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Linguistic Legal Model

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ABSTRACT:

In this paper I will present a Linguistic Legal Model, which is intended to clarify discrepancies between lay people and legal experts regarding judgments. The Linguistic Legal Model is composed of Layer Analysis and Register Analysis. Layer Analysis frames a theatre-type concept to gain different types of perceptions affected by a variety of norms of differing layers. Register Analysis accounts for linguistic characteristics of judgement papers in the analysis of lexicon, syntax, and discourse. Layer Analysis elucidates the structure of law and society, whereas Register Analysis examines the structure of legal language. The Linguistic Legal Model is like a two-wheeled vehicle of Layer and Register Analyses, in which the two wheels are indispensable for the operation of the vehicle. With the movement of the two wheels Linguistic Legal Model can illuminate the complex interaction among law, language, and society.

I. Introduction

There has been deep dissatisfaction of some court rulings among lay people in Japan. Some judges are perceived as bigots, and justice in the courtroom as injustice in the world, as can bee seen in the description of some sensational articles of weekly magazines[1]. In this paper I would like to propose a model which is intended to explain the discrepancy between legal experts and lay people. The model called Linguistic Legal Model is a combination of Layer Analysis and Register Analysis. Layer Analysis is a modified analysis of Layer-Based Genre Analysis which was presented in Okawara (2002). Register Analysis aims to identify linguistic characteristics of one legal genre, judgement paper.

This paper starts with Layer Analysis and is concluded with Register Analysis. The characteristics of legal language, the decision-making of the judges, and one result of the decision-making, namely judgement paper, are discussed with the aim of understanding the

norms of Layer Analysis. In Register Analysis much work is spared for English legal register due to relatively scarce work of Japanese legal register. Nonetheless there are not a few points of similarity between the two legal registers. I believe the points of sameness with English legal language will provide a structural analysis for Japanese legal language.

II. Layer Analysis

1. Layer Analysis

Layer Analysis which is presented in this section was termed as Layer-Based Genre Analysis in my previous study (2002). This is because each layer is regarded as the configuration of genres and the features of layers are characterised by genres accordingly. In this section, first, I will introduce Layering proposed by Clark, then move to the discussion of genres.

2. Layering

Clark (1996) proposes a concept like theatre stages built one on top of another layering, to explain many roles in which participants conduct in language use. More concretely, an apt analysis of jokes, ghost writers, and translators can be carried out by the use of the notion of layering. For example, when a speaker tells a hearer a joke, the two people are in Layer 1, the actual world, and the joke itself is in Layer 2, a hypothetical world. Clark compares layering to a theatre stage; Layer 1 is at the ground level of a theatre on which Layer 2 is the stage built on top of Layer 1. A theatre audience sees a play on the stage, while the performance is to be played on its own, more commonly, without the actual participation of the audience.

Hale and Gibbons (1999) apply Clark's notion of 'layers of action' and analyse courtroom situation by their notion of 'reality'. The courtroom situation is described as two intersecting planes of reality: the courtroom as the reality of here and now, and the world outside the courtroom as the particular events that are the subject of the court's deliberations. Since the world outside the courtroom, the second reality, does not exist in the courtroom, the second plane of reality is represented by way of real evidence and versions through testimony.

3. Genre

The notion of genre has been traditionally used in literary criticism, where particular types of writings such as a comedy or a tragedy have been distinguished by common characteristics of its own. In rhetorical analysis genre is classified into four discourses: narrative

discourse; descriptive discourse; procedural discourse; and persuasive discourse. In the field of language studies the notion of genre has been used by ethnographers, systemic linguists, and other related linguists.

1) Ethnography

Hymes (1972), from the ethnographic perspective, indicates that the notion of genre could well identify formal characteristics of speech and that the number of explicit formal characteristics decides the type of genres. For example, a sermon obviously has more formal markers than casual speech. Although Hymes sees that genres and speech events share common features, he states that genres are different from speech events because speech events refer to more concrete activities of speech. Hymes (1974) proposes two types of genres: elementary or minimal genres, and complex genres. Elementary or minimal genres, which are often called minor genres, include riddles, proverbs, prayers, couplets, greetings etc. Complex genres are more complex groupings which modes and structures are entered into. If a court case is a complex genre, oral proceedings, examination of evidence, rendition of judgment are elementary or minimal genres with written and spoken mode of legal styles. Saville-Troike (1982) also views from the perspective of ethnography of communication that a genre is a type of events, more concretely, a particular class of speech events which is considered by the speech community as being of the same type.

2) Systemic linguistics

Systemic linguists also use the notion of genre to describe how people use language. Martin (1984:25) defines genre as a stages, goal-oriented, purposeful activity in which speakers engage as members of our culture. Martin indicates that one of the principal responsibilities of genre is to constrain the possible combinations of three variables used by a given culture: people doing things with their lives (field); interacting with other people (tenor); and making use of one or another channel of communication and abstraction (mode). Genre represents strategies used to accomplish social purposes of many kinds at an abstract level. These strategies are basically understood as stages, which are used to realise a genre. Briefly, a genre has a beginning-middle-end structure. A genre itself thus has a schematic structure, which varies among cultures.

3) Legal setting

By the use of the notion of genre, Gibbons (2002) elaborates the analysis of legal setting.

Gibbons states that legal setting is a composite of genre structures that underlines intersecting planes of three realities. The first reality is the interaction of the legal process such as events in courtroom, the police station. i.e. the reality of here and now in the legal process. The second reality indicates disputed events, which have caused legal actions. Finally, the third reality is the law itself. Gibbons considers the first reality as staged processes and all the realities are described through genres. The second reality is reconstructed through genres because this reality is not the actual events happening in the legal process. In other words, the function of genres is not only to comprehend discourse but also to construct discourse. Genre is a composite of several layers of genre types: macro-genre; genre; genre stage. If a macro genre is a trial, then a spoken discourse of a judge can be a genre and a conclusion of the trial is a genre stage. Different types of genres thus interweave on different planes of realities in a complex manner to form a macro genre of a trial.

In brief, a good genre model must capture the first reality and the second reality. In the first reality are theer found the distinctive stages (Gibbons 2002:147):

1. A representation of the second reality;
2. The 'fit' between the secondary reality and the legal representation;
3. The degree of any difference between the secondary reality and legal theory.

Gibbons (2002:150) importantly notes the two tensions within the judicial process: the one tension is between competing versions of the same event; and the other is the fit between the construction of the event and the legal theory.

Gibbons (2002:130-1) furthermore emphasises that genre structures are constantly evolving. Humans manipulate genres to make genres as functional as possible, but it does not mean that genres do not have any solid underlying structures. Genres are composed of surface genres which are constantly evolving for specific social purposes, and underlying genres which are formalized and rigid.

4) Layer Analysis

In this study I use a slightly modified version of Martin's definition of genre. A genre is a staged, goal oriented, purposeful activity in which participants engage as members of their culture. A culture here indicates a particular layer which a particular group of participants belongs to. Each layer supposedly holds the norm to prescribe its genres, i.e. purposeful activities. The model of Layer Analysis is designated schematically in Figure 1.

Linguistic Legal Model

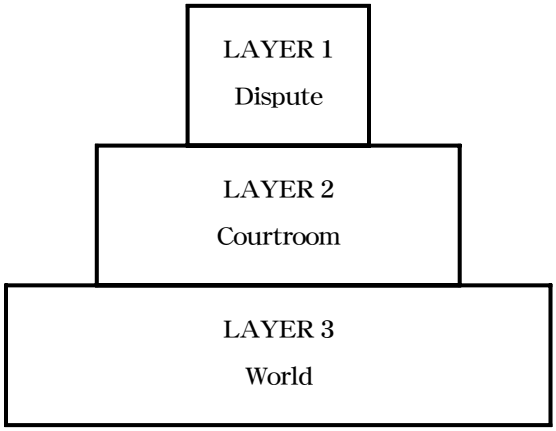


Figure 1

Discrepancies between legal experts and lay people can be explained by Figure 1. The participants of each layer are prescribed by the norm of their own layer. Among the norms of each respective layer, the norm of Layer 2 is the most distinctive one, which can be roughly referred to legal reasoning. Legal experts are trained to acquire the norm of Layer 2 so that they could use the norm at small or large legal genres such as a complaint or a trial. The interesting point is that the issue of the case is often deliberated exclusively among legal experts in the courtroom though the participants of Layer 1 are actually involved in the issue. The discrepancy between Layer 2 and the other Layers often causes some bewilderment to non-legal experts. Let us see one example, the Hole In The Wall case (1996)[2].

Kabe No Ana Foods holds the trademark right of *Kabe No Ana* (‘hole in the wall’) written laterally in Japanese *kanji* and *hiragana*. On the other hand, Kabe No Ana Of Pasta Speciality Store holds the trademark right of the figure of a woman boiling pasta and the English lettering of ‘HOLE IN THE WALL’. In 1996 Kabe No Ana Foods demanded a trial of invalidation of registration, claiming that the trademark of the pasta store is similar to its own trademark. The Japanese Patent Office, however, ruled that both trademarks were different in terms of sound, idea, and appearance. Both marks are different in sound because one is pronounced in English sounds and the other is uttered in Japanese sounds. They are dissimilar in appearance because the one is written in Japanese lettering only while the other is the combined trademark of the figure and English lettering. As for the idea, the English phrase, ‘HOLE IN THE WALL’, is not a commonly understood English one for average Japanese and this means that Japanese would not consider the English phrase, HOLE IN

THE WALL, as its Japanese equivalent, *Kabe No Ana*. Dissatisfied with the judgement of the Patent Office, Kabe No Ana Foods appealed to Tokyo High Court.

Tokyo High Court, however, also ruled against Kabe No Ana Foods. The court first acknowledged that the trademark of the defendant consisted of a ninety percent of the figure and a ten percent of English lettering and then made an interpretation that the lettering gave consumers an impression that the lettering was not the main part but some additional part of the trademark itself. The court also stated that the English lettering 'HALL IN THE WALL' was not a commonly used English phrase for Japanese. The assessment of the English phrase carried out by the court is similar to the fact-finding process in the legal world, Layer 2; the norm of Layer 2 was used. The court acknowledged that the term 'wall' and the prepositional phrase 'on the wall' were easily understood English words for average Japanese because the court found them in English textbooks of elementary school as well as in Readers English-Japanese *Dictionary* (1984 edition)[3]. However, the court judged that the prepositional phrase 'in the wall' was a more difficult one because the phrase was not found in these reliable sources. Accordingly, the court reasoned that general Japanese would not understand the meaning of the English phrase 'in the wall'. The court thus concluded that the ideas of the two trademarks were different.

