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“CHŌSAKAN”: RESEARCH JUDGES TOILING AT THE STONE FORTRESS

MASAKO KAMIYA*

I. INTRODUCTION

We know that they are there, but, unlike law clerks at the United States Supreme Court,¹ not much has been written² about our “courtiers”³ to the Supreme Court of Japan: *saikō saibansho chōsakan*.

To avoid confusion and to indicate who they really are, “*saikō saibansho chōsakan*” should be translated as “research judges at the Supreme Court.” According to Article 57 of the Judiciary Act of 1947:

(1) “*Chōsakan*” will be assigned to the Supreme Court, high courts, and district courts.

* Professor, Faculty of Law, Gakushuin University. I would like to thank all the participants at the “Decision Making on the Japanese Supreme Court” symposium, especially David Law. I am very grateful to those research judges, past and present, who agreed to talk about their work as research judges. They remain anonymous as I have promised. Needless to say, all errors are mine.

1. See, e.g., TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES* (2006).

2. The single insider’s information (i.e., written by a “chōsakan” himself of “chōsakan”) that is published, as far as I am aware, is HIROHARU KITAGAWA, *Saikōsaibansho chōsakan seido ni tsuite* [*On Research Judges at the Supreme Court*], in KON-NICHI NO SAIKŌ SAIBANSHO: GENTEN TO GENTEN [THE SUPREME COURT TODAY: ORIGINS AND THE PRESENT] 110–15 (Hōgaku Seminar Special Issue 1988). Kitagawa had been a chief research judge, see *infra* notes 5, 15 and accompanying text, from May 1990 to December 1994; a senior research judge, see *infra* notes 5, 17 and accompanying text, from April 1983 to March 1988; and a research judge from 1970 to 1972. He also served as an associate Justice from September 1998 to December 2004. Takuji Kurata, a retired judge, has written a series of autobiographical essays, *Saibankan no sengo shi* [*A Postwar History of a Judge*], *infra* note 31, which includes his days as a chōsakan from 1959 to 1963. On reading his essays, one cannot avoid feeling that these were the idyllic days long gone. Another source also offers a brief explanation of what research judges do. TSUGIO NAKANO ET AL., HANREI NO YOMIKATA [JUDICIAL PRECEDENT AND HOW TO READ IT] 99–100 (3d ed. 2009). When this book, written by a group of very respected judges and stating that judicial precedent is a source of law that is binding upon judges in Japan, was first published in 1986, it was a shocking pronouncement that Japan was slowly but steadily drifting from a civil-law country toward a case-law jurisdiction. TSUGIO NAKANO ET AL., HANREI NO YOMIKATA [JUDICIAL PRECEDENT AND HOW TO READ IT] 14 (1st ed. 1986). Apart from David J. Danelski’s forty-year-old article, *The Supreme Court of Japan: An Exploratory Study*, in COMPARATIVE JUDICIAL BEHAVIOUR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST 132–37 (Glendon Schubert & David J. Danelski eds., 1969), Hiroshi Itoh’s monography might be the only available source of information on chosakan available in English at the moment. HIROSHI ITOH, *THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN* 57–64 (2010).

3. See PEPPERS, *supra* note 1.

(2) “*Chōsakan*” will engage in research necessary for trial and adjudication of a case as instructed by judges (at district court level, “*chōsakan*” will only deal with intellectual properties and tax cases), and other matters provided in other laws.⁴

In 2010, there were thirty-seven research judges⁵ working at the Supreme Court. These are judges with at least ten years’ experience, some with over twenty years’ experience at ordinary law courts (i.e., trial or appellate experience), who are assigned by the Supreme Court to this position. They are distinctively different from other “*chōsakans*” at various other courts mentioned in Article 57 who are not necessarily, and usually not, judges. They are definitely not freshly graduated law school students recruited by Justices themselves. Yet, they appear to perform functions at the court similar to those performed by American law clerks—or do they?

One of the supplementary provisions to Article 57 further provides that the Supreme Court will assign, whenever necessary, judges and prosecutors as “*shihō kenshūjo kyokan*,” instructors at the Legal Research and Training Institute (LRTI), and judges as “*chōsakan*,” for the time being.⁶

Justice Kitagawa indicates the possibility that the American law clerk system might have had some influence upon the initial plan to establish “*chōsakan*” because, in the first draft, “*chōsakan*” would have been appointed either from court clerks and those eligible as clerks or from those who passed the National Bar Examination⁷ but have not been to the LRTI and are therefore not properly qualified as lawyers.⁸ In the end,

4. Saibansho ho [Judiciary Act], Law No. 59 of 1947, art. 57.

5. There are thirty-seven research judges: one chief research judge, seventeen research judges in the *minji* (civil) chamber (including one senior judge), nine research judges in the *gyosei* (administrative) chamber (including one senior judge), and ten research judges in the *keiji* (criminal) chamber (including one senior judge). These have been the numbers since 2005. Twenty years ago, in 1989, the figures were one, thirteen, five, and ten, respectively, indicating a huge increase in administrative law litigations coming to the Supreme Court. (Information from the Supreme Court General Secretariat) (on file with author).

6. Saibansho hō, fusoku [Judiciary Act, Supplementary Provisions], Law. No. 59 of 1947, Supplementary Provision no. 3.

7. KITAGAWA, *supra* note 2, at 112; *see also* MASAO ONO, BENGOSHI KARA SAIBANKAN HE [FROM A PRACTICING LAWYER TO A JUSTICE] 55 (2000); SHIGEO TAKII, SAIKŌ SAIBANSHO HA KAWATTA KA? [HAS THE SUPREME COURT CHANGED?] 32 (2009).

8. To qualify as a “lawyer” in Japan, in the narrowest sense, there are currently two paths. Until 2010, one could be a qualified lawyer if one passed the National Bar Examination, spent twelve, eighteen, or twenty-four months at the LRTI as a trainee (the length depending on when one decided to register at the LRTI), and passed the LRTI final exams. Bengoshi hō [Law Governing Lawyers], Law No. 206 of 1949, art. 4 (as written before amendment by Law No. 9 of 2004). After 2006, one has to

“*chōsakan*” as provided for in the Act were placed in the category equivalent to judges, and the supplementary provision outlined above was added in 1949, justifying appointments of judges as “*chōsakan*.”⁹ In 1951, the clause referring to those who passed the National Bar Examination was deleted.¹⁰ In spite of several changes in the statutory language, in reality, research judges have been with the Court since the beginning, and they have always been judges.

The fact that research judges have always been recruited from younger judges appears to support Hiroshi Itoh’s theory that the history of research judges goes back to the practice at the Great Court of Cassation, the highest court under the 1889 Constitution, not to the American law clerk system.¹¹ Itoh states that when a young judge at the beginning of his career sat to the left side of a presiding judge, he “assumed . . . the task of reviewing a lower court’s handling of facts and law in an appeal” under the supervision of the senior judge.¹² In those days, the Great Court of Cassation consisted of forty-five judges, in comparison to about thirty research judges assisting fifteen Justices today.

The fact that the Supreme Court was newly established in 1947 with a different mandate makes Justice Kitagawa’s view based upon statutory evidence more persuasive, although, in deciding details such as the

graduate from one of seventy-four law schools with a J.D. equivalent, pass the New National Bar Examination, spend twelve months at the LRTI as a trainee, and pass the LRTI final exams. Bengoshi hō [Law Governing Lawyers], Law No. 9 of 2004, art. 4. There have been several exceptions: for example, under the old rule, law professors teaching (in theory, any legal subjects, but in reality, bar exam subjects) at a university granting undergraduate and graduate degrees in law could apply to local bar associations to register as practicing lawyers. Bengoshi hō [Law Governing Lawyers], Law No. 206 of 1949, art. 5 (as written before amendment by Law No. 9 of 2004). Under the new system, those who passed the New National Bar Examination but did not go to the LRTI may become qualified if they have spent some years in positions related to law. Bengoshi hō [Law Governing Lawyers], Law No. 9 of 2004, art. 5. In any case, persons who had been Supreme Court Justices are qualified as lawyers, notwithstanding article 4. Bengoshi hō [Law Governing Lawyers], Law No. 206 of 1949, art. 6.

