup. Ct., G.B.1964, 18 SAIKŌ SAIBANSHO MINJI KANKETSUSHŪ [MINSHŪ] 270 (Japan).

[29] Sup. Ct., G.B. 1976, 30 SAIKŌ SAIBANSHO MINJI KANKETSUSHŪ [MINSHŪ] 223 (Japan).

overruled nor distinguished the 1964 precedent. The *Koshiyama* case has thus defined the issue as a question of the extent of imbalance based on the comparative ratio of voters per representative or councilor in contested districts.

III. ROLE OF PRECEDENT

Precedent matters. Putting aside the role of civil codes and well-established scholarly commentary, rather than judicial decisions as foundational sources for private law rules and principles in civil law jurisdictions, the role of precedent in Japan seems as firmly fixed as in the United States and other common law systems. Instances in which the Supreme Court has overruled prior decisions are rare, even decisions by its prewar predecessor, the *Daishin'in*. In nearly every field of law, we can identify long-standing precedents that continue to be followed.

In criminal law, for example, in 1958 the Supreme Court followed two cases from the 1930s holding that the defendant's omission to extinguish a fire caused by his fault with the intent to allow the building to burn constituted the crime of arson.[30] In the first case, a 1932 *Daishin'in* decision, the Court had held that a son engaged in life-and-death struggle with his adoptive father was guilty of the crime of setting fire to an inhabited building (CC art. 108) for failing to put out a fire caused by burning wood the father had thrown at him.[31] In the second case, decided six years later in 1938, the Court had held that at the failure to extinguish a fallen candle that caused a fire that burned down a house constituted the crime of arson because of the candle had been lit by the defendant.[32] Such cases may seem relatively minor and narrowly decided, gap-filling decisions, but they exemplify the continued validity of much court-made, prewar criminal law jurisprudence.

The case that in my view best illustrates the deference to precedent is the Supreme Court's 1975 decision in *Sumiyoshi v. Governor of Hiroshima Prefecture*,[33] in which the court held a licensing standard restricting the location of pharmacies to avoid competition to be an unwarranted

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[30] Gr. Ct. Cass. 1958, 12 KEISHŪ 2882 (Japan).

[31] Gr. Ct. Cass. 1932, 24 Keiroku 1558 (Japan).

[32] Gr. Ct. Cass. 1938, 17 DAIHAN KEISHŪ 237 (Japan).

[33] Sup. Ct., G.B. Apr. 30, 1975, 29 MINSHŪ 4 (Japan). For an English language translation, *see* LAWRENCE W. BEER AND HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, 188-99 (1996). For my comment, *see* John O. Haley, *The Freedom to Choose an Occupation and the Constitutional Limit of Legislative Discretion—K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*, 8 L. JAPAN: AN ANN. 178 (1976).

infringement of the freedom of occupation under Article 22 of the constitution. The Court refrained, however, from overruling the otherwise controlling precedent in *Shimizu v. Japan*[34] (better known as the *Fukuoka Bathhouse* case). On the facts, the cases are nearly identical except for the businesses involved and the fact that the *Bathhouse* case was a criminal action.

A telling example of the rare instance in which the Court has overruled precedent is the Supreme Court's 1973 decision in *Aizawa v. Japan.*[35] In that decision, the Court declared unconstitutional on equal protection grounds the provisions of Article 200 of the Criminal Code that imposed a more severe penalty for murder of a lineal ascendant than for any other murders. The decision explicitly overturned a 1950 Grand Bench case that, although criticizing the greater severity of the punishment for murder of lineal ascendants under article 200, nevertheless refused to hold it to be unconstitutional.[36] The 1973 decision left standing, however, a 1949 decision in which the Court had affirmed the constitutionality of a similar Criminal Code provision in article 205 that imposed a greater penalty for the crime of causing death by physical injury to a lineal ascendant than to others.[37]

The reluctance to alter or overrule prior cases reflects, in my view, the deeply ingrained values and habits of common conservative inclinations, with emphasis on consistency, certainty, and consensus along with an equally conservative and overriding deference to the contributions of their predecessors, judges of the past.

IV. LEGISLATIVE AFFIRMATION OF JUDICIAL PRECEDENT

No feature of Japanese law has been more distinctive than the pattern of subsequent legislative action affirming judicial precedent, in many instances years later. Among the best known examples was the inclusion of the "good faith" and "abuse of rights" principles in the postwar amendments to article 1 of the Civil Code. Legislative recognition, albeit with

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[34] Sup. Ct., G.B. 1955, 9 KEISHŪ 89 (Japan) (translated by Masaaki Ikeda *in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60 293 (1964).