It does not necessarily mean that the word not appeared in the dictionary is more difficult than the word appeared in the dictionary. Hayashi (2001:30) states that the prepositions 'in' and 'on' are among the most basic prepositions and therefore have basic senses and many extended senses. Hayashi contrasts basic senses (prototypes) of prepositions 'in' and 'on' with extended senses (extensions) of those in terms of the English acquisition of Japanese learners. In his classification 'in' of 'in the wall' is a prototype while 'in' of 'in danger' has an extended sense. 'On' of 'on the wall' is again a prototype whereas 'on' of 'on duty' is an extended one. Hayashi indicates that the acquisition of the basic senses of prepositions 'in' and 'on' is easier for Japanese learners to make than that of less prototypical ones. He adds that Japanese lexical items, (*no*) *naka* and (*no*) *ue* generally correspond to 'in' and 'on' respectively.

Kao (2001) uses a different term for the same notion of the preposition types indicated by Hayashi. In Kao's term, 'genuine preposition' indicates Hayashi's prototypes, while 'pseudo-preposition' means Hayashi's extended one. Kao (2001:197) also states that the learning of the English pseudo-prepositions is notoriously protracted. It is because a pseudo-preposition like 'for' of 'a respect for the truth' does not carry the meaning of the message.

In the issue of 'in the wall' and 'on the wall', both prepositions are genuine prepositions or prototypical prepositions. As the basic meanings of both prepositions have corresponding

Japanese meanings, we can say that ordinary Japanese can understand both phrases as long as they have a minimum English vocabulary. Legal experts use law books for consultation because the appearance of a certain term in law books often decides its application to the case at issue. This is certainly the norm of legal experts. For a linguist, a participant of other Layers, the norm used in the assessment of English proficiency by the court seems to be peculiar and unconvincing. In the next section I would like to generalise the language used in Layer 2.

III. Legal Language

Communication is the process of en-coding and de-coding. In the field of legal language, en -coding is the production of legal documents such as legislative documents, judgement papers, while de-coding is the interpretation of legal documents. If some parts of legal documents are ambiguously produced, the parts invite various interpretations. Legal documents are therefore expected to be produced with preciseness. On the other hand, legal documents need to have room for vagueness and flexibility so that the documents can operate well in an unexpected situation.

Tiersma (1999: 139) classifies legal documents into three classes: operative documents, expository documents, and persuasive documents. Operative documents have a performative function, in other words, the function of performing an act by the very fact of being uttered. Examples given are pleadings, petitions, orders and statutes, and private legal documents such as wills and contracts. Due to the nature of performative functions, operative documents have a rigid structure as well as formulaic language, and are therefore difficult for lay people to understand. On the other hand, expository documents such as office memoranda and persuasive documents like briefs to court are not as formulaic as operative documents, and have less rigid structure. Judgement papers, which are taken up in this paper, are a type of operative documents.

Legal language is one genre, which consists of smaller genres such as written legal language and spoken written language. Unlike Common law countries, oral exchange is not often observed in Japanese courts; it is therefore more appropriate to focus on written language in terms of the analysis of Japanese legal language. Written legal language, as mentioned above, is a smaller genre, which consists of much smaller genres such as written complaints, written answers, and judgement papers. In brief, legal language is one genre, which contains a stratum of genres within holding folds of mini-genres.

Written legal language has been notorious for its incomprehensible nature. This is partly due to its peculiar style and its distinctive norms used in the legal arena. A glance at technical terms used in legal documents gives general readers a perplexing impression and therefore legal language is regarded as incomprehensible language. However, its complexity more commonly originates in sentence structure, such as grammatical metaphor proposed by Halliday (1985:93-96).

Halliday (1985:93-96) introduces the notion of grammatical metaphor in the process of differentiating between written and spoken languages. What Halliday notes is that something represented as a verb can be represented as a noun. Let me cite one example from Halliday's work. One sentence 'after the announcement, people applauded' can be paraphrased into another sentence 'applause followed the announcement'. The verb 'applauded' in the first sentence is transformed into the noun form 'applause' and thereby the verb 'followed' is introduced in the second sentence. Halliday states that the type of newly introduced verbs are 'be' verb or its synonyms such as 'form' and 'constitute' or its related verbs such as 'lead to'. 'follow'. In other words, the verbs used in grammatical metaphor are rather limited, while the nouns in the metaphor express a diversity of lexical meanings. Grammatical metaphor is certainly a more complex form and is a characteristic feature of written language.

As Gibbons (2002:20) states, grammatical metaphor can contain the dense packaging of information in the form of the noun phrase, and surprisingly the sentence itself turns to be simple. In other words, complex information can be expressed in a form of simple sentence with noun phrases of densely packed information in grammatical metaphor. Gibbons (2002: 167) then elaborates three complex features of grammatical metaphor. The first is the distortion of the relationship among noun, verb, adjective, conjunction, etc, which causes difficulty in comprehension. The second is a complex morphological form such as 'author＋ship' or 'in＋comprehensib＋il＋ity'. The third is the use of Greek or Roman origin word such as 'insertion' instead of 'putting in'.

As noted before, grammatical metaphor is a feature of written language and therefore one must not be surprised that it is also a characteristic of legal written language. Other than grammatical metaphor Gibbons (2002:20-21) lists lexical density, passives, long sentences, logical structure such as 'therefore'. These features are regarded as register and will be discussed in detail in the section of Register Analysis.

Gibbons (2002:21-24) cites other features such as de-contextualisation, consistency, and conservatism as basic features of legal written language. I would like to consider those features as norms of Layer 2, which is a kind of tool to effectuate legal system. Let me

elaborate this point. Unlike daily conversation which is conducted between speakers and hearers on the spot, legislative documents must be interpreted without any reference of a particular context, for the purpose of a fair application of legislation for all the people of a relevant community. Therefore, legislative documents are expected to be less personal as well as less emotional. What legislation needs is a single clear meaning. With a single clear meaning people can share the common interpretation of legislation and can justify an imposition of legislation. Once a word is admitted as a single meaning in legislation, legal experts follow the meaning of the term so that they could avoid challenge from the opposing party. It is certainly safer to follow suit in the legal arena. The term has been therefore used and will be used in a de-contextualised, consistent, and conservative manner in the legal world. Consequently, the manner adopted in the legal arena has thus become the norm of Layer 2. Accordingly, the participants of Layer 3 do not properly comprehend written legislative documents from the lack of legal norms.

Gibbons (2002:36-37) states that it is not just a specialist vocabulary but a special way of conceiving and constructing the world that separates legal experts from lay people in the understanding of legal issues. I would like to use here a slightly different notion, namely, the norm of the legal arena. Even newly trained legal experts, who have not formed 'the special way of conceiving and constructing the world', learn and use the legal norm during the course of the work in Layer 2. It seems to me that all the learning process implants a kind of legal schema into the minds of unfledged legal experts.

Tiersma and Gibbons state that legal language can make the membership of the elite legal experts club. However, this does not apply to the situation of Japan. As jury system has been suspended since 1943 in Japan, Japanese courtroom is the monopoly of legal experts. Without lay people as jurors in the courtroom, Japanese lawyers do not need to develop a peculiar linguistic style of verbal exchanges to convince lay jurors. Japanese court is not the highlight of the Perry Mason show but is merely a public office. In the absence of outsiders, the language of Japanese legal experts displays less socio-cultural functions of in-group membership.

IV. The Decision-Making of Judges

1. The Decision-making in the Mind of Judges

It is not clear for lay people to see how judges reach at their judgements. Some judgments make sense to lay people, while other judgments are simply absurd for the common sense of lay

people. Even in the cases at similar issues, one judge makes a broad interpretation of a key word whereas another judge gives a narrower interpretation of the same term in a different case. In this chapter I would like to deal with the decision-making process of judges. In reference to the analysis of judgments, Philips (1998) examines how judges vary in their courtroom language from the perspective of the ideology of judges; more concretely, how ideology influences judgement. However, in this paper, I would like to conduct the analysis of judgement paper without the consideration of ideology of judges. The purpose of this study is to present linguistic characteristics of judgement paper, not those of ideology.

I would like to note that there are substantial differences between the Common law judges and Japanese judges in the decision-making process. Common law judges have more discretion for judgement than Japanese judges have; linguistic analyses are often used in the decision-making of Common law countries. On the contrary, Japanese judges are expected to be in the interpretation of laws and thereby have less discretion for 'unorthodox' methods such as linguistic methods. A first glance of the decision-making process of the Common law countries seems to be more reasonable than that of Japan due to a variety of analyses employed in Anglo-American courtrooms. As there are various linguistic interpretations for a certain issue, the Common law countries do have some problems in the process of making judgements. In the following section I will first discuss two cases in Common law countries: an American case and a Malaysian case.

2. Common Law Countries

1) USA

Solan (1993) argues from the perspective of Common law countries that the responsibility of being a fair judge involves dual tasks-decision making and presentation. In the decision-making process, judges have to consider two systems to the conflict—law and judge's personal value. In a clear-cut case, the judge simply says what has led him to decide the case. In other words, the decision-making process is a representation of the presentation. In a more difficult case, however, there is a gap between the decision-making process and the presentation. As they are expected to appear determined, judges speak decisively and usually do not disclose the degree of difficulty of their decision-making. Judges are also expected to rely on law and neutral principles of law as well. However, judges have difficulty to find the right legal principle in hard cases. Accordingly, they search for a variety of means to make the decisions both decisive and neutral. Linguistics is also used as one of tools in the process of filling a gap between decision-making and presentation.

Solan (1993:29-34) introduces one interesting case, Mrs Anderson's Case, in discussing the use of linguistic principles used by judges to justify their decisions. Mrs Anderson drove a Mr Larson to a country fair with Mr Yocum's Cadillac. The problem in this case was that Mrs Anderson believed that the Cadillac was Mr Larson's car and she was not aware that she was actually driving Mr Yocum's car. Unfortunately she was involved in an accident while she was driving Mr Yocum's Cadillac, which was damaged. Mr Yocum sued Mrs Anderson for the damage of his car and obtained a judgement of thirteen thousand dollars. Mrs Anderson then tried to collect the money from her own insurer, State Farm, but her request for the coverage was denied by her insurer. She therefore sued her insurer.

Mrs Anderson's automobile insurance policy covers two classes of drivers in the event of a car accident involving a non-owned automobile. The following is the portion of the relevant insurance policy.