9. Law No. 177 of 1949.

10. Law No. 59 of 1951.

11. ITOH, *supra* note 2, at 57–58.

12. *Id.* at 58. This form of on-the-job training for junior judges is not limited to the Great Court of Cassation of the past but continues to this day. In any three-judge panel, be it at a district court or at a high court, the most junior judge who sits to the left of the presiding judge will write a draft opinion reviewing facts and parties’ arguments, after sounding other judges’ opinions. Under the presiding judge’s tutelage, this draft opinion eventually becomes the judgment of the court. Yet, it should be noted that research judges are not novices sitting next to an experienced Justice, but are exceptionally able and bright judges who are viewed as elites among lower court judges, and they might be supporting someone who has never had the experience of being a judge before coming to the Supreme Court. *See* ITOH, *supra* note 2, at 64.

number of research judges to be assigned, prewar experience, as Itoh suggested, might have had some influence.

II. RESEARCH JUDGE SYSTEM AND HOW IT WORKS

The current Supreme Court Rule (SCR) No. 8 concerning the chief research judge and others¹³ dates from December 2, 1968. There are thirty-seven “research judges” at the moment.¹⁴ One chief research judge, or “*shuseki chōsakan*,”¹⁵ is responsible for all matters concerning “research judges at the Supreme Court.”¹⁶ Three senior research judges, or “*joseki chōsakans*,”¹⁷ under the direction of the chief research judge, will manage matters concerning research judges at the Supreme Court.¹⁸ The other thirty-three¹⁹ are assigned to three chambers: *minji* (civil), *keiji* (criminal), and *gyōsei* (administrative). Each of the three senior research judges mentioned above is in charge of one of the three chambers.²⁰ There are three rooms in the civil chamber, one in the administrative chamber, and three in the criminal chamber.

Because they are judges, and because they are part of Japanese career judiciary, these research judges are assigned to the present positions by the Supreme Court. Nominally, they belong either to Tokyo District or High Court while serving as research judges and will be relocated to high courts or to district courts as ordinary judges after spending four to five years at one of these chambers.²¹ This means that nine or ten judges are appointed as new research judges every year, making the annual turnover rate high. A few have had the chance to serve as research judges twice in their entire career as a judge.

13. Saikō saibansho shuseki chōsakan to ni kansuru kisoku [Rule Concerning the Chief Research Judge], Sup.Ct. Rule No. 8 of 1968, Kampō No. 12591, p. 2 (as amended by Sup. Ct. Rule No. 2 of 1981, Kampō No. 16248, p. 2) [hereinafter SCR No. 8].

14. See *supra* note 5.

15. The current chief research judge was first appointed as an associate judge about thirty-five years ago and has been at the judiciary ever since. See *supra* note 5.

16. SCR No. 8, *supra* note 13, art. 1.

17. Current senior research judges themselves have just about thirty years of experience as judges.

18. SCR No. 8, art. 2. This article was added by the 1981 amendment to the SCR. See Kampō [Official Journal], March 26, 1981.

19. Their experience as judges varies from eleven to twenty-three years. See note 5, *supra*.

20. It should be noted here that this assignment system means that no research judges consider it their task to deal with constitutional litigation as such, even though the most important ground for both codes of procedure is constitutional issues. See *infra* note 33 and accompanying text.

21. Ono has the impression that research judges in civil and administrative chambers remain in the same position for four years, whereas those at the criminal chamber usually leave after three years. ONO, *supra* note 7, at 56.

Theoretically, the Judicial Conference, consisting of all Justices of the Supreme Court, is the ultimate organization to determine all administrative matters pertaining to the Judiciary, including hiring and assigning judges to courts all over Japan.²² According to the black-letter law, it is the Supreme Court who appoints research judges to their positions.²³ Having said this, I must emphasize that Justices admit that proposals, be it on personnel, budgetary, or even SCR and other rules coming from the Secretariat, are invariably ratified without any amendment at the conference.²⁴ In reality, Justices do not decide personally who will be chosen as research judges to help them.²⁵ The Secretariat, whose members are invariably judges of high caliber, exercises the power to assign all judges to their individual positions, including those at the Secretariat and research judges.²⁶ In early years, one young judge was audacious enough to refuse to promise that he would accept any assignment after spending three years at Kōriyama.²⁷ I have not heard of another case in which a judge refused to be relocated, but then, the judge has the choice of leaving the judiciary to practice or teach if she does not want to go to wherever she will be assigned.²⁸

22. Saibansho hō [Judiciary Act], Law No. 59 of 1947, arts. 12, 57.

23. See *supra* note 6 and accompanying text.

24. Takii cannot remember an occasion in which a proposal from the Secretariat had been amended. TAKII, *supra* note 7, at 17.

25. Justices who have not been at the Secretariat themselves usually do not have sufficient knowledge of all judges, or even the best and the brightest among them, to decide who will be suitable for what position, particularly if one realizes that several hundred judges move around each year.

26. The Secretariat also controls the budget within the judiciary, Saibansho hō [Judiciary Act], Law No. 59 of 1947, art. 83, and negotiates judicial budget with the Ministry of Finance. In YOSHIO ISHIKAWA, OMOIDASU MAMA [AS I REMEMBER] 227–308 (2006), Judge Ishikawa recounts a vivid memory of one such negotiation in 1968.

27. ISHIKAWA, *supra* note 26, at 143–46. Judge Ishikawa, after going through Articles 78 and 80 of Kempō (the Constitution) and Article 48 of the Saibansho hō, reached the conclusion that a judge cannot be relocated to a court in another area during his tenure as a judge. The chief judge of the Yokohama District Court arranged for him to talk with a director-general at the Secretariat, who also is a judge, and he was told that he need not sign such a document. This was because he was going out to Kōriyama, a “rural” area, as opposed to coming into an “urban” area. In other words, if a young judge was assigned to Tokyo District Court, for example, he had to sign and should not refuse, after three years, to go anywhere. Judge Ishikawa opines that depriving judges of the constitutionally protected position and making all judges pawns for the Secretariat has made judges weak-kneed and apathetic bureaucrats who have forgotten that they are an important part of the constitutional structure of Japan. ISHIKAWA, *supra* note 26, at 148.

28. I also noticed that of the practitioners who were recruited as judges in the last two decades, quite a few had been judges before. This lateral movement of becoming a judge after some years of practice is often understood to signify the “unification of the bar and the bench,” one of the most important goals of the Federation of Japanese Bar Associations (FJBA). See Hōsō ichigen no jitsugen ni mukete bengoshi ninkan wo zenkai agete suishin suru ketsugi [Resolution to Promote and Accomplish the “Unification of the Bar and the Bench” by All Members of the FJBA by

A very rough estimate by one of the senior research judges whom I interviewed is that about eighty percent of present research judges have had their “year abroad” experience, mostly in the United States, Germany, France, and the United Kingdom. In other words, they are a select few who are relatively familiar with foreign legal systems, legal trends, and new theories.

A. *The Tasks*

In his paper discussing research judges, the future Justice Kitagawa indicated that they are there to “conduct the research necessary for trial and adjudication of a case as instructed by”²⁹ the Justices, to provide their opinions if necessary, and to attend the Justices’ conferences.³⁰

According to Judge Kurata,³¹ who was a research judge from 1959 to 1963, research judges write case memoranda (and present that report to a Justice in charge of that case), attend Justices’ conferences whenever asked,³² help Justices select judgments to be published as “*hanrei*” or precedents of the Supreme Court in the narrowest sense of the word, and write case notes known as “*chōsakan kaisetsu*.” Five decades later, current research judges confirm during interviews that they continue to perform the same tasks that Judge Kurata mentioned.

1. *Case Assignment and Research*

The Supreme Court Manual on arrangements concerning chambers³³ defines “civil” as all matters of civil dispute, excluding those matters

Recommending Appointment of Judges from the Practicing Lawyers], FEDERATION OF JAPANESE BAR ASSOCIATIONS, May 8, 2001, http://www.nichibenren.or.jp/ja/opinion/report/2001_27.html.

29. Saibansho hō [Judiciary Act], Law. No. 59 of 1947, art. 57(2). It should be noted that this Article applies not just to the Supreme Court but to research judges at all levels of the judiciary.

30. KITAGAWA, *supra* note 2, at 113–14.

31. Takuji Kurata’s *Saibankan no sengo shi* (A Postwar History of a Judge) was written as a series of essays published in the Hanrei Times, a legal biweekly publication. The relevant parts are in 780 HANREI TAIMUZU (HT) 62 (1992); 781 HT 46 (1992); 784 HT 39 (1992); 787 HT 51 (1992); 789 HT 47 (1992); 792 HT 60 (1992); 796 HT 51 (1992); 797 HT 18 (1992); 799 HT 30 (1993); 802 HT 59 (1993); 805 HT 39 (1993); 808 HT 33 (1993); 811 HT 6 (1993); 814 HT 7 (1993); 816 HT 73 (1993); 817 HT 3 (1993); 818 HT 6 (1993); and 819 HT 8 (1993).