[35] Sup.Ct., G.B. Apr. 4, 1973, 27 KEISHŪ 265 (Japan). For an English translation, *see* BEER AND ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 143 (1996)..

[36] *See* Sup. Ct., G.B. 1949, 4 KEISHŪ 10 (Japan).

[37] Sup. Ct. 1950, 4 KEISHŪ 2037 (Japan). For English translation, *see* KURT STEINER, MAKI, COURT AND CONSTITUTION IN JAPAN 129 (1964). The contested sections of article 205 remained effective if not often enforced until fully removed along with repeal of article 200 by the Diet under Law No.91, 1995, although previously modified by Law No. 156, 1989.

modification of the prewar judicial precedents related to land and house leases described above, are early examples. The 1921 Land Lease Law[38] and House Lease Law,[39] not to mention the 1900 Law Concerning Superficies[40] and the 1909 Law Concerning the Protection of Buildings, [41] may be somewhat exceptional in that they appear to reflect a common legislative concern to supplant judicial activity as soon as possible and thereby, arguably, reduce judicial innovation, or at least to avoid inconsistency and the tensions between codified and judge-made rules. In two areas that have been central to both my earliest and most recent research,[42] however, as described below, the pattern of full legislative recognition is evident.

In the case of non-code security interests, statutory affirmation came many decades later. A 1902 *Daishin'in* decision first recognized (*neteitōken*)–translated variously into English as "base," "root," or "maximal" hypothecs.[43] Not until 1971 was the Civil Code amended to provide for this flexible form of hypothec.[44] Similarly, other forms of non-possessory security interests in movable as well as immovable property recognized by judicial decision decades before any statutory provision. In 1906, the Court recognized contractual *jōtō tampo* arrangements as legitimate and effective secured transactions.[45] It took nearly eight decades for the Diet to enact a statute recognizing such by then commonly used, convenient forms of secured transactions in registered collateral, particularly immovables.[46] The most recent example is the 2011 amendment of the Code of Civil Procedure on international adjudicatory jurisdiction. [47] The amendment notably made little if any change in the rules and standards developed by the courts during the preceding half century, including the landmark 1981 Supreme Court decision in *Goto v. Malaysian Airlines.*[48] The amendments in language and effect essentially legislatively confirmed existing judicial approaches and precedents including, in Article 3-9, a

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[38] *Shakuchi hō*, Law No. 49 of 1921 (Japan).

[39] *Shakuya hō*, Law No. 50 of 1921 (Japan).

[40] *Chijōken ni kansura hōritsu,* Law No. 72 of 1900 (Japan).

[41] *Tatemono hogo ni kansura hōritsu*, Law No. 40 of 1909 (Japan).

[42] *See* JOHN O. HALEY, FUNDAMENTALS OF TRANSNATIONAL LITIGATION: THE UNITED STATES, CANADA, JAPAN, AND THE EUROPEAN UNION (2012).

[43] Gr. Ct. Cass. 1902, 8 MINROKU 72 (Japan).

[44] 1971, no. 99, adding Civil Code articles 398-2 through 398-22.

[45] Gr. Ct., Cass. 1906, 12 MINROKU 1172 (Japan).

[46] Kari-tōki tanpo keiyaku ni kansuru hōritsu [Law concerning Provisional Registration Security Interest Contracts] Law No. 78, 1978 (Japan).

[47] Law, adding Code of Civil Procedure Articles 3-2 through 3-12, enacted on April 28, 2011 and promulgated on May 2, 2011, effective in 2012.

[48] Sup. Ct., 2nd P.B. Oct. 16, 1981, no. 7, 35 MINSHŪ 1224 (Japan).

provision for dismissal of actions on the basis of the principles of *jōri*, thereby effectively affirming the 1986 Tokyo District Court decision in *Mukoda v. The Boeing Co.*[49]

That legislators may to some degree at least share conservative attributes of the judiciary may help to explain this remarkable deference to the judiciary and judicial law-making. However, I suspect this pattern of legislative affirmation of judicial decisions is better explained by an imbedded emphasis on consensus as a societal value as well as product of structural political configurations. The need for consensus in the face of disagreement over the appropriate direction of the law arguably precludes any significant change in a status-quo that has been determined by the courts. The consequence is ultimate legislative acquiescence in the role of judges in the law-making process.

[49] Tokyo Dist. Ct. June 20, 1986, HANREI TIMES (No. 604) 138 (Japan).