> Such insurance as is afforded by this policy ... with respect to the owned automobile applies to the use of a non-owned automobile by the name insured ⋯ and any other person or organization legally responsible for use by the named insured ... of an automobile not owned or hired by such other person or organization *provided such use is with the permission of the owner or person in lawful possession of such automobile.* (Emphasis added by Solan)

The two classes of people covered in the policy are 'the name insured' and 'legally responsible for use by the name insured'. In this case the issue is whether the name insured, Mrs Anderson, is eligible for the coverage or not even though the named insured did not obtain the permission of the owner of the car. The court applied the last antecedent rule[4] to the interpretation of the policy. In other words, the second class of the drivers, 'legally responsible for use by the name insured', is the last antecedent and the conditional, 'provided such use is with the permission of the owner or person in lawful possession of such automobile' modifies only the second class driver, but not the first class driver. Since Mrs Anderson was the first class driver, 'the name insured', the permission of the owner was not required. The court also reasoned that the lack of any punctuation between the conditional and the second class driver was the evidence of the close linkage between the two parts. As a result, Mrs Anderson was able to compel the insurance company to pay the money which Mrs Anderson owed Mr Yocum for his damaged Cadillac.

Solan argues that the court decision is peculiar and is against the intuition of most native speakers in the understanding of the relevant language of the insurance policy. The insurance company claims that the conditional part is directly attached to the compound noun phrase of '

the name insured' and 'any other person...' and that thereby the names insured without the permission of the car owner, Mrs Anderson, would not be covered. Solan states that the reasoning of the insurance company can be supported by the 'coordinate structure constraint' proposed by John Ross. The constraint asserts that grammatical operations generally do not disjoint a coordinate structure, in this case, the compound noun phrase of 'the name insured' and 'any other person…'

Solan conjures the motives of the judges in the decision. The court made a decision based on a reasonable consideration. Mr Yocum is an innocent owner of the car and his damaged Cadillac should be covered by the insurance. As a responsibility of the court to the parties as well as to the world, the decision must be relied on legitimate reasons. In order to justify their decision, the court applied the last antecedent rule. Solan argues that judges do theory-talk not to describe the process to the decision but to make the process look better. Judges seem to conceal the fact that they often cannot make decision based on legitimate factors; ironically judges believe lay-people expect judges to use only legitimate factors in decision-making process.

Solan concerns two unfavourable factors arising from the concealment of judges. First, the unreasonable reliance on linguistic rules becomes precedence and thus incoherence prevails in judgements. Second, toward the unnatural reliance of linguistic rules non-judges tend to feel 'lied' by judges and the credibility of legal system is damaged. Solan suggests that judges must be candid in telling the truth; the purpose of insurance policy is to compensate the accident of the innocent victim and therefore judges do not need to force the unnatural interpretation on the decision-making.

What Solan suggests is that judges do not need to disguise the decision-making process when they find the legal norm of lager 2 inexplicit for the decision-making process. In consideration of the intent of the law, judge can use the norm of Layer 3. It is certainly possible in Common law countries because the juries, who are participants in Layer 3, are temporal but crucial participants of Layer 2. This means that legal experts, participants of Layer 2, are keen to the norm of Layer 3. However, in Japanese cases, the participants of Layer 2 are exclusively legal experts and the legal norm thus dominates Layer 2. This can be observed in Article 76, Section 3 of the Constitution of Japan, in which how judges decide the case is prescribed. I would like to return the issue later in this section.

2) Malaysia

One case in a former British colony has also presented a language issue: Malaysia Tobacco

Co Bhd v. The Roadrailer Service Bhd [1995] MLJ 847 (Gibbons 2002: 67-8). Unlike Mrs Anderson's case, the judge in this case was more straightforward in reading the intent of the case. The Roadrailer Service is a transport company which has received a contract for the deliver of tobacco products to Northern Malaysia. Unfortunately, the Roadrailer Service was robbed of the goods on the way to the North. One the basis of the interpretation of the clause "the hired hauler undertakes to indemnify the company in full for all losses…, arising from whatever cause including misdelivery and mishandling by person with the hired hauler's control, theft, burglary, …" in the indemnity clause of the agreement, the Roadrailer asserted that firstly 'robbery' was not included in 'theft' and that secondly 'robbery' was again not included in 'whatever cause' because 'robbery' did not occur 'by person with the hired hauler's control'. The Roadrailer therefore denied liability.

The difference between 'robbery' and 'theft' is that the former is involved with a violent action whereas the latter is related to a secret and unseen activity. However, the judge in this case read the intent of the agreement and found the transport company liable by the use of a definition in a broad sense from an old case of Malaysia, "robbery is an aggravated form of theft". As for the second assertion of the hauler, the judge bluntly rejected the hauler's idiosyncratic grammatical interpretation.

Gibbons (2003: 69) proposes some possible linguistic contributions to the two issues. Whether 'robbery' is included in 'theft' or not could be answered from the analyses through concordance and language corpora or through questionnaire on word-based knowledge. The second issue can be resolved by last antecedent rule. Gibbons indicates that linguists often vary in their opinions on linguistic issues. This could well result in some scepticism toward linguistic analyses among legal experts. Legal experts should be aware that linguistic analysis is simply one measure, not an almighty measure. Gibbons (2002:69-70) furthermore presents the three sources of legal interpretation: textual semantics; legislator's intentions; and application of societal standards. For the purpose of a reasonable judgement, judges need to rely on the three aspects in a balanced way. Semantics in linguistics can obviously contribute to textual semantics; pragmatics to legislator's intentions.

It may be that the legal experts in Common law countries have scepticism towards a variety of possible linguistic analyses for a certain language issue. After all legal experts believe that they themselves are linguistic experts reasoned by a syllogism. First, language is essential in laws. Second, legal experts are the experts of laws. Therefore, legal experts are the experts of language as well. This tendency is strongly shown in Japan than in Common law countries as Japanese courts with the suspension of the jury system are more exclusively closed to legal

experts. In the following section I would like to discuss the decision-making process of Japanese judges.

3. Japan

1) Japanese Judges

In Japan lay people tend to hold a more impersonal image towards judges than those in Anglo-American countries. A judge was an agent of a lord who ruled the commoners in the feudal age of the world. The judgement was therefore more or less an 'order' from the administration rather than a way of protecting the right of each individual commoner. However, differing court systems have projected different images towards judgeship. For example, in America, the jury system was introduced to protect the rights of colonial citizens form a tyrant English judge. The court has not been necessarily a different world for ordinary American citizens. Moreover, some American judges in lower courts are often elected by citizens with the consideration of their political stand. Americans feel closer to the court as well as to the judge than Japanese do. However, for average Japanese the court is a distant world and judges are a group of people who dwell in the distant world. Furthermore, the fact that judges are not only being government employees but also are holding the most official and public status among all the government employees in Japan has created an impersonal image. Also, judges themselves believe that they are only bounded by law, not by the feelings of the masses. However, the problem is that law does not serve as a guiding principle to all the foreseen cases. In the following I would like to discuss how Japanese judges are restricted by laws.

2) Japanese Judgement

(1) The Judges and the Laws

(a) The Constitution

In Japan the judgment of judges is prescribed in the Constitution (Article 76.3): All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws[5]. The Constitution stipulates that all Japanese judges deliver the decision with the use of the commonly shared standards as the profession of judges. In legal circles it is interpreted that a judge in a lower court is not to be influenced by a judge in a higher court and that a higher-court judge cannot exert an influence upon the decision-making of a lower-court judge.

Next comes to the interpretation of the term, 'conscience', which refers to the vocational

ethics of judges. This means that when the right positive law does not exist for the application of a certain case, a judge, by the use of his or her 'conscience', searches for an objective principle in the realm of all positive laws.

Inoue (2001) discusses what the terms 'this Constitution' and 'the laws' denote. It is axiomatic that 'this Constitution' indicates the Constitution of Japan. However, it is not clear what kind of laws the term 'the laws' refers to. In Japan there are five major types of laws: the Constitution, Law, Order, Regulation, and Treaty. The Constitution is the supreme law of Japan, which is prescribed in Article 98 of the Constitution. The second item, Law, has two senses. In a broad sense, Law is a body of various rules promulgated by the government. In a narrower sense, Law indicates only the rules passed by both the House of Councillors and the House of Representatives. Order is a body of rules enacted by Executive agencies and is therefore placed lower than Law in the legal hierarchy. Regulation is a body of rules enacted by local public entities and is placed lower than Order. Treaty is an agreement concluded between two or more nations and is believed to be placed between the Constitution and Law in terms of legal effect. It is generally agreed that 'the laws' include both Treaty and Law. It is true that Order and Regulation are placed lower than Law and they cannot be enacted beyond the interpretation of the Law. It is also understood in legal circles that Order and Regulation should be included in Law and thereby the judge be bounded by Order and Regulation as well. Other Roman law countries such as Austria, China, Denmark, Germany, Poland, Russia, Spain, and South Korea also guarantee the independence of judges and also bind judges to the laws. On the contrary, as I mentioned before, the judges of the Common law countries have more discretion in their decision-making process. In short, Japanese judges are bounded by the laws in their decision-making process.

(b) The Code of Civil Procedure

In order to prevent personal feelings from reflecting into the judgement, the code of civil procedure regulates exclusion of judges (Article 23 of the Constitution) and challenge to judges (Article 24 of the Constitution). A judge is excluded from the exercise of his function if the judge or his related family member is a party in the case. In a situation in which the impartiality of decision on the part of a judge, a party is allowed to challenge the judge.

(2) Judges and Interpretation

Judges take into consideration the entire tenor of oral proceedings as well as the result of examination of evidence, and then render judgement according to the free discretion of judges. The judge makes the interpretation of the law in the decision-making process. The primary

interpretation is grammatical interpretation, which is the literal interpretation of words and sentences. When the grammatical interpretation is at a deadlock, logical interpretation is then used. If the logic does not work, a broad interpretation of a term or a sentence is commonly applied. On the other hand, a narrow interpretation, which reduces the interpretation of a word or a sentence, is also commonly used. Another form interpretation is an analogical interpretation, which bases the interpretation of one case on the interpretation of a similar case. A contrary interpretation is used when one leads an interpretation as a contrary proposition in the absence of the appropriate law.

(3) Judges and Sources

The provision that Japanese judges are bound by 'the Constitution and the laws' indicates that judges cannot rely on their intuition in their decision-making. For example, in a criminal case, when a judge intuitively perceives that the defendant is guilty but the prosecution cannot provide convincing evidence against the defendant, the judge must pronounce not guilty. It is because Article 317 of the code of criminal procedure stipulates trial on evidence: Findings as to the fact shall be made by evidence[6]. The decision of the judge may arouse some angers among lay people, but such decisions are acceptable from the perspective of legal effect. The intuition of a judge is too subject to be reflected in the judgement.