32. Judge Kurata’s writings indicate that regular attendance at Justices’ conferences was not expected when he was a research judge. The First Petty Bench never allowed research judges to attend, but the Second Petty Bench expected research judges to attend all conferences, and the Third Petty Bench would ask a research judge whenever Justices thought it necessary. Takuji Kurata, *Saibankan no sengo shi* [A Postwar History of a Judge], 781 HANREI TAIMUZU 46, 46 (1992).

33. Saikō saibansho chōsakan-shitsu jimū toriatsukai yōryō [The Supreme Court Manual on Arrangements Concerning Research Judges’ Chambers] (1981).

assigned to the “administrative” chamber and including matters concerning industrial properties;³⁴ “criminal” as all criminal cases; and “administrative” as all administrative cases, civil labor disputes, and civil cases listed in article 45, Section 1 of the Administrative Litigation Act.³⁵ Senior civil and administrative research judges may, after consultation, assign civil and administrative cases pertaining to industrial properties, civil cases whose outcome will be greatly affected by interpretation and application of administrative law, and other cases deemed appropriate for administrative research judges to conduct research. The Manual also mentions collaborative research by providing that such research shall be conducted whenever a Justice in charge of a case designates collaborative research for the case, or the chief research judge deems it appropriate for several research judges, either within one chamber or among two or more chambers, to conduct research together.³⁶ Having said this, it has been the practice to classify cases being appealed to the Supreme Court into the above-mentioned three categories—civil, criminal, and administrative—as they are filed and then allocate them mechanically within the three chambers.

The practice has been for a research judge to start the research as soon as she is assigned her case (without waiting for some instruction from a Justice assigned to the case).³⁷ The research shall cover the applicable

34. Industrial properties refer to patent, new designs for practical use, design, trademark, unfair competition, and copyright cases. (“Industrial properties” is a 1980s parlance of what we would now call “intellectual properties.”) One intellectual property case will be counted as the equivalent of two ordinary civil cases in assignment.

35. Gyōsei jiken soshō hō [Administrative Litigation Act], Law No. 139 of 1962, art. 45, § 1. Article 45, section 1 provides that:

Court shall apply article 23 sections 1 and 2, and article 39, *mutatis mutandis*, whenever the existence and/or validity of an administrative decision or adjudication is disputed in litigations concerning private legal rights.

Id. Article 23 gives discretion to courts to allow relevant, but nonparty, administrative agencies to intervene in litigations between a private entity and the original agency. Article 39 states that courts will notify an administrative agency whenever a litigation to confirm the existence of a legal relationship based on the agency’s administrative decision or adjudication has been filed against the party to the aforesaid decision or adjudication.

36. The Supreme Court Manual, *supra* note 33, at pt. IV, § 4.

37. The allocation of cases to Justices also happens mechanically in that cases are assigned to three petty benches as they are filed, and within each petty bench, they are assigned to the five (or four) Justices in rotation. In the past, it was the custom for Chief Justices not to participate in the assignment, deliberations, and decisions of his petty bench, thus limiting the number of Justices to four. At his first press conference on November 25, 2008, the present Chief Justice Hironobu Takezaki declared that he would like to join the petty bench rotation because he has not experienced being at the Supreme Court as an Associate Justice. See Kazumi Kitamura, *Saiban’in “Kokumin no Rikai wo”* [(The New Chief Justice Urges) Citizens to Accept Lay Judge System] MAINICHI SHIMBUN [MAINICHI NEWSPAPER], Nov. 26, 2008, at 28. He has been true to his words, because a judgment rendered on March 9, 2009, by the Second Petty Bench indicated that that he presided over a case that was

statutes (i.e., the text), legislative history (including legislative facts), important court decisions interpreting the statute (particularly whether there are relevant precedents by the Court), influential academic theories, practice, and foreign statutes, cases, and theories whenever relevant. These materials are distilled into a short memorandum to the Justice who is assigned the case. She is often called the presiding Justice for the case.

For a research judge, it is important to write that memorandum in a form useful to the presiding Justice. Thus, she states the facts and issues and explains what law should be applicable and why, based on the materials she had gone through. It is not rare for a Justice to ask for a further memorandum to clarify some points of law or to address new issues which appeared irrelevant at the beginning. Not necessarily in all cases, but sometimes (and sometimes too often, particularly when its conclusion is considered patently obvious), research judges do not hesitate to express their opinions in memoranda based on the research they have done.³⁸ A research judge's memorandum is, in its official status, merely one piece of information among many that a Justice shall take into consideration. In reality, it appears to have enormous weight and influence in the actual decision process.

One research judge is assigned to one case to do research, and she conducts the research by herself. She usually has several cases under investigation at the same time. Collaborative research, although mentioned in the Manual, is rare. Yet research judges usually talk of their research being collaborative. It has long been customary at chambers to talk with other research judges about the issues and the merits of cases they are handling. Exchanges of views among research judges are informal and very frequent, and every research judge I have met refers to these exchanges as extremely helpful. In fact, some appear to consider that these exchanges should be done regularly, and a senior research judge should

assigned to him like other Justices. See Saikō Saibansho [Sup. Ct.] Mar. 9, 2009, 63 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 27. There are two more judgments bearing his name as the presiding Justice apart from the September 30, 2009, Grand Bench decision of 2009, Saikō Saibansho [Sup. Ct.] Sept. 30, 2009, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1520. See Saikō Saibansho [Sup. Ct.] Apr. 24, 2009, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 765 (2d petty bench); Saikō Saibansho [Sup. Ct.] Oct. 16, 2009, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1799 (2d petty bench). As far as the author could tell, in other cases decided by the Second Petty Bench where other Justices are in charge, judgments are rendered by four Justices. For an explanation of the Minshū and Keishū, see *infra* note 72. My interview with research judges in the summer of 2010 revealed that, at the moment, Chief Justice Takezaki has not scheduled himself to join his Second Petty Bench peers' rotation. However, they emphasized that it is a matter of schedule rather than of an apparent decision not to join the rotation anymore.

38. According to Ono, a draft judgment was attached to every case report. ONO, *supra* note 7, at 10.

carefully manage her chamber so that she knows what is going on, what stage each research has reached, what issues are troubling the research judge in charge, and other matters for each case on which research is being done. The physical conditions also promote mutual accessibility and the daily exchange of ideas in that two or three research judges share one room, and rooms belonging to one chamber are clustered and occupy the same floor within the fortress-like Supreme Court Building. Each chamber has its own shelves of case reports and statutory compilations. The research judges cannot avoid bumping into each other as part of their daily routine even if they do not intend to.

Civil, administrative, and criminal chambers have different practices and traditions vis-à-vis the inner workings of each chamber.³⁹ The difference also may be due to the personalities of the senior research judge in charge of each chamber as well. Administrative research judges mentioned that they have to check with their senior research judge while conducting their research and that they often have chamber workshops to discuss a case. Civil research judges mentioned that their workshops do not necessarily involve all members of their chamber. There could be a couple of workshops going on at the same time within the civil chamber. Justice Kitagawa mentions that the merits of having these in-chamber workshops are that it gives opportunities to look at important issues from different perspectives before submitting a case memorandum to a presiding Justice and that it helps to avoid not-so-apparent conflicts of precedent.⁴⁰

There is also a formal setting where all research judges gather together about once a month to go over hard cases, known as “chosakan kenkyu-kai.” These workshops are presided over by a senior research judge. A research judge in charge of the case in question becomes the “reporter” and describes the facts, issues, and possible approaches to be taken. Then, the floor is open to all. When a “chosakan kenkyu-kai” reaches a certain conclusion, many Justices feel that that conclusion from the workshop should not be treated lightly.

39. A senior criminal research judge mentioned that his workload includes case research like other research judges, whereas a senior civil research judge did not refer to doing case research as her workload.

40. KITAGAWA, *supra* note 2, at 113. Research judges in civil chambers and criminal chambers see their tasks quite differently and are very much aware of the differences. The explanation given was based upon the differences in the provisions concerning final civil appeals, MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] arts. 312, 318, and final criminal appeals, KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] arts. 405, 406, 411. *See infra* note 41.