It is true that 'the Constitution and the laws' are not sufficiently fit for all the cases. Therefore, Japanese judges often use a variety of materials in the actual process of forming the decision. The materials may be the litigation materials prepared by the parties, relevant books, the materials of the Executive agencies or the Diet, or Court Report. As the Constitution does not state that judges are bound by those kinds of materials as well, Inoue (2001:30) argues that it would be against the Constitution if the judge reflects, for example, one precedent case from Court Report and delivers the decision reasoned by the precedent, not on 'the Constitution and the laws',

There are cases in which the current law cannot govern an issue in question. Nonetheless Japanese judges try to apply the law to the case on deliberation. Although the law is later modified to settle forthcoming similar issues, the initial case is given a rather unfair judgement from the perspective of ordinary citizens. A famous old case is the electricity theft case of 1902. The defendant used electricity for his factory by pulling it from a nearby electric-light pole. Although the defendant was guilty at the first court, he was acquitted at the appeal court. The legal definition of theft Article 366 of the former criminal code was to steal some tangible objects. The issue of the case was therefore whether the act of stealing electricity, intangible

object, was considered as theft or not. The Former Supreme Court eventually acknowledged that electricity was a tangible object only because it was movable and manageable. In 1907 a new article, Article 245, which specifies that electricity is considered as a tangible object was added to the former criminal code. The judge in the Malaysian Roadrailer case was able to find the precedent case which acknowledged that 'robbery is an aggravated form of theft', Although the intent of the Former Supreme Court has been regarded as being reasonable, there have been legal arguments as to whether the interpretation of the Former Supreme Court was too broad or too analogical.

(4) The decision-making Process

Let me elaborate the civil procedure. A litigant wants to resolve the matter, but more importantly in favour of him or her. In this stage the litigant searches for possible applicable laws for the case. The litigant selects the most relevant laws. Based on the laws, the litigant constructs a series of legal facts, in technical terms, legal requisites, and the legal effects of the legal requisites. The legal requisites and legal effects are called legal constitution. The job of a legal counsellor is to make the best possible legal constitution, and the job of a judge is to form a judgement on the legal constitution submitted in the court. Therefore, even if a judge can think of a better legal constitution for the case, the judge is required to deliberate the legal constitution presented by the litigant. This is because the judge must be fair to the opposing litigant as well.

The judge is thus bound by the legal constitution submitted by the litigant. The judge examines both the legal requisites and the legal effects, and then identifies the content of the legal constitution by the application of the laws. The judge from the perspective of the legal effects decides whether the claim of the litigant should be acknowledged or not. If not, the claim is dismissed. If yes, the judge assumes the main fact which is applicable from the legal requisites and then regulates the claim of the litigant. Unless evidence is required, the judge finds the facts based on the evidence and then decides the right or wrong of the legal requisites. After the establishment of the legal requisites, the judge applies the law into the legal requisites and obtains the legal effects, and then leads the formal adjudication.

As long as normative laws exist, the judge must obey the norm of laws and does not have any discretion to refuse the legal norm. However, we cannot expect that all the existing laws are applicable to all the current and future cases. Therefore, when the normative laws do not exist, then the judge has the full-discretion to examine the case. The full-discression, however, causes some controversy in some cases.

Inoue (2001:131-4) discusses the legal norm and the discretion form a drunken driver case. On 28 November 1999, a truck driver, who consumed some Japanese spirits and whisky at lunch, successively collided with two cars in the front. This accident resulted in the death of two young children and the injury of five people. At Tokyo District Court the drunken driver was sentenced to four years' penal servitude on 6 February 2000[7]. The maximum assessment of professional negligence resulting in injury and/or death as well as a violation of the Road Traffic Act (driving while intoxicated) is seven years' penal servitude. The prosecutor proposed five years' penal servitude. Although it is a common practice that the term of penal servitude is reduced twenty percent against the proposal of the prosecutor, the prosecutor appealed, which is quite unusual. Tokyo High Court dismissed the appeal on 12 January 2001[8]. The court reasoning was that four years' penal servitude was not too light in light of similar cases and that the fairness of punishment would be damaged if the court imposed a heavy punishment only on this particular case. The court furthermore suggested that a legislative measure to make the assessment heavier would be needed. Inoue (2001:132,134-5) criticises the judge of the appellate court for acting on the basis of the legal assessment and the judge should have exercised the common sense of the world. He also adds that the judge's comments on lawmaking are superfluous. His interpretation is that the court dodges the criticism on the sentence by saying that the light sentence is not the fault of the court, but it is simply due to the fault of the legislation. Inoue states that the assessment of the appellate court was against Article 76.3 of the Constitution because legal assessment is not law. He emphasises that the judge, whose independence is guaranteed in the Constitution, should have considered the general public's feeling and should have acknowledged the proposal of the prosecutor and should have ruled in favour of five years' servitude.

From the perspective of the public, five year's servitude is still too light. There is little difference, in the minds of lay people, between four year's servitude and five year's servitude regarding the case of a drunken truck driver killing two young children and injuring five adults. If the appellate court judge had ruled five year's servitude as Inoue suggested, lay people would have complained that the sentence was still too light. The wonder for the public is the maximum year servitude as only seven years in the penal code and they cannot understand in the first place why the prosecution proposed only five year's servitude, not the maximum term of seven year's servitude. Twenty year's servitude or a life sentence would be a reasonable punishment by the standards of the public. A fair judgement is certainly difficult to render and it is difficult to prescribe standards.

Inoue (2001) proposes five factors relevant to the standards of a trial: common sense;

benevolence; precedence; legal provisions; and notice. These five factors are not necessarily required in all trials. Only some of these factors apply to a particular case in a particular country in a particular era.

It is important to note here that the legal notion of truth often differs from the truth of the world. Confession is established as truth in the litigation even if the confession itself may be false. The truth in the judgement is not necessarily equivalent to scientific truth. The norm of Layer 2 prescribes the definition of truth of Layer 2 for the purpose of a fair and consistent judgement.

IV. Judgement paper

1. Legal Genre

I would like to emphasise that there does not exist one legal genre. Legal genre is composed of a set of various discourses which are spoken or written, as mentioned before. Examples are judicial decisions, courtroom discourse, legal documents and legal consultation. Maley (1994) points out three main legal genres: legislation, trial proceedings, and judicial judgment. In Common law countries, codes of law as well as case law are involved in the application of particular legal cases. However, in Roman law countries, codes of law play an important role in the application process, discussed in the session on the decision-making of judges.

2. Legislative Documents

Legislation has very peculiar characteristics in terms of different types of people associated with legislation in different stages. Both in the Common law countries and in the Roman law countries, legislation is enacted by the parliament or the congress for the application of the affairs of general citizens. However, legislation is actually drafted by public servants. Those who interpret legislation are legal experts. Maley (1994:18) emphasises that it is the interpretations of legal experts which are enforceable. Thus some flexible terms such as 'reasonable' are deliberately used in legislative documents so that judges can have some discretion in decision-making.

In Layer Analysis legislative documents are governed by the norm of Layer 2. As drafters draw up legislative documents in the minds to legal experts, the language and format of legislative documents is divorced from that of the documents used by ordinary citizens. The distortion between the real readers of legislative documents and nominal readers causes

communication gap for the participants of Layer 1 and 3. Without proper training in the legal norm of Layer 2, legislative documents are often difficult to comprehend for ordinary citizens.

Bhatia (1993) discusses cross-cultural variation in legal discourse. First, he contrasts the Common law countries with the Roman law countries. An example of a Roman law country is France. The civil code in Roman law countries prefers generality whereas the Common law uses particularity. Moreover, in Roman law countries legal draftsmen are more considerate of the ordinary readership than is the case in Common law countries. It is interesting to note that the draftsmen in Common law countries are more concerned whether particular parts are not misunderstood by legal specialists rather than the ordinary citizens.

3. Judgement Paper

Judgement paper, if I use Maley's term (1985:159), is a written non-fictional discourse type. In the Common law countries there seems to be distinct patterns for judgement papers but it does not mean that they have standard formats. On the contrary, in Japan we do have more rigid terms on the constituent elements of judgement paper. In Japan Legal Training and Research Institute publishes manual books how to write a variety of legal judgements of civil and criminal courts, the first trial and intermediate appeal for legal apprentices at the Institute. Those manuals are also published by Japanese Bar Association and are sold for those interested.

In this section I will start with Common law judgement papers from the work of Maley, Bhatia, and Gibbons.

1) Common Law Countries

(1) Maley

Maley (1985 and 1994) proposes a very interesting discourse analysis of an Australian legal judgement. Maley uses five structural elements in the analysis of one assenting judgement-Facts, Issues, Reasoning, Conclusion, and Order. Facts (F) are an account of events and/or the relevant history of the case; Issues (I) are facts or laws, or both; Reasoning (R) are the reasoning of the case; Conclusion (C) is the principle or rule declared applicable for the case; and Order (O) is the order of the assenting judge.

All these elements are obligatory in a single judgement as well as the first judgement of a series of judgements. Facts precede Issues and Reasoning, which are iterative and recursive. Conclusion and Order appear either initially or finally.

(2) Bhatia

Bhatia (1993) selects legal case reports and discussed the communicative purposes of legal cases in terms of authentic records of past judgement, precedents for subsequent cases, reminders to legal experts, and illustrations of certain points of law. Bhatia analyses the last two purposes, reminders and illustrations, with the use of three case reports of the same case. Although the three case reports are drastically different in length, they are similar in the way the information is structured. The way detailing the incident is dissimilar among the three reports, particularly in the part of legal argumentation.

Bhatia (1993:127-36) presents a typical structure of legal cases which accounts for the structure of the case:

1. Identifying the case
2. Establishing facts of the case
3. Arguing the case
   (a) Stating history of the case
   (b) Presenting arguments
   (c) Deriving ratio decidendi
4. Pronouncing judgement.

Bhatia refers these four steps as moves and states that these moves are obligatory in legal cases, though they differ in the amount of detailed information.

(3) Gibbons

Gibbons (2002:135-139) summarises case report genre in a modified structure of Maley's work. The case report is divided into two parts: the prefatory material and the judgement. Let me cite the list by Gibbons and see how the case report of Malaysia Tobacco Co. Bhd v. The Roadrailer Service Bhd is structured.

PREFATORY MATERIAL

Heading

Name of case

Court name

Reference number

Name(s) of Judge(s)

Date(s)

Keyword summary

Law & Procedure

(Evidence)

(Words and Phrases)

Summary of judgment

In English

Summary (Obiter) (Per curiam)

In Bahasa Malaysia

Summary (Obiter) (Per curiam)

(Appeal)

From/To

References

(Notes)

(Cases)

(Legislation/Regulation)

(Previous lower court)

Names of counsel

(Date)

JUDGEMENT

Orientation

Participants

Previous litigation

(‘*Facts*’)

[narrative genre]

Issues

Counsels’ argument

Judge’s interpretation/reasoning

Decision

(Legal issues)

Finding

Verdict

(Penalty/Award)

Costs

(Obiter)

Finally, Common law judges enjoy freedom to speak in their own words to some extent. Although styles vary among judgments, judgement paper certainly has lofty and formal tone. However, there are some variations to the degree of formality. As can be expected, English judges, particularly the judges of higher courts, are more restrained than those of lower courts or American and Australian judges.

2) Japan

(1) Basic Structure

I will first show the structure of Japanese judgement paper of civil cases. Article 253 of the code of civil procedures stipulates what to be entered in the writ of judgment.

(i) Text;

(ii) Facts;

(iii) Reasons;

(iv) Date of conclusion of the oral argument;

(v) Parties and their legal representatives:

(vi) Court.

'Text' in this code indicates 'Order' in Common law countries.

(2) Historical Background

(a) Movement for Plain Judgement Paper

It is well known in legal circles that to write up a judgment forces a tremendous amount of work upon judges. First, a judge delivers judgment with a variety of purposes. It is certain that a judge has in mind the individual litigant in the case. However, more importantly, a judge is extremely conscious of an appellate judge. The public are also added for the recipient of the judgement in the minds of a judge. Secondly, a judge must put his or her heart and soul

into the writing of judgement because it is a traditional belief that judgement is the life and soul of a judge. Third, a judge is required to painstakingly investigate massive records of the case and to complete Facts and Issues. Therefore, a judge puts as much as sixty percent of their energy on writing up the judgement and only forty percent on the examination of the case.

Under the high-pressure of the situation, Miyake (1994:71-6) discusses the movement for plain judgement paper. There have been five possible schemes for the movement for plain judgement paper, but all these schemes are initiated for the sake of judges, not for the comprehension of the public. The first scheme is the omission of judgement papers. When a defendant is absent in a civil trial, a judge simply writes up one sentence 'The court acknowledges the claim of the plaintiff' on the written complaint. Or a court clerk writes down the judge's oral judgement on written evidence. The second scheme is to acknowledge the citation of contents of trial records. In criminal cases court record can be substituted for judgement document under certain conditions (Article 218 of the rule of criminal procedure); in civil cases the movement to substitute written statements for written judgements is now in progress. The third scheme is to attach the copy of written documents of the litigants and cite them as the main part of judgement paper. Unless the content of those documents is inappropriate, this scheme does not cause any problem. The forth scheme is to use a prescribed format of a judgement in certain limited cases such as litigation of bills. The fifth scheme is to simplify judgement paper itself.

For the past ten years even in the civil cases the principle of trial basis proceedings has been accepted, though it was adopted much earlier in criminal cases. The principle of trial basis proceedings emphasises trial work more than the process of writing judgements. More importantly for lay public, the purpose of judgement paper is to make the judgement known to the litigants. Since litigants are aware of their own claims, judges do not need to duplicate the details of the claims of judgement. The idea that judgement paper should be written for the litigants has made judgement paper use a plain style.

Plain style involves two types of plainness: terminology and grammar. As I discuss the terminology in the section of Register Analysis, I will focus on only form here.

(b) Historical Change of Judgement Paper

Nara (1994:17-26) and Takano (1994: 36-42) present a historical change of judgement papers of civil cases. As mentired before, what to be entered in the writ of judgement is now stipulated in Article 253 of the code of civil procedure: Text; Facts; Reasons; Date of conclusion of the oral argument; Parties and their legal representatives; and Court. However, the pre-war

judgement paper was composed of five parts: Text, Facts and Issues, Reasons, Parties and their legal representatives, and Court. One notable characteristic of Facts of civil cases was that each litigant's claim, approval or disapproval, submission method of evidence, approval or disapproval of evidence were written in one single sentence. The language used was literary language, full of Chinese characters, and no punctuation. This old style is referred as Traditional Style *(dentou-gata*).

After the War, the language of judgement paper has improved drastically due to plain language use of the Constitution. Some notable improvements are the use of punctuation, spoken language, ordinary Chinese characters, and more importantly the insertion of subtitles. In 1958 the civil-case judges who taught at Research Institute for Legal Training published a book, 'A Guide to Prepare a Judgement of Civil Cases' and formalised the style of judgement paper. Due to the guidebook, the style is referred as Guide Style (*tebiki-gata*)[7]. Guide Style has separate sections for Facts and Reasoning. As Issues tend to have a larger amount of statement than Reasoning, the unbalanced distribution has faced some criticism among legal experts.

In order to focus on the claim and establishment of facts of the litigants, Facts and Issues are combined into one part of judgement statement. Facts and issues are then divided into three parts: Claim of Plaintiff, Summary of Case, and Judgement on Issue. Summary of Case is further divided into Acknowledged Facts between Parties, Issues. This style is called as New Style (*shin-youshiki*).

Takano (1994:37) mentions some criticism rose among the legal circle regarding New Style. The description of Issues tends to be shortened; not enough work is possibly achieved; the litigants and appellate judges will not satisfy the extremely plain style. The following is the list of two structures of judgement paper: Guide Style and New Style.

GUIDE STYLE

1. Heading

1) Reference Number

2) Case Type

3) Parties and Legal Representatives

2. Text

3. Facts

The claim of the plaintiff is presented respectively together with the approval or disapproval of the defendant.

1) Gist of Petition

2) Grounds for Petition

3) Issue

4) Evidence

4. Reasons

1) Court

NEW STYLE

1. Heading

2. Parties and Legal Representatives

3. Text

4. Facts & Reasons

Round off the approved part by the opposing party and extract the disputed issues.

1) Claim of Plaintiff

2) Summary of Facts

(1) Acknowledged Facts between Parties

(2) Issue

3) Judgement on Issue

5. Court

It seems that Guide Style is more suitable from the perspective of legal theory than New Style. This is because the part of Facts deals with only the Facts claimed by the parties, which are to be examined from the legal perspective. More concretely, legal requisites are described in Facts. However, in New Style, instead of writing legal requisites, the description of the case is deemed sufficient with the description of Summary of Case and Acknowledged Issues between Parties. Some legal experts like Inoue are concerned that the application of law becomes dubious in New Style, though they understand that the purpose of New Style is to make judgement paper easier for the general public to read.

(3) Superfluous Remarks

It is mandatory that Reasons shall be stated in any decision, as prescribed in Article 44.1 of the penal code procedure and Article 253.1 of the civil code procedure. Reasons are more subjective than Facts and thus reflect the judge's decision-making process. Inoue (2001:139) considers Reasons as the process of legal theory led to Text. However, as New Style presents Facts and Reasons as one pair of item, there have been seen more superfluous remarks. Inoue

(1998:171) regards superfluous remarks as unnecessary addition which is not to be bounded by legal theory and therefore states that it should not be in Reasons. As lay public including the media cannot distinguish superfluous remarks from Reasons, they consider the remarks as part of Reasons when they appear in Reasons. As Text is not resulted from superfluous remarks, lay public consider the ruling as absurd without understanding the legal background of the case. This is because the norm of law is not apparently shared with the other Layers.

(4) Responsibility for Claim

Under the pleading principle, it is the responsibility of the parties to work for the claim to be acknowledged. The court does not take the initiative to disclose the truth unless the case is important to the public interest. Unless the party claims legal requisites, the court does not acknowledge the production of legal effects and the party would be therefore at a disadvantage. This is called responsibility for claim. Responsibility for claim is a leading mark in the examination. Facts are thus classified under responsibility for claim: grounds for petition (plaintiff's responsibility for claim), affirmative defence (defendant's responsibility for claim), and re-defence (plaintiff's responsibility for claim). Grounds for petition are based on the claim of the plaintiff; affirmative defence has legal effects to deny the legal effects by grounds for petition. Re-defence is to deny the legal effects of affirmative defence.

(5) Illustrative Judgement

The Supreme Court often uses fixed patterns in dismissal cases of final appeal. The writ of judgement of these fixed patterns, which are known as illustrative judgement is disputable among legal experts. The following is one example of illustrative judgement (Inoki 1994:8), in which Inoki, a former judge of Fukuoka High Court, was a legal representative for the appellant of the case. It took as long as three years for Inoki and the appellant to receive the decision from the Supreme Court, which was a very simple and conventional dismissal judgement.

TITLE: The Reason of the Final Appeal by Legal Representative(s) for Final Appeal Court

We can acknowledge the fact-finding judgement (the legal conclusion obtained from fact finding and its legal application) of the original court regarding the points (argued in the Reason for Final Appeal) as justified in light of the related evidence produced in the original court and that there is no illegality of the points in the process. The Supreme

Court cannot adopt the points of argument because the points criticise the fact finding and the decision of adoption or rejection of the evidence which reserve exclusively for the original court, or denounce the judgement of the original court based on their own extraordinary and unacceptable perspective.

Consequently, the court unanimously delivers judgement as stated in Text, in accordance with Article 401, 95, 89, 93 of the code of civil procedure.

Inoki (1994 and 1996) argues that the Supreme Court does not provide any clear reasons for dismissing the Jokoku-appeal. It is not clear whether the Jokoku-appeal criticised the reasoning of the original judgment or the reasons for the appeal. The appellant claims the deficiency of the original judgement in terms of reasons, judgement process, as well as the breach of law based on legal theory. Therefore, Inoki is concerned with the fact that his reason was treated as an 'extraordinary and unacceptable' view. Since the Court did not provide any concrete reasons for the judges arriving at the judgement legally, the Reasons are simply reiteration of the Text. Inoue (1998:33) also states that the Reasons in the case are an offence against the law due to Article 253, 313, 297 of the code of civil procedure which requires Reasons in the writ of judgement and mutatis mutandis shall be applied to Jokoku-appeal.

Inoue (1998:33-5) puts four reasons for illustrative judgement. First, Supreme Court judges are simply too busy to write specific legally bound Reasons for each case. Some 4,000 cases come up to the Supreme Court every year and petty benches have to deal with over 1,000 cases per year. For the purpose of the rationalisation of the Supreme Court work load, standardised forms have been prepared and are used for the appropriate cases with some minor revision. As the Supreme Court has a very low rate of revocation, some one percent, using standardised forms certainly saves a tremendous amount of time and energy. Second, the Supreme Court judges believe that the use of standardised forms is constitutionally right because the forms have been produced after long experience in the Court. Third, the legality of a traditional custom has generally not arisen in a variety of organisations, particularly in the case of government offices. Lastly, the fact that the Supreme Court is the final court of Japan means that there are no institutions where the legality of the Supreme Court decision is examined. Moreover, legal scholars cannot make any criticisms to the content of the Reason unless they are specified in the judgement.

VI. Register Analysis

1. Register

A register is one variety of language which is associated with a particular group of people who shares the same occupation, like doctors or lawyers, or who has common activities like cricket. A register is more commonly characterised by a particular set of vocabulary, for example, a German word 'Karte' for patient's chart in Japanese medical practice. A distinctive grammatical construction such as the use of tag question in cross-examination in the court of Common law countries is also an item of legal register.