2. *Discretionary Appeals, Case Selection, and “Conference Worthiness”*

There is one outstanding difference between the Japanese Supreme Court and the United States Supreme Court in the area of discretionary appeals and case selection. The wording of both codes of procedure⁴¹ indicates that all appeals to the Japanese Supreme Court are strictly limited and discretionary, even when constitutional violations are alleged. Furthermore, the Japanese Supreme Court may accept cases to unify the interpretation of laws and regulations and to enforce the de facto binding authority of its own precedent.⁴²

41. Minsohō, the Code of Civil Procedure, and Keisohō, the Code of Criminal Procedure, state the terms of the final appeal to the Supreme Court somewhat differently.

Minsohō, article 312, provides that

(1) A final appeal may be filed by reason that a judgment contains a misconstruction of the Constitution or any other violation of the Constitution.

(2) A final appeal may also be filed by reason of the existence of any of the following grounds; provided, however, that this shall not apply to the grounds set forth in item (iv) where ratification is made under the provision of Article 34(2) (including cases where applied mutatis mutandis pursuant to Article 59):

(i) the court rendering judgment was not composed under any Acts;

(ii) a judge who may not participate in making the judgment under any Acts participated in making the judgment;

(iii) the judgment was made in violation of the provisions concerning exclusive jurisdiction (excluding cases where any of the courts specified in the items of Article 6(1) made a final judgment in the first instance when the suit is subject to the exclusive jurisdiction of another court pursuant to the provision of Article 6(1));

(iv) the judgment was made in the absence of the authority of statutory representation, authority of representation in a suit or the delegation of powers necessary for performing procedural acts;

(v) the judgment was made in violation of the provision on the opening of oral argument to the public;

(vi) the judgment lacks reasons, or the reasons attached to the judgment are inconsistent.

MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 312. KEISOHŌ, article 405, provides that

A final appeal may be filed with the Supreme Court against a final judgment made by a high court as the court of second instance or the court of first instance by following reasons:

(i) the judgment contains a misconstruction of the Constitution or any other violation of the Constitution,

(ii) the judgment contains a determination that is inconsistent with precedents rendered by the Supreme Court,

(iii) the judgment contains a determination that is inconsistent with precedents rendered by the Court of Cassation (Daisin'in) or by high courts as the final appellate court or the court of second instance, in the absence of precedents rendered by the Supreme Court.

KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] art. 405.

42. Minsohō, article 318(1), provides that

With regard to a case in which the judgment in prior instance contains a determination that is inconsistent with precedents rendered by the Supreme Court (or precedents rendered by the Court of Cassation (Daishin'in) or those rendered by high courts as the final appellate court or

There is an average of over 9000 appeals annually.⁴³ Yet neither the codes nor the rules of procedure provide for an initial process to select cases worthy of full and detailed deliberation from among all appellate cases. In short, the court lacks a process equivalent to the review of petitions for certiorari, a distinct process the United States Supreme Court uses to exercise its discretionary judgment. This lack of a case-shifting procedure and the public's expectation that all appellate cases are treated in the same manner have produced an enormous burden upon the Justices. Even the fact that the Code of Criminal Procedure, since 1948, and the Code of Civil Procedure, since 1998, have abolished the right of appeal to the Supreme Court except on constitutional grounds⁴⁴ has not been

the court of second instance, if there are no precedents rendered by the Supreme Court) or any other case in which the judgment in prior instance is found to involve material matters concerning the construction of laws and regulations, where the court with which a final appeal shall be filed is the Supreme Court, the Supreme Court, upon petition, by an order, may accept such case as the final appellate court.

MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 318(1). KEISOHŌ, article 406, provides that

Notwithstanding the preceding article which defines instances of appeal, the Supreme Court may accept as a court of final appeal, in accordance with the rules of the Supreme Court, cases whose judgment in prior instance are found to involve material matters concerning the construction of laws and regulations and have not been finalized.

(c) The Supreme Court, as a court of error, has the power to quash or overrule judgments below if it deems it appropriate

KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] art. 406. MINSOHŌ, article 325(2), provides that

The Supreme Court, as the final appellate court, even where the grounds prescribed in Article 312(1) or (2) do not exist, may quash the judgment in prior instance if there is a violation of laws or regulations that apparently affects a judgment, and except in the cases set forth in the following Article, may remand the case to the court of prior instance or transfer the case to another court equivalent thereto.

MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 325. KEISOHŌ, article 411, provides that

A court of final appeal may overrule the judgment in prior instance in cases which do not satisfy any requirement as provided by Article 405, it would have been in great violation of justice not to overrule if at least one of the following items exists:

- (i) a violation of laws or regulations apparently affects a judgment,
- (ii) the sentence is utterly disproportionate and improper,
- (iii) the erroneous finding of material facts which apparently affects a judgment,
- (iv) there is a reason to demand for a new trial,
- (v) the crime was either abolished, or altered, or was the defendant pardoned, after the judgment.

KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] art. 411.

43. The Supreme Court also has jurisdiction over "appeals to court order" cases. See Saibansho hō [Judiciary Act], Law No. 59 of 1947, art. 7. For judicial statistics, see *Justice Statistics, COURTS IN JAPAN*, <http://www.courts.go.jp/search/jtsp0010> (last visited May 4, 2011). The most recent figures are of the year 2009, in which there are 6927 new civil and administrative cases and 3856 new criminal cases being filed at the Supreme Court.

44. The texts of the Minsohō and Keisohō, *supra* notes 41 and 42, suggest that challenges based on constitutional issues are also subject to the Court's discretion. They have been construed so the Court will accept all final appeals raising nonfrivolous constitutional issues.

sufficient even among lawyers to justify differentiated processes.⁴⁵ To make matters worse, because the Supreme Court has the power to quash or overrule judgments below if it deems it appropriate, as noted above, appeals and petitions are filed even when there are no appropriate grounds to file appeals and petitions. Justices feel that they are expected to go through all the documents relevant to each case assigned to them, and they look for some help to separate the wheat from the chaff. Thus, it naturally falls upon research judges to select “conference-worthy” cases.

If a research judge comes to the conclusion that a case is not conference worthy, she presents a case report indicating that conclusion to the presiding Justice in charge of the case, with all the relevant documents. If the presiding Justice agrees with the disposition recommended in the report, usually to dismiss the appeal or petition without referring the case to the Justices’ conference, the case report will be circulated to other Justices belonging to the same petty bench.⁴⁶ Each Justice would go through relevant documents separately. The process is called conference by circulation, or “*mochi mawari shingi*.” When all five Justices (or four in the present Second Petty Bench⁴⁷) agree, the appeal or petition is formally dismissed without being discussed at a face-to-face conference. There is a template form for the dismissal of a petition,⁴⁸ known colloquially as “three lines and a half,” because it resembles a letter of divorce agreement during the Tokugawa period, which was written in three lines and a half.

A Justice could object to a case being treated in this manner, in which case it would be reclassified as conference worthy, and the research judge in charge would be expected to produce a more detailed memorandum. These reclassified cases do exist, but in most instances, the evaluations of Justices and research judges do not differ much.⁴⁹ Thus, the voluminous

45. It surprises this author to find that some lawyers submit exactly the same argument for an Article 312 final appeal and an Article 318 petition for acceptance of a final appeal, even though the requirements are substantially different. *See supra* notes 41 and 42 (discussing the *Minsohō*).

46. Takii mentions that at the Third Petty Bench, an assigned Justice would draft a short memorandum and circulate it together with a research judge’s report in all cases, not just “conference-worthy” ones, whereas a Justice at the Second Petty Bench was not expected to indicate his opinions even for “conference-worthy” cases, illustrating that each petty bench has its own rules and customs. TAKII, *supra* note 7, at 22.

47. *See supra* note 37.

48. As with a decision to deny a petition for certiorari, there occasionally are dissents to dismissals, indicating that one or more Justices believed the case should not be dismissed. *See* TAKII, *supra* note 7, at 23.

49. Ono mentions that he found that he, a liberal practitioner, would agree with research judges’ reports around ninety percent of the time, and the ten percent difference he experienced was more

caseload is *the* reason for having research judges to the Supreme Court and for them to start their research before being given any instruction from the presiding Justice.

Research judges usually explain that most appeals and petitions actually do not state appropriate reasons to file the appeals and just indicate the fact that the appealing party is not happy with the judgment below. According to their view, any lawyer worthy of her name would have agreed with most judgments below on matters of law. Because the Supreme Court has the power and authority to quash or overrule judgments below if it deems it appropriate, even if there is no question of law involved, and because one of the reasons it could do so could be some error by lower courts on questions of fact, it is not enough in the eyes of research judges to read just the appellate briefs presented to the Supreme Court stating issues of law.⁵⁰ Thus, research judges say they feel obligated to go through all relevant materials available before concluding that a case is not conference worthy.