Halliday uses the notion of register to refer to the relationship between language and situation. Halliday (Halliday & Hasan 1990:38-9) defines a register as a configuration of meanings that are typically associated with a particular situational configuration of field, mode, and tenor. 'Field' refers to 'situation', more concretely, what is happening or what is being talked about; 'mode' refers to 'channel' in other words, in what way language is organised; 'tenor' means 'participants' who are taking part in the exchange of communication.

Ferguson (1983) analyses sports announcer talk in terms of register variation by the use of the notion of Halliday. He has tried to locate a presumed register by identifying situational features, roughly in Halliday's term 'mode', which is the oral reporting on the radio. Next, he focused on the essential role of participants (tenor), which is a monolog or a dialog-on-stage targeted to an unseen mass audience. Lastly, he deals with the topic of the discourse (field), which is a radio sports talk. He then concludes that there does not exist a simple way of identifying registers due to a flexible nature of the concept, but he adds that the identification of proto-typical registers certainly helps to form a nature of register variation. In the case of judgement paper, field is the judgement of a judge about a certain case. 'Mode' is written legal language. 'Tenor' is idiosyncratic; judgement paper is primarily meant to be written for litigants, in most cases, lay people, but in reality it is written in the minds of executors as well as prospective appellate court judges. The discrepancy between actual readers and nominal readers results in the incomprehensible nature of judgment paper. The notion of register has some overlapping with the notion of genre, or a type or writing, as the term 'genre' is traditionally used in the study of literature. In this section, I will first identify English legal register from numerous studies in this field, heeding some proto-typical registers from a perspective of trans-language, and then mould these commonly shared registers into Japanese legal register.

2. Legal Register

1) English Legal Register

There have been many works concerning the characteristics of legal English. The pioneer of this field is a law professor, Mellinkoff, followed by linguists, Crystal and Davy, Danet, Bhatia, Maley, and Gibbons, and then Tiersma with both academic backgrounds. I would like to discuss their approaches, followed by a summary of Legal Register.

(1) Mellinkoff

Mellinkoff (1963:11-29), in his well-known book, describes what the language of the law is and how it got that way. In the first part, 'what is the language of the law?', he mainly discusses characteristics of the language of the law together with its mannerisms.

Mellinkoff deems that law language has an uncommon touch. He presents nine concrete items for the characteristic of legal English: frequent use of common words with uncommon meanings; frequent use of Old and Middle English words once in use but now rare; frequent use of Latin words and phrases; use of French words not in the general vocabulary; the use of terms of art; use of argot; frequent use of formal words; deliberate use of words and expressions with flexible meanings; and attempts at extreme precision.

The use of common words with uncommon meaning indicates that the meaning of a certain word which legal experts share among themselves is a peculiar meaning of the word for lay people. Let me cite an example: the term 'action' means 'lawsuit' for lawyers, but obviously not in the daily usage. The next usage is Old and Middle English. Old and Middle English has influenced present-day English, and we still see the traces in the areas of ministry, sailing, and law. In the case of law 'hereafter', 'In witness whereof, I have set my hand, etc', 'aforesaid' are commonly used archaic expressions. Not only Old and Middle English but also Latin words are also frequently used in legal English. Some examples are 'certiorari' and 'nil', Another linguistic area, which has influenced legal English, is French. However, French here means Law French, which is mostly composed of French words of Old French and Anglo-Norman origin.

In addition to the ancient words, technical words with specific meanings, which are called terms of art, are used in law as well as other specialised fields such as horsemanship. Examples are 'amicus curiae' or 'felony'. Similar to terms of art, argot is also used. The difference between terms of art and argot is that argot is a specialised vocabulary exclusively used among in-group people whereas terms of art are also specialised vocabulary, but are used by both specialists and non-specialists. However, Mellinkoff indicates the boundary between

the two is not clearly defined. A word like 'demur' is a terms of art when officially used in the courtroom, but could well be argot when used by one lawyer to another at a cafeteria in the courthouse. For the purpose of the addition of a ceremonial quality on legal English, a formal expression such as 'approach the bench' instead of 'come here' or a euphemistic expression like 'the deceased' are used. Lawyers also deliberately use vague terms such as 'reasonable' to cover a variety of situations. By contrast, legal experts use other words in an extremely precise way. One example is drawn from a contract or a statute is 'words used in the masculine gender include the feminine and neuter', Legal experts deem that explicit definitions engineer precision in law.

In the section of mannerism of legal language, Mellinkoff presents four items: wordy, unclear, pompous, and dull. An example of 'wordy' is 'written document' for 'document'. Mellinkoff's examples of 'unclear' are: extremely long sentence, long sentence with awkward constructions, and strange use of metaphor. A pompous expression is a way to praise one's side and to discredit the opposing side. One example is 'my client's claim is clearly justified' instead of 'your client is entirely unsupported'. Finally, Mellinkoff states legal language is dull due to wordiness, lack of clarity, and pomposity.

(2) Crystal & Davy

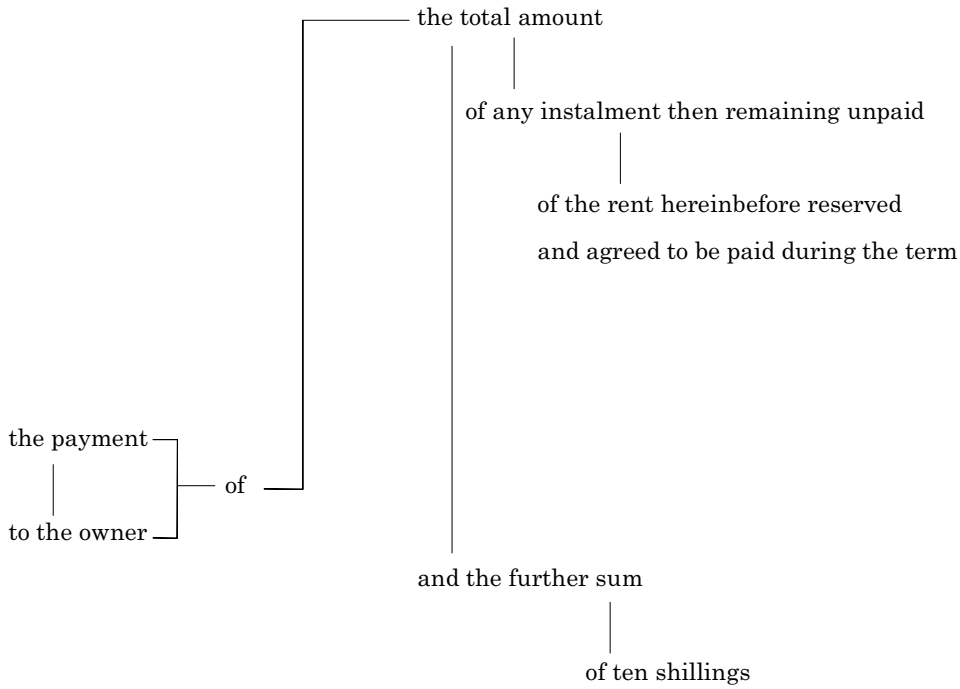
Crystal & Davy (1969) describe the characteristics of legal documents from linguistics, more precisely from syntax. They first note the extreme length of sentence with arrays of subordinate devises and repetition of lexical items and scarcity of anaphora. This is because all the necessary information can be held in a single sentence. Crystal & Davy (1969:201) therefore indicate that one legal sentence is a self-contained unit by putting connective information into the form of very complex sentences capable of standing alone. The reason for scarcity of anaphora is seen because of the avoidance of confusion; however, it could be well said that it has now one established characteristic of legal genre because the use of anaphora is avoided even in the unambiguous situation.

The second notable feature of legal documents is that it contains only complete major sentences, which are mostly in the form of statements. Incomplete sentences often heard in conversation do not appear in legal language. Furthermore, most of the complete sentences have so many folds of underlying logical structures such as 'if X, then Z shall be Y' or 'if X, then Z shall do Y', As 'if X' is an adverbial clause, it can generally make its own sentence more complex. The modifying strata that a small adverbial clause is embedded in a large adverbial clause, which is further embedded in a larger adverbial clause, makes legal

documents more incomprehensible.

Legal English has a number of distinctive features on clause-level other than sentence-level. Clauses in legal language contain a large number of adverbial elements, which add complexity to clauses and sentences as well. In order to pursue precision an adverbial element is often placed in a peculiar way. Let me use one of Crystal & Davy's examples: 'a proposal to effect an assurance with the Society' is described as 'a proposal to effect with the Society an assurance', The placement of the prepositional phrase between the verb and the object is odd in ordinary language, but it clarifies that 'with the Society' is solely modifies the verb 'effect', but not the noun 'assurance', To make legal English more complicated, adverbial elements are often coordinated. The use of 'and' or 'but' to adverbial clauses makes the whole clause longer and more complex. Tiersma (1999:65) indicates that the unusual sentence structure in legal English is a trace from free order nature of Latin.

Apart from clause-level, nominals in legal documents have distinctive features: long and complex. This is because of the postmodification of nominals. The following is an example from Crystal & Davy.



Lexical type used in legal language is rather idiosyncratic. Descriptive adjectives like 'splendid' or 'happy' are used less frequently. Intensifying adverbs like 'very' or 'extremely' are not

used. Nouns used in legal documents such as 'declaration', 'stipulation' are more or less abstract.

(3) Charrow and Charrow

Charrow and Charrow (1979) investigated the comprehensibility of standard jury instructions by psycholinguistic study. They gave two linguistically different jury instructions to two different groups respectively. The first type of jury instruction is the original standard jury instruction used in California. The second type is a linguistically modified version of the first type. They conclude that certain linguistic constructions lead to incomprehensibility but the alteration of problematic linguistic constructions facilitates the comprehension of juries.

The important part of their study for this paper is the isolation of the linguistic features of legal genre. The following is their list: nominalisations; 'as to' prepositional phrases; unusual positioning of phrases; 'whiz' and complement deletion[9]; lexical items; passive constructions in subordinate clauses; multiple negatives; word lists such as doublets or triplets; numbering; and numerous embeddings within one sentence. Charrow and Charrow state that the incomprehensible nature of nominalisation is due to the abstraction and impersonality caused by the elimination of the true subject of a sentence. 'As to' prepositional phrase has a rather vague meaning, in contrast with other prepositions with basic meanings such as 'in', 'on', 'at' etc. Lexical items are composed of legal terms, unfamiliar expressions, uncommon words in terms of the frequency appeared in dictionaries. Charrow and Charrow emphasise that the location of passives causes more comprehension problems nature than the types of passive construction. As for numbering, redundant information by the addition of numbering could cause incomprehensibility, which can be explained by Grice's Maxim of Quantity. Finally, the types of embeddings such as numerous subordinate clauses within one sentence affect negatively the comprehension than the absolute number of embedding.