In a way, this selection process very much resembles the certiorari pool memorandum that the Justices share at the United States Supreme Court. But case memoranda here are not single-page “flimsies,” and it requires five votes (or four in the present Second Petty Bench) from all Justices on that petty bench for a case to be dismissed as not conference worthy. Research judges mention that they would rather wrongly recommend a case as conference worthy than wrongly recommend a case as not conference worthy—the very reason that their research appears to be thorough, making sure no stone is left unturned.

Research judges believe that most petitions fail to state requisite grounds for appeal in their brief, as the claims are not really about misconstruction of the Constitution or other violations of the Constitution. Yet, unlike the United States Supreme Court, as governed by Supreme Court Rule 10,⁵¹ the Japanese Supreme Court is willing to reach out to parties who have been wronged. Fittingly, both codes leave plenty of room

often a matter of jurisprudential difference, rather than a matter of disagreements in legal technicalities. ONO, *supra* note 7, at 57.

50. There is a distinct difference in the manner of dealing with assigned cases between research judges belonging to the civil chamber and those belonging to the criminal chamber. The latter are far more concerned with the possibility of erroneous findings of fact that might deprive an innocent person of her life or liberty.

51. Rule 10 of the United States Supreme Court states that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.” SUP. CT. R. 10. Also important is the fact that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” *Id.*

for appeals on grounds of erroneous factual findings and misapplication of statutes and rules.⁵² Research judges, especially those in the criminal chamber, are eager to tell us that almost all appeals assert that “the judgment below contains a misconstruction of, or is in violation of the Constitution, or a determination that is inconsistent with precedents rendered by the Supreme Court,”⁵³ but in fact they merely allege that the judgment below applied a construction of laws or regulations which was different from the one that the party asserted, that there was an erroneous finding of material fact that could affect the outcome of the case, or the sentence is utterly disproportionate and improper.⁵⁴ Nevertheless, research judges feel obliged to go through all records and check, for example, the credibility of the defendant’s confession by examining the appropriate evidence. It is my impression that documents in criminal cases are far more voluminous, and case memoranda far more detailed, than those in civil cases. In criminal appeals, it is considered conference worthy when defendants continue to deny the charge or have confessed under dubious circumstances, where the case has attracted social attention, or where the death penalty was ordered.⁵⁵ Research judges, especially in the criminal chamber, are greatly concerned with ferreting out any erroneous factual findings that may influence the outcome of a case because it is their belief, shared very much by society, that it is the role of the Court to examine whether the defendant was wrongfully convicted, to correct any wrong, and to bring justice. Thus, research judges take extreme care and will go the extra mile to scrutinize all documents available so as not to miss any errors in factual findings. The pressure that research judges feel in reaching *the* right conclusion is probably much greater than that felt by law clerks at the United States Supreme Court, which does not define itself as a court of final correction.⁵⁶

52. *See supra* note 42.

53. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] art. 405.

54. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] art. 411.

55. TAKII, *supra* note 7, at 25.

56. It apparently boggled the minds of research judges to hear that new evidence indicating that the defendant might be innocent does not necessarily mean a judgment ordering a new trial at the United States Supreme Court. The Japanese government rarely gives a pardon to those who are wrongly convicted. Instead, the Supreme Court orders a new trial in which public prosecutors might file for dismissal of the case, or they might still charge, but the defendants might eventually be found not guilty.

3. Justices' Conferences

Justices' conferences are held once or twice a week. A grand bench conference would be on Wednesday,⁵⁷ and each petty bench designates days of the week as its conference day(s).⁵⁸ A senior Justice of each petty bench would determine the agenda of the day, usually three to five cases, after receiving reports from responsible Justices that a case is ready to be discussed. Unlike the United States Supreme Court practice, research judges attend Justices' conferences.⁵⁹ The explanation for their regular attendance is that they are there to answer questions that may arise during the Justices' discussion. It also helps a research judge whenever she is asked to do some additional research on the case if she knows why such a request was made and in what context. The rule at these conferences is that research judges will not speak unless spoken to.⁶⁰ Instead of speaking up, they take notes. These notes form the basis of the first draft of judgments that research judges will write. It may take several sessions before the Justices come to a conclusion and direct the research judge to start drafting a judgment.⁶¹ Drafts are circulated so that the Justices will have time to go through them before the next conference.⁶² These notes would undoubtedly provide windows into what is really happening at the Court. But the likelihood of these notes or initial drafts slipping out of chambers and being circulated outside of that Stone Fortress appears to be nil. Do we need to be reminded that they are judges with brilliant futures? As for the current chief research judge, one look at the list of recent chief

57. Since there are so few cases being referred to the Grand Bench, the judicial conference, *supra* note 24, takes place on most Wednesdays. See ONO, *supra* note 7, at 7–8.

58. Conference days were on Tuesdays and Fridays for the Third Petty Bench in the 1980s and 1990s. See MASAMI ITO, SAIBANKAN TO GAKUSHA NO AIDA [BETWEEN A JUSTICE AND A SCHOLAR] 8–9 (1993); ONO, *supra* note 7, at 8. Itoh states that the original practice was to meet on Mondays and Thursdays for the First Petty Bench, Mondays and Fridays for the Second Petty Bench, and Tuesdays and Fridays for the Third Petty Bench, but they now meet less frequently. ITOH, *supra* note 2, at 66.

59. According to Kitagawa, *supra* note 2, at 113, research judges regularly attend Justices' conferences, but it was not so when Kurata was a research judge. Kurata, *supra* note 32, at 46. See *supra* note 31. The practice appears to have changed somewhere between the 1960s and the 1980s. Ono understands that the change occurred sometime in the early 1980s. ONO, *supra* note 7, at 26. Also, Justices refer to the fact that each petty bench has its own practices and procedures. See, e.g., ITO, *supra* note 58, at 8; TAKII, *supra* note 7, at 22.

60. KITAGAWA, *supra* note 2, at 113–14; ONO, *supra* note 7, at 27.

61. According to Takii, the Supreme Court may recommend settlement. On such occasions, the actual negotiation and facilitation process is relegated to research judges. TAKII, *supra* note 7, at 23.

62. *Id.* at 30.

research judges suggests that he⁶³ has an excellent chance of being nominated as a Justice in the not-so-distant future.⁶⁴

Grand Bench conferences are held only when the Supreme Court is set to decide the constitutionality of a new statute, rule, or regulation; to declare a statute, rule, regulation, order, or act unconstitutional; or to overrule a precedent.⁶⁵ Since all cases are allocated to petty benches when filed, it has made Justices reluctant to refer cases to the Grand Bench. The explanation is that with six decades of precedent, there are enough *ratio decidendi* for every new case coming to the Court now.⁶⁶ It also has been mentioned many times by the Justices themselves that adding a very complex conference case to the Court's agenda will take time and increase the burden upon fellow Justices, and every Justice would try to avoid placing this extra burden upon his colleagues.⁶⁷ Once a petty bench decides⁶⁸ that a case will be referred to the Grand Bench, the research judge will write a new (and more detailed, sometimes exceeding two hundred pages) case memorandum.⁶⁹ The chief research judge and the senior research judge, as well as the original research judge, will attend the Grand Bench conference at which all fifteen Justices are present and the Chief Justice presides. It is the task of the chief research judge, not the original research judge, to explain the materials and documents prepared for the occasion. After all the Justices have spoken and the Chief Justice sorts out the issues and arguments, research judges prepare the initial draft of the Court's opinion, while those who do not agree or wish to clarify a point will start drafting their own opinions.⁷⁰

63. So far, all chief research judges have been male.

64. See Appendix.

65. Saibansho hō [Judiciary Act], Law No. 59 of 1947, art. 10.

66. This often means stretching the scope of a previous ruling to a situation that the Court in the previous case probably had not thought through. This might well be an indication that the understanding of "precedents," "*ratio decidendi*," and "*stare decisis*" is quite different from common law jurisdictions in the Japanese judiciary. See ITO, *supra* note 58, at 22–69.

67. See, e.g., TAKII, *supra* note 7, at 28; ONO, *supra* note 7, at 40–42.

68. Since all cases are first allocated to petty benches, the petty bench to which the case was allocated decides whether the case should be referred to the Grand Bench and files a request to the Judicial Conference to decide whether to refer the case to the Grand Bench. At the conference, it would be the task of the Justice in charge of the case to explain the request, including what had transpired at the petty bench conference.