(4) Danet

Danet (1985:279-86) observes a linguistic description of the legal register as follows: lexical features; syntactic features; prosodic features; and discourse-level features. She draws on the first 60 lines of a document known as an Assignment as an example of British legal English and discusses the high incidence of the above-mentioned linguistic features.

In the syntactic features, Danet notes the misplacement of the prepositional phrases as well. As for sentence length, Danet presents, in contrast with Gustafsson's corpus-based work on the average sentence length as 55 words (1984), Citibank sentence with 242 words in one

sentence as one typical example of the unusual length of legal English. Furthermore, Danet emphasizes the unusual complexity nature of legal English based on the comparison between Gustafsson's work on an average of 2.86 clauses per sentence in ordinary language and Charrow's work on nine subordinate clauses in the most complex sentence in jury instruction. She further states from the work of Hiltunen (1984) that the high incidence of the right branching structure, i.e., the placement of embedded clauses after the main clause, results from the insertion of embedding in the nature of legal English.

Danet, in the cohesion of discourse-level features, admits five cohesive devices in the Assignment: anaphora, conjunction, substitution, ellipsis, and lexical cohesion. In the first device of anaphora, Danet locates two instances of pronoun usage, 'he' and 'him', which refer to 'the trustee' in the Assignment. As the anaphora does not occur frequently in legal documents, she agrees with other predecessors like Crystal and Davy (1969) about the avoidance of pronouns and the repeated use of the term like 'trustee' in legal register. In addition, the instances of 'said' and 'such' are discussed as the peculiar usage of anaphora. Secondly, the terms like 'hereinafter' or 'aforesaid', together with the ordinal number, are found as the device of conjunction in the Assignment. The third device of substitution is another rare occurrence in her data, though a transition from an active verb 'has proposed' to a nominalization 'such proposal' is found in the Assignment. Next, ellipsis is again a rare device found and the rare usage is whiz-deletion. The last device is lexical cohesion, in which lexical reiteration is employed instead of pronouns and little use of synonyms or general terms is found in the Assignment. Briefly, Danet claims that, for the purpose of precision and explicitness of legal discourse, cohesion devices except conjunction or simple lexical reiteration are generally avoided. However, she admits that a few instances of those rare devices are stil found in the Assignment.

In another device of discourse-level feature, thematic organization, Danet introduces three approaches: Kurzon's (1984) model of thematic structure, the cohesive link set up by the themes of the component sentences of a text; the foreground and background approach by Vargas (1984), in which the discourse with little foregrounding is a more abstract legal discourse; and finally her extreme propositional density approach, which indicates lack of redundancy in information communicated.

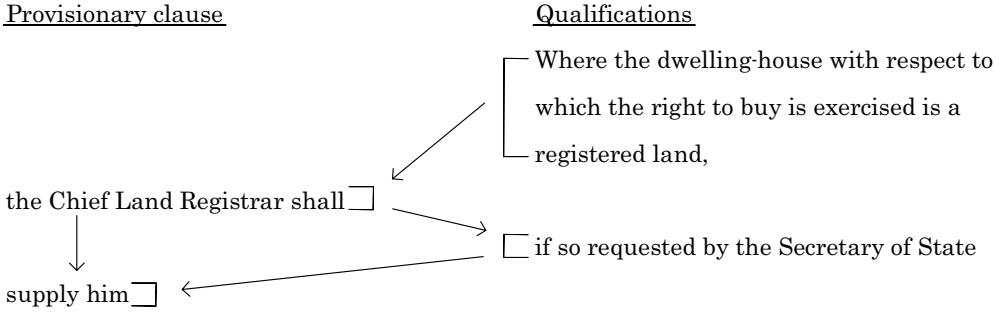
(5) Bhatia

Bhatia (1993) indicates that syntactic and discoursal features of legislative writing are interconnected. This means that the legal requirement of expressing something precisely could

result in syntactic discontinuities and thereby the discoursal structure of sentence turns to be complex as well as compound. Therefore, Bhatia argues that characteristic syntactic features need to be analysed before the analysis of distinctive discoursal features.

From the perspective of cognitive structuring, Bhatia focuses on how the complexity of intervening qualifications is reflected in the legislative provision. He is critical about Crystal and Davy's claim of 'If X, then Y shall do/be Z' as a representative form of legal genre, and argues that it is an oversimplified form. Then, Bhatia proposes three types of qualifications: preparatory qualifications, operational qualifications, and referential qualifications. Preparatory qualifications describe cases for the application of the rule of law; operational qualifications give additional information about the implementation of the rule of law; and finally, referential qualifications identify the main inter-textual nature of the legislative provision. Bhatia (1993: 115) claims that qualifications play a very important role in the structuring of legislative writing because most legislative provisions are written in terms of 'a two-part interactive move-structure consisting of the main provisionary clause and the attendant qualifications of various kinds'. One part of his examples of a two-part interactive cognitive structure is as follows:

> Where the dwelling-house with respect to which the right to buy is exercised is a registered land, the Chief Land Registrar shall, if so requested by the Secretary of State, supply him …



In summary, Bhatia claims that the sentence of legal provision is dominated by a two-part interactive structure of provisionary clause and qualifications and that the motivation for preciseness and clarity in legal provision results in syntactic discontinuities.

(6) Tiersma

Tiersma (1999:51-143) also discusses the nature of legal language. First, he presents some characteristics of lawyer-talk in terms of peculiar pronunciation and spelling. Tiersma

concludes that all these idiosyncratic nature of lawyer-talk functions as 'a badge of membership in the legal fraternity',

After he presents the uncommon placement of adverbial phrase which Crystal & Davy has indicated, Tiersma discusses the frequent use of negation. Tiersma's (1999:66) explanation for its frequency is a legal reasoning that whatever is not explicitly forbidden is permissible. Also, impersonal construction is described as a common feature found in legal language. Lawyers address judge by saying 'May it please the court' as if he or she were the third person.

Tiersma makes a very interesting point regarding the vagueness of legal terms; the masculine gender includes the feminine and the neuter. The pronoun 'he' indicates 'he', 'she', and 'it'. The same principle applies to the tense. The present tense includes the future, sometime even the past tense. Furthermore, the singular include the plural, and vice versa. All these redefinitions apply only when applicable in context.

For the strategic point of view, passives and nominalizations are used to obscure the actor. In order for a certain legal term to endure through time, a flexible term such as 'reasonable' is used.

Tiersma also discusses legal lexicon in terms of legal archaism; formal and ritualistic language; jargon, argot, and technical terms; relationships among words. In the relationships among words, he presents the notion of legal homonyms, synonyms, antonyms. Legal homonym (Tiersma 1999: 111) is defined as the legal vocabulary that looks like ordinary language, but has quite a distinct meaning. An example is 'action', which is a lawsuit, not a physical movement. In synonyms Tiersma states synonymous phrases such as 'rest, residue and remainder' which have become fixed expressions and cannot replace with other similar words. Another interesting point made is antonym. Unlike antonym in ordinary language, certain words are made to serve the function of antonym. Tiersma's example is 'speech' and 'conduct'. In ordinary language, 'speech' can be interpreted as a part of 'conduct'. However, in the case of American legal language, the key distinction between 'speech' and 'conduct' is that 'speech' is protected by the Free Speech Clause whereas 'conduct' is not. One might well call it 'legal antonym'.

(7) Maley

In order to identify the five structural elements of the assenting judgement, Maley applies formal and semantic criteria to the discourse. Formal features involve types of clause or illocutionary act, selection of tense, mood or specific lexical items. Semantic features are related to the kinds of meanings. For example, the term 'hold (that)' is a performative verb

with the legal meaning of 'give a decision and a rule of law' and its function is to make the Conclusion precise. The use of indefinite article 'a (careless) act' or 'one (member)' makes the sentence general and normative; the sentence sets out a rule. On the contrary, definite articles 'the (looking pins)' are used in the part of the facts of the case as part of Issue. Maley (1985: 164), referring to Austin and Searle, states that the declaring of a principle of law with the use of general and normative language performs an illocutionary act and that the illocutionary act confers powers or create rights etc. One example given is 'may' which is an expression of 'deontic modality' or 'modulation', for which Maley means that the speaker's assertion of the obligation is inherent. Unlike Japanese judges, Common law judges are allowed to declare the law as he or she believes it to be and therefore a personal tenor is manifested in the expression of 'I (would state for) myself my (reasons)..', Also, 'the question in the present case…', 'the submission made on behalf…' are considered as a legal register collocation. As a typical legal reasoning, Maley discusses reasoning by analogy. Modal expressions such as objectivity as in 'it cannot be doubted' 'it is clear' are used in the reasoning process.

(8) Gibbons

Gibbons (2002), in a comprehensive manner, classifies the characteristics of legal register into four areas: words, grammar, discourse, and interpretation. In words, he introduces the distinct notions of words of legal usage; one is a term of art or a technical word, and the other is more relevant to an interpersonal usage, in-group language.

(i) Words

Gibbons explains the terminology of legal experts in the following notion: specialist terms, archaic deictics, doublets and triplets, short forms, proper names, ordinary words used with specialist meanings, and slang.

Specialist terms, however, are not monolithic. It is true that legal language has pure technical words that are unknown to lay people. However, some terms of art have used by lay people as well, as in the following examples: 'homicide', Some words like 'a will' or 'murder' are very well known to general people. As for doublets and triplets, Gibbons states that these are not exclusively the characteristics of English legal language and presents some Spanish and Hebrew examples of this kind. In the case of Hebrew, doublets and triplets seem to be more or less the remnant of the poetization of legal language. However, Japanese legal language does not have any sort of doublets and triplets. Therefore, doublets and triplets seem to be more or less a feature of Indo-European languages. Another characteristic of legal English, which is not that of Japanese counterpart, is the use of proper names to refer to a

particular legal concept related to that person. One famous example is 'Miranda Warnings',

(ii) Grammar

What makes the grammar of legal language distinctive is not only unusual grammatical structures but also the frequency and distribution of certain grammatical features. The first feature is the frequency of long sentence. Sentences in legal English become longer with the addition of elements after the main part. In the case of legal Japanese, additional elements are attached one by one before the main verb because Japanese is a left-branching language. In addition, one section of documents is expressed in one single sentence. The reason behind this is that one can avoid possible legal challenges based on coherence of words. The second feature is the arbitrary application of grammatical forms. 'And' can be replaced as 'or' (Solan) and 'if' can be interpreted as 'and' (Gibbons 2002:58). The third item is a more characteristic type of grammatical forms. Crystal & Davy first introduce this as a logical structure; and then as cognitive structuring by Bhatia; and later as condition-based cognitive structure by Gibbons. Gibbons (2002:170) elaborates the notion of complexity of various grammatical levels in terms of the relationship between constituents and the number of constituents.

a) Syntactic complexity (the relationships between and the number of simple sentences in a complex sentence);
b) Inter-sentence complexity (the relationships between and the number of phrases);
c) phrasal complexity (the relationships between and the number of words in a phrase);
d) lexical complexity (the relationships between and the number of morphemes in a word.