69. This memorandum is usually accompanied by two versions of a draft judgment, one dismissing the appeal, the other reversing the judgment below. ONO, *supra* note 7, at 37.

70. TAKII, *supra* note 7, at 29. Research judges do not assist Justices writing minority opinions. ONO, *supra* note 7, at 37. There appear to be several reasons why Justices are discouraged from writing separate opinions. ONO, *supra* note 7, at 105; ITO, *supra* note 58, at 45.

4. *Hanrei Selection*

Not all Supreme Court decisions are published in Japan.⁷¹ It falls upon the Supreme Court precedent selection committee, or “*saikō saibansho hanrei iinkai*,” to select which judgments will be published and declared as precedents. The decisions designated as precedents of the Supreme Court, or “*saikō saibansho hanrei*,” are published in the Supreme Court case reports, “*Saikō saibansho hanrei shū*,”⁷² from publisher *Hanrei chōsa kai*, and the committee’s name appears as the editor. The committee consists of six Justices, two from each petty bench, and they meet once a month, separately, for civil and criminal cases. All research judges attend committee meetings as secretaries or “*kanji*,” but their function is not limited to mere attendance. Research judges have workshops beforehand and discuss not just which decisions should be published, but also what issues are being decided, “*hanji jikō*,” and the *ratio decidendi*, “*hanketsu yōshi*” or “*kettei yōshi*,” of the decision. Each research judge is ready at committee meetings to present the cases assigned to her that have been decided since the last meeting, including a summary of the issues being decided, the *ratio decidendi*, and the relevant statutes and decisions. After the research judge finishes fielding questions, mostly from other research judges, a senior Justice presiding over the meeting takes a vote on whether to publish the case.⁷³ Lately, cases are officially published in about six months.⁷⁴

71. The status of unpublished opinions is a delicate matter anywhere. Although permissible to cite, *see* FED. R. APP. P. 32.1, the status of unpublished opinions as precedential is still controversial even in the United States federal judiciary. One fairly recent discussion of the argument is found in David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61 (2009).

72. The Supreme Court case reports are more commonly known separately as *Minshū* (*Saikō saibansho minji hanreishū*) and *Keishū* (*Saikō saibansho keiji hanreishū*), although they are published in the same volume. Those cases not important enough to be published in *Minshū* or *Keishū* are filed in *Saibanshū minji* (*Saikō saibansho saibanshū minji*) or *Saibanshū keiji* (*Saikō saibansho saibanshū keiji*), which are not “published,” although they are available at the court libraries and at certain university libraries. Private publishers also publish the officially unpublished Supreme Court decisions in *Hanrei Jihō* and *Hanrei Taimuzu*. Anonymous comments accompanying Supreme Court decisions published in *Hanrei Jihō* and *Hanrei Taimuzu* are said to be written by research judges who wrote memoranda for the cases.

73. Apparently, because designating the status of precedent is considered an important matter, the process is considerably more formal than deciding whether to publish a decision of the United States Courts of Appeals in the Federal Reporters. Furthermore, West Publishing Company also publishes those decisions designated as “not for publication” in the Federal Appendix.

74. The Japanese Supreme Court’s website publishes some decisions within a day or so of its official pronouncement. SUPREME COURT OF JAPAN, <http://www.courts.go.jp> (last visited May 4, 2011). I have not been given any explanation of their selection process so far. To some extent, they

Although Japan is a civil law country, judges' attitudes toward these "precedents" sometimes surprises practitioners.⁷⁵ Justice Sonobe writes in detail about the difference between a precedent and a judgment in a particular case, what is *stare decisis* or "*senrei hōri*," and why all precedents should be published.⁷⁶

5. Case Commentaries

The first case commentaries, or "*hanrei kaisetsu*," written by a research judge appeared in the February 1954 issue of *Hōsō Jihō*.⁷⁷ Since then, commentaries are first published in *Hōsō Jihō* and then compiled in an annual volume. In the beginning, commentaries were published within two weeks of the Supreme Court precedent selection committee's meetings in which the committee decided to publish the case. In other words, the case and the commentary appeared within two months after the decision was handed down,⁷⁸ making the commentary fairly brief. The assumption then was that these commentaries were based on case reports and that commentaries were not an extra task for research judges who had properly prepared case reports.

In the 1960s, the nature of commentaries began to change. They started to include case comments (naturally published after the decision) and academic writings, which were not yet available at the time when the case was decided. They are no longer brief⁷⁹ or available immediately after the decision, and they tend to resemble a scholarly article.⁸⁰

cover the precedential cases, but often there are more cases initially published on the website than are later officially published in *Minshū* and *Keishū*.

75. Ono refers to precedent-centrism, or "*hanrei chūshin shugi*," as being prevalent in the judiciary. ONO, *supra* note 7, at 105.

76. ITSUO SONOBE, *SAIKŌ SAIBANSHO JŪNEN [A DECADE AT THE SUPREME COURT]* 140–42 (2001). Apparently, Sonobe, as the author of the decision, is irritated by case comments that show slight understanding of the important difference between logical explanations leading to *stare decisis* and *stare decisis* itself.

77. 6 HŌSŌ JIHŌ [LAW. ASSOC. J.] 55–100 (Feb. 1, 1954). There are twenty-seven brief explanations about cases decided on December 1953 entitled *Saikō saibansho hanrei* (Judicial Precedents of the Supreme Court). The title, *Saikō saibansho hanrei kaisetsu* (Explanatory Remarks on the Supreme Court Decisions), appeared for the first time in the next issue, 6 HŌSŌ JIHŌ [LAW. ASSOC. J.] 79 (Mar. 1, 1954).

78. In the 1960s, the selection committee meetings of the civil chamber were held around the twenty-fifth of the month, and the commentary for each case selected was due on the tenth of the next month, allowing judges a fortnight to write. Kurata, *supra* note 32, at 47.

79. In 1954, 125 cases were dealt with in 202 pages, whereas in 1968, commentaries for 151 cases took some 1500 pages. See TAKII, *supra* note 7, at 34 n.6, 352.

80. Kurata is critical of the present state of commentaries because (1) the timing of its publication is unpredictable and (2) the writings should provide just the information that only those who had had the opportunity to see records and evidences would know. Kurata, *supra* note 32, at 48.

Because lower courts, lawyers, and law students today often assume that what is written in a commentary is the real intention of the court rather than the personal opinion of one research judge, they tend to follow its suggestions word-for-word. By writing these case commentaries, the influence of research judges may be greater than that of the actual decisions of the Supreme Court.⁸¹ Because many people read between the lines and assume that case commentaries illustrate the real intent of the Supreme Court, this might well be the most controversial aspect of the research judges' tasks.

6. *The Differences*

It is true that law clerks help Justices prepare draft opinions, like research judges. But their functional similarities end there. Research judges do not differentiate between the process of selecting conference-worthy cases and the process of researching for final judgments. Therefore, they do not stop after reading the appellate briefs when deciding whether cases are conference worthy. They inevitably read all documents and information submitted from the beginning of trial to the latest motions to the Court to make sure there has been no error at any stage. They do not confine their search to important issues that the Court feels it should deal with now or to issues for which there are conflicting judgments from different high courts when they start their initial research. This attitude toward the search for errors to be corrected continues until the research judges present their case memoranda and recommendations for the outcome of each case. They apparently do not distinguish or divide their research process between the preparation of memoranda for conference worthiness and the preparation of memoranda for conference itself.

Unlike research judges, law clerks do not attend Justices' conferences. I cannot say whether this difference has created any further difference in the functions that law clerks and research judges perform. Law clerks are

Takii is critical because, in spite of the fact that the commentaries themselves are the works of individual research judges without input from their chamber, colleagues, or the presiding Justice responsible for the decision, they often are perceived as *the* authentic explanation by the Court in disguise. TAKII, *supra* note 7, at 35.

81. See TAKII, *supra* note 7, at 36. On the other hand, Sonobe, who was once a senior research judge, states that it is essential for anyone studying Supreme Court decisions to read these commentaries because the decision and its commentary should be read as one. SONOBE, *supra* note 76, at 14.

given sufficient information to help their Justices draft opinions even though they are not there.

Since the Supreme Court of the United States publishes all decisions, there is no need to select opinions for publication by either the Justices or the law clerks. When federal courts of appeals choose not to publish some opinions, it has been up to the judges who authored the opinions to select which to publish and which not to publish. The decision whether to publish has never been left to law clerks, even if they might have helped to write the opinions.

Another thing a law clerk would not attempt to do is to write about the case she had worked on with the kind of authority that research judges assume. Research judges see it as their obligation to publish their research results and more, so that others may have a better understanding of the case in question. This is a rather peculiar phenomenon in that Japanese judges and Justices often refer to a legal maxim: “a judge should not explain her judgment except by the opinion she wrote.” A good judgment should contain, accordingly, everything necessary and sufficient but no more. This maxim has often been used as the reason Justices decline to speak publicly. In fact, Justices never give public speeches, even to law school students or at academic conferences, while they are on bench. Yet, it is considered a part of research judges’ tasks to publish commentaries of cases they researched as some sort of authority.

Research judges perform distinctively different functions from law clerks. Yet both are often criticized for usurping the role of Justices in deciding cases at the Supreme Courts.

B. The Influences of Having Experienced Judges Serve as Justices’ Research Assistants

Most Justices seem to appreciate the experience that research judges have shown in supporting the Justices.⁸² Nevertheless, they, as a group, have a very strong tendency to uphold the status quo ante in the form of a vague understanding of the binding authority of precedent.⁸³ The fact that it is part of their task to select “hanrei,”⁸⁴ which judges believe are

82. See, e.g., ITO, *supra* note 58, at 149; ONO, *supra* note 7, at 56, 58; see also MASAMICHI OKUDA, FUNSO KAIKETSU TO KIHAN SOZO [DISPUTE RESOLUTION AND CREATING NORM] 7–8 (2009); KOICHI YAGUCHI, SAIKOSAI TO TOMONI [ALONG WITH THE SUPREME COURT] 133–34 (1993).

83. See ITOH, *supra* note 2, at 64.

84. See *supra* note 71 and accompanying text.

precedents and have binding quality,⁸⁵ makes them more committed to “hanrei” and to the status quo ante than the rest of the legal profession.⁸⁶

Interviews of research judges made it apparent that all of them are very much aware of what the factual consequences of each decision would be had the Supreme Court accepted the appeal and affirmed or reversed the judgment below. This is an indication that the Supreme Court is still the final court of error even in the eyes of the members of the judiciary. It is inevitable that these judges will go through all available documents meticulously to make sure their memorandum is not missing a clue that something went wrong that would deprive the parties of a just result. One of the research judges mentioned intuition and a sixth sense nurtured during her trial experiences as necessary capacities for a research judge. In other words, although what they do looks very theoretical and academic, it is not really a job fit for an academic or a recent graduate with very little experience.

These research judges also do not hide their interest in contributing to the formation of new “case law” and in persuading Justices to accept their views. But Justices, especially those who are not from the judiciary, are strong-minded people to start with. Even if research judges try hard to persuade, their advice will fall on deaf ears unless Justices already are inclined to listen.⁸⁷ It appears that research judges sometimes have a difficult time persuading Justices who are not from the judiciary.

Research judges repeatedly emphasize that the Supreme Court is the court of last resort to correct wrongs and to accomplish justice. Some mentioned that because most cases challenge lower-court decisions based on the facts of each case, alleging as-applied challenges of unconstitutionality at the most, the status of “hanrei” should be awarded to a very few important decisions. In spite of the fact that they are keen to contribute to the formation of new case law, they tend to minimize the policy-making function that this entails. My impression was that research judges would like to have substantial influence, if possible, in setting the future direction of law but prefer to do so incognito. It is not easy to state what their real influence is and whether it is greater than that of law clerks. My guess is that their real influence might not be as great as they try to

85. See NAKANO, *supra* note 2.

86. See *supra* note 75, discussing what Ono saw as precedent-centricism.

87. In a book they co-authored, Yamaguchi and Miyaji illustrate the jurisprudential changes taking place at the Supreme Court in the twenty-first century. These occur not by the change of heart by a sitting Justice or two but, by the change of membership at each petty bench. SUSUMU YAMAGUCHI & YU MIYAJI, SAIKOSAI NO ANTO: SHŌSŪ IKEN GA JIDAI WO KIRIHIRAKU [SECRET FEUDS WITHIN THE SUPREME COURT: MINORITY OPINIONS ARE CHANGING THE WORLD] (2011).

portray and is probably smaller than that of law clerks because of their limited future options.

C. Criticisms of “Chōsakan saiban” (Adjudication by Research Judges)

The Supreme Court has been subject to criticism that its adjudication process is being taken over by research judges because Justices rely too much on research judges. It is known that Justices do not read all relevant documents and that research judges present Justices with not just memoranda of cases but preferable outcomes and draft judgments.

Justices candidly admit that they do not have time to read all relevant documents sent to the Supreme Court⁸⁸ and have to rely heavily on research judges in writing opinions.⁸⁹ They are also aware that too much reliance would threaten the independence and subjectivity of their minds.⁹⁰ Thus, it is hard to believe that Justices accept, or rather swallow, all of the research judges’ memoranda and recommendations, warts and all.

A more plausible concern is that because research judges are bright, diligent, and trustworthy as lawyers, research judges’ recommendations are very persuasive and actually have enormous influence in Justices’ understanding of cases. A research judge prepares a memorandum for each case before receiving any instruction from a presiding Justice, which gives some ground for the suspicion that research judges could easily dictate the outcome of cases by selecting the information that the Justices will read. Because the selection of information is the basis of well-informed decision making, it is sometimes crucial to the final outcome. Therefore, it is undeniably true that research judges could and would have a very large influence upon how each Justice would understand a case based upon a research judge’s memorandum. A Justice could ask the research judge for additional research, but since Justices do not have their own personal research assistants, they might not be aware of the need to do so. The collaborative working atmosphere within the chambers mentioned above forces research judges to view a case from various perspectives and to check the validity of their own memorandum, preventing it from becoming too self-content or self-righteous. There is no denying the fact that research judges honor previously decided cases, especially those of the Supreme Court, and tend to present a fairly static view of the world,

88. See, e.g., ONO, *supra* note 7, at 9–10.

89. See, e.g., ITO, *supra* note 58, at 149–50.

90. See, e.g., ONO, *supra* note 7, at 57.

recommending the status quo ante.⁹¹ Needless to say, Justices themselves are coming to the Supreme Court with substantial experience as judges, practitioners, prosecutors, administrators, and academics and can count on their own expertise to check the adequacy of any memorandum being presented to them.

Another concern is that the recommendations of research judges are used as the first draft of the opinion of the Court. This phenomenon could mean the ultimate delegation of decision making to a research judge by a presiding Justice. But Justices indicate that, unless cases are not conference worthy or considered suitable for conference by circulation,⁹² their deliberation in the conference rooms is very active, thorough, and meaningful.⁹³ This would make it rather difficult for the final product, the opinion of the Court, not to reflect the contents of that deliberation. Nevertheless, these opinions are known to be bland and characterless, which raises the suspicion that they are actually written not by the Justices themselves but by research judges. There is one apparent difference. Unlike the majority opinions of the Supreme Court of the United States, the majority opinions of the Japanese Supreme Court do not indicate the person who penned it by name. The assumption is that the presiding Justice is probably the author, but one can never be sure. In contrast, the minority opinions indicate who wrote each of them. They are more interesting because they more or less reveal Justices' jurisprudence in livelier ways. This reinforces the suspicion that majority opinions are the work product of research judges. Furthermore, research judges not only present memorandum of the case but also a recommended outcome, and are quite often asked to prepare the first draft of the opinion. It is easy to conclude from this that majority opinions are written by research judges, and Justices go through them with red pens in their hand, checking dots for "i's" and dashes for "t's" but never totally rewriting them.

Justices explain that it is the responsibility of the presiding Justice to go through the initial draft carefully before presenting it at the conference.⁹⁴ The initial drafts are often rewritten to reflect the deliberation at the conference to the extent that, often, it is not easy to recall the original wording or structure.⁹⁵ The bland wordings reflect not a single Justice's

91. Ono considers this feature inevitable as a supporting organ. *See* ONO, *supra* note 7, at 58.

92. A presiding Justice may circulate a case report and its recommended disposition to all the other Justices of the same petty bench. If all the other Justices agree, the case is disposed of without being discussed at Justices' conference. *See supra* note 46.

93. *See, e.g.*, OKUDA, *supra* note 82, at 8.

94. TAKII, *supra* note 7, at 30.

95. *Id.* at 30, 61.

opinion but the conclusion and common factors finally agreed on at the Justices' conference.⁹⁶

There is no evidence, except for some writings by the Justices themselves, to show that the final opinions are more different from the first draft than is often assumed.⁹⁷ The Justices' assertions that the opinions are different from research judges' drafts might not be sufficient to completely negate the accusation that Justices are rubber stamps. Because data are not available to the public, many people outside of the Supreme Court believe that, except in few difficult cases, Justices tend to rely upon and make extensive use of first drafts in producing majority opinions.

In my view, majority opinions tend to be bland because they hope to garner as many supporting Justices as possible. In order to make the opinion acceptable and palatable to many, the writer would rather erase strongly worded phrases or interesting metaphors so as not to alienate tentatively interested Justices. The result consists of blandly worded compromises,⁹⁸ written in the least offensive manner. Of course, this theory does not negate the possibility that research judges are the actual authors writing on behalf of the majority of Justices.

III. THE FUTURE

All Justices agree that research judges are indispensable because of the caseload at the Supreme Court and the amount of work necessary for the thorough preparation required before adjudicating any serious case (i.e., checking facts, relevant cases, and applicable theories) and because the Supreme Court is expected to do so many difficult things: interpret the Constitution, unify statutory interpretations and legal doctrines, correct errors which occurred in courts below, and administer justice. Research

96. In all Supreme Court decisions that have been published or made public by commercial publications, no presiding Justice has written a minority opinion that bears his name.

97. Takii emphasizes that drafts are drafts, that the final choice lies in the hands of the Justices, and that the final opinions always reflect the Justices' judgments. *Id.* at 34. Yamaguchi and Miyaji recount a case where Justice Takii, while the presiding Justice, was in the minority and was not willing to endorse the majority opinion. Apparently, the research judge assigned to the case did not assume the task of writing the opinion of the Court. The publication of a minority opinion by a presiding Justice was eventually avoided when Takii retired in 2006. YAMAGUCHI & MIYAJI, *supra* note 87, at 78. It is hard to believe that not a single presiding Justice took a minority position within a single petty bench since the Court was established in 1947. One could think that Takii's intent to publish his minority opinion was side-stepped by a research judge's delaying tactics.

98. Takii believes that opinions often lack persuasiveness because they are the result of compromise. TAKII, *supra* note 7, at 61.

judges as an institution are well established and here to stay with the Supreme Court.

Justice Takii suggests that a Justice should nominate her own research assistants.⁹⁹ The sentiment might be based on the experience of the phantom dissent that Yamaguchi and Miyaji refer to.¹⁰⁰ The obstacles are many: newly appointed Justices, unless they had been at the Secretariat for a long time, would not know many judges on which they would personally want to rely as their own research assistants; it would be very hard for practitioners to leave lucrative private practice on short notice to become a research assistant;¹⁰¹ it is not enough to know just the doctrinal aspects of legal arguments to function well as a research judge; and, in any case, the person must be a brilliant lawyer who could deal with any subject matter, unlike present research judges who have their own specialized fields of expertise. Justice Ono admits it is probably impossible to find someone who fits the bill.¹⁰² Thus, introducing something in Japan similar to American law clerks does not appear to be on the horizon.

Now that all Supreme Court Justices in the United States have clerked, would that also be an expected feature of future Justices appointed from the judiciary? It is true that almost all of the recent chief and senior research judges eventually end up at the Supreme Court. It also is true that those who were section chiefs and directors at the Secretariat also end up at the Supreme Court. A judge who had been at the Secretariat or was a research judge is very likely to be appointed as a Justice, but there could always be some exceptions.

This paper is based on some interviews with research judges, past and present. But I did not have access to any documents detailing the inner workings of the Supreme Court, such as conference memoranda or personal papers left by individual Justices. We will all benefit when students of the Supreme Court can base their hypotheses on real evidence, rather than some anecdotes that a researcher was able to gather. A new

99. *Id.* at 33.

100. According to Yamaguchi & Miyaji, Takii was unable to present his minority opinion because he was the presiding Justice for the case. YAMAGUCHI & MIYAJI, *supra* note 87.

101. Practitioners are asked a couple of years ahead of time whether they are interested in being a candidate. Some decline at this point; others go through several steps of the selection process, first through the local bar association, and then through the FJBA, before the FJBA finally presents a short list, usually of three people, to the Supreme Court. When short-listed, most practitioners are said to subtly ask other practitioners to take over active cases. Some start to decline taking new cases unless there is a sufficiently large group of lawyers involved to minimize the impact of his or her absence. For academics and others, the notice comes rather suddenly with almost no time for preparation.

102. ONO, *supra* note 7, at 59.

Freedom of Information Act¹⁰³ will be proposed, and the Public Records Management Act¹⁰⁴ will come into effect in April 2011. But neither statute applies directly to the judiciary. Our hope for a better understanding of the judiciary rests upon more, accurate information concerning courts, judges, and their inner-working system, coming directly from the judiciary on their own initiative. Unless we have better access to information on research judges, their portraits will be much, much larger than life, and we will have to guess at what is left behind the curtain.

103. The statute in force is Gyosei kikan no hoyu suru joho no kokai ni kansuru horitsu [Freedom of Government-owned Information Act], Law No. 42 of 1999. After a decade of hiatus, the Government is said to be presenting a new bill this “January to June 2011” session of the Diet.

104. Kobunsho to no kanri ni kansuru horitsu [Public Records Management Act], Law No. 66 of 2009.

APPENDIX

CHIEF RESEARCH JUDGES SINCE 1968

	Chief Research Judge	Justice
SAITO, Toshio	December 1968 to February 1970	
YASUMURA, Kazuo	February 1970 to October 1971	
NAKAMURA, Jiro	October 1971 to July 1976	September 1978 to February 1984
OGATA, Setsuo	July 1976 to March 1977	
NISHIMURA, Koichi	March 1977 to May 1982	
IGUCHI, Makiro	May 1982 to February 1984	
KABE, Tsuneo	February 1984 to May 1987	May 1990 to March 1997
MIYOSHI, Toru	May 1987 to May 1990	March 1992 to October 1997
KITAGAWA, Hiroharu	May 1990 to December 1994	September 1998 to December 2004
UEDA, Toyozo	December 1994 to March 1998	February 2002 to May 2007
IMAI, Isao	March 1998 to February 2002	December 2004 to December 2009
KONDO, Takaharu	February 2002 to December 2005	May 2007 to present
CHIBA, Katsumi	December 2005 to November 2008	December 2009 to present
NAGAI, Toshio	November 2008 to present	

HEADS OF THE SECRETARIAT OF THE SUPREME COURT SINCE 1947

	Director	Justice
HONMA, Yoshikazu	August 1947 to June 1950	
GOKIJO, Kakiwa	June 1950 to March 1958	August 1961 to December 1966
YOKOTA, Masatoshi	March 1958 to May 1960	February 1962 to August 1966; Chief Justice, August 1966 to January 1969
ISHIDA, Kazuto	May 1960 to March 1962	June 1963 to January 1969; Chief Justice, January 1969 to May 1973
SHIMOMURA, Saburo	March 1962 to June 1963	
SEKINE, Kosato	July 1963 to June 1965	January 1969 to December 1975
KISHI, Seiichi	June 1965 to July 1970	April 1971 to June 1978
YOSHIDA, Yutaka	July 1970 to February 1973	May 1973 to February 1979
YASUMURA, Kazuo	February 1973 to December 1974	
TERADA, Jiro	December 1974 to November 1977	March 1980 to September 1982; Chief Justice, October 1982 to November 1985
MAKI, Keiji	November 1977 to March 1980	May 1982 to November 1989
YAGUCHI, Koichi	March 1980 to November 1982	February 1984 to November 1985; Chief Justice, November 1985 to February 1990

	Director	Justice
KATSUMI, Yoshimi	November 1982 to January 1986	
KUSABA, Ryohachi	January 1986 to February 1988	November 1989 to February 1990; Chief Justice, February 1990 to November 1995
ONISHI, Katsuya	February 1988 to November 1989	May 1991 to September 1998
KAWASAKI, Yoshinori	November 1989 to February 1992	
CHIGUSA, Hideo	February 1992 to September 1993	September 1993 to February 2002
KANATANI, Toshihiro	September 1993 to November 1996	October 1997 to May 2005
IZUMI, Tokuji	November 1996 to March 2000	November 2002 to January 2009
HORIGOME, Yukio	March 2000 to November 2002	May 2005 to June 2010
TAKEZAKI, Hironobu	November 2002 to June 2006	Chief Justice, November 2008 to present
OTANI, Takehiko	June 2006 to January 2009	June 2010 to present
YAMAZAKI, Toshimitsu	January 2009 to present	