Other characteristics are the separation of verb from subject, and multiple negatives

(iii) Speech Act

Speech Act is a useful notion in the operative documents because a legal conduct is done by stating the performative expressions such as 'declare', 'appoint', or 'witness',

(iv) Discourse

In discourse, Gibbons discusses pronouns, defined pro-forms, and core noun with deictic. Pronouns are generally avoided in order to prevent any possible ambiguity that might risk legal rights. Expressions are simply repeated, though they are redundant. In order to minimise redundancy, 'defined pro-forms' are used. Defined pro-forms are set up to indicate special meanings for words or expressions by means of definitions and to be used in the whole legal text. Another important feature is that judgement paper is presented in chronological order; past tense is used accordingly.

(9) Classification of English Legal Register

In summary legal English is classified into three main levels: lexicon, syntax, and discourse. The three levels are divided into various items as follows.

LEXICON

Legal archaism

Legal formalism

Legal homonym (the use of common words with uncommon meaning)

Legal synonym

Legal antonym

Terms of art

Doublet/Triplet

SYNTAX

Grammatical Metaphor (nominalisation)

Negation

Repetition

Sentence completeness

Sentence structure (word order)

Sentence length

DISCOURSE

Anaphora

Conjunction

Substitution

Ellipsis

Lexical cohesion

Vagueness

Preciseness

Impersonal construction

2) Legal Japanese

Unlike English legal register studies, Japanese legal register has not been studied fully. The pioneer work is conducted by Iwabuchi, not a linguist but a leading scholar of traditional Japanese language studies.

(1) Iwabuchi

Iwabuchi (2001:225-8) proposes fifty articles for the avoidance of a bad style, though, interestingly enough, Iwabuchi uses these articles as index items in his book. His fifty articles

are classified into four sections: the component of a discourse; the component of a sentence; the choice of words; and the usage of the honorific. The first three sections are relevant to the register analysis of legal language whereas the last section, the honorific, is not pertinent to the legal language in general. As the usage of the honorific is not very common in official documents of the present-day Japan, it seems that the honorific is not the component of the legal language of the judgement papers.

The other sections of Iwabuchi correspond to the three features of Danet. More concretely, the component of a discourse is comparable with the discourse-level feature; the component of a sentence could be well equivalent to the syntactic feature; and lastly the choice of words can be paraphrased as the lexical feature. For the purpose of standardization of terminology, I will apply Danet's terminology to this paper. Iwabuchi's three features will be described in detail in the following three paragraphs. A phrase in the parenthesis refers to the example of its preceding word.

The lexical feature consists of fourteen items as follows:

a) not to use redundant expressions (a row of tree is in a row) and to clarify the meaning of ambiguous terms;
b) to avoid a roundabout way of saying;
c) not to use inaccurate expression which could invite misunderstanding;
d) to avoid self-complacent newly-coined words;
e) to avoid odd or incoherent expressions
f) to use expressions in consideration of the feelings of readers, particularly when giving instructions or orders;
g) to state facts as they are;
h) to reconsider the appropriateness of the usage of similes and metaphors;
i) to use the right idiomatic expressions;
j) to avoid a direct-translation style;
k) to paraphrase Chinese, literary, and technical vocabulary;
l) to use neither loan words nor foreign words;
m) to avoid homonyms particularly when speaking;
n) not to use unfamiliar abbreviated words.

The following is nineteen items of the syntactic feature:

a) to shorten a long sentence;
b) not to include more than two different matters in one sentence;
c) not to be divergent in context;

d) not to use too many *chushi-ho* (a continuous form of verb) when explaining complicated matters;
e) not to use *chushi-ho* (a continuous form of verb) which could invite various interpretations;
f) to mark *chushi-ho* (a continuous form of verb) with punctuation marks;
g) not to delete verb;
h) not to put verb away from subject;
i) not to delete subject when you change the subject of the sentence;
j) try not to delete the parallel marker of the final word in parataxis (let the child drink water and bread);
k) not to repeat the same particle with the same meaning within one sentence;
l) not to delete a grammatically required particle;
m) to use adverbs in a grammatically correct way;
n) not to put a modifying expression away from a modified expression;
o) to clearly present the position of the modified expression;
p) not to use negation in an ambiguous manner;
q) not to use an extremely long modifying expression;
r) to separate one sentence with extremely long modifying expressions into several shorter sentences;
s) not to overuse passives.

Finally, Iwabuchi cites seven instances for the discourse-level feature:

a) to keep to the point;
b) to organise the structure of the discourse in consideration of the readers and to set up paragraphs based on the structure;
c) to narrate a story with a natural and frank manner;
d) to state the conclusion with one short sentence at the beginning of a long discourse;
e) to put a subtitle for a long discourse;
f) to use conjunction or demonstrative pronouns or adverbs when connecting two sentences;
g) to use the conjunction *ga* correctly.

(2) *Nihongogaku*

Nihongogaku (Japanese Language Studies) made up the special edition of judgement paper in the volume 13 (1994). The salient features of judgement paper are pointed out by several contributors of the journal. In this section, I will re-arrange those features in the categories of lexicon, syntax, and discourse.

The distinctive characteristics of the lexicon of judgement papers are rather contradictory: literal but plain (Tao 1994). The vocabulary of flourishes, loftiness, coinage, and queerness is avoided for the nature of legal text. On the contrary, the vocabulary of archaism is employed due to the legal tradition of following precedents. More concretely, the laws enacted in the Meiji era (1868-1912) had stylistic features: the exclusive use of Chinese characters and *katakana* alphabet in the old usage without *hiragana* alphabet, and furthermore without punctuation and voiced sound marker (*dakuon*). Chinese words and expression together with literal language have been thus predominantly used even in the present-day legal texts.

Another unique feature of the lexicon is the use of legal technical terms. This includes the usage of ordinary terms with unusual legal meanings. One example is *zeni* and *akui*. In ordinary usage, the meaning of *zeni* is a favourable sense, good intentions whereas *akui* means an evil intention. On the contrary, in legal usage, *zeni* indicates the fact that one is not aware of while *akui* means the fact that one knows. If one commits a crime, knowing it is a crime, this act is perceived as *akui*. On the other hand, *zeni* indicates that one does wrong without knowing it is a crime. Another type of legal technical terms is the terms exclusively used in legal text. To take an illustration, the term *shoron* (assertion) is predominantly used in legal term and is rarely used in the ordinary sense.

The use of technical terms has been accepted in the legal circle because judgement paper is usually written with legal experts in mind such as the judges of appellate courts, executors, and attorneys (Kawakami 1994:48; Kurata 1994:10; Takano 1994:38). For this reason, I would like to note that legal technical terms are jargon for legal experts. To make legal language more incomprehensible, the definition of legal terms varies among different areas of laws, as different laws have distinct notions of certain legal terms. For example, a 'person' in the civil code indicates a fetus completely leaving the mother's womb whereas a 'person' in the penal code does not need to wait for the complete secession of the fetus from the mother's womb for its definition. A fetus partially leaving the mother's womb is regarded as a 'person' in the penal code (Tao 1994:69).

The distinctive nature of legal syntax is redundancy, stiff style, and lengthy sentence. In addition, a unique grammatical structure is used: *mata wa* (or, either or) and *moshiku wa* (or, either or). *Mata wa* is used to connect the largest parts, whereas *moshiku wa* is the other parts. Another notable feature of legal discourse is to start a new paragraph with conjunctions such as *shikashite* (and then), *shikaraba* (however). One of the most notorious features of judgement paper is 'extremely long-sentence disease' (Hagiwara 1994:32; Kawakami 1994:47). The motivation for lengthy sentence seems to be to avoid the repetition of a subject, more commonly

'the defendant'. Nara (1994:21) states that it was a tradition before early in the Showa era (before 1945) that the Fact of the judgement paper contained only two sentences in which defendant and plaintiff were respective subjects of each sentence. As each sentence contained claim, approval or disapproval, evidence of the party, the sentence simply became very long. Therefore, Miyake (1994:78) also mentions that as a judge must include many items in the judgement, it seems to be a natural habit that the judge uses *chushi-ho* (continuous form of verb) and continues the sentence in a far-stretching way. Another notorious feature of judgement paper, though it is related to sentence length, is a long distance between subject and verb. Takano (1994: 36) gives us one example; there are 2,851 characters between the subject and verb in a single sentence.

(3) Higaki

Higaki (2003) criticises Japanese judgement paper as the acme of poor writing. Although it is rather sensationally written, he makes several points worthy of note. First, the tendency of tradition to cut and paste in legal circles has been accelerated with the spread of computers. For example, Higaki presents the identical acknowledgement of an insane person in two different judgements. In one case of Tokyo District Court (3 August 1966), the defendant is an insane person who mainly has a tendency to hold a nature of unfeelingness, autism, adhesiveness, self-revelation, and cruelness[9]. In another case of Tokyo High Court (27 January 1967), the defendant should be considered as an insane person who mainly has a tendency to hold a nature of unfeelingness, autism, adhesiveness, self-revelation, and cruelness[10]. The two cases were the cases of the 1960s, when commonly used writing machines were Japanese alphabet typewriter. This means that in the present-day of Japan the cut and paste process can take place with much less work.

Higaki discusses a sheer lack of logic in the Reasons of the judgement. He argues that judges present a 'conclusion' but not a 'reason' in the Reasons. Also, he adds that duty and humanity, instead of logical argument, are the basis of the Reason. More concretely, the repentance of the defendant serves well in the judgement.

Another interesting point made by Higaki is that judges avoid the usage of the first person marker, 'I' or 'we', The first person usage was traditionally found in the dissenting opinion of the Supreme Court; due to the educational policy of unobtrusiveness, even in the Supreme Court, the first person usage has become uncommon. He indicates that the judge, by the avoidance of the first person usage, can assume a noncommittal attitude when he or she wants to avoid the responsibility, and also can give others the impression that the judge thoroughly

investigates the evidence though in reality he/she simply reads and analyses the documents.

Finally, Higaki points out the unusual complex sentence in judgement paper and states that the judge ignores the grammatical structure of the complex sentence with main clause and subordinate clause. He argues the multiple number of subjects and particles *ga, te, ari, (ue) ni, kara* in judgement paper is used to hold as much as information possible in one sentence.

(4) Classification of Japanese Legal Register

Like legal English, legal Japanese is quite unpopular among the general public due to its incomprehensible nature. It is also evident that there exist some similarities between legal Japanese and legal English. The following are the characteristics of legal Japanese, based on the English one. These characteristics are registers which make up the genre of judgement paper.

LEXICON
Legal archaism (Chinese terms)
Legal formalism
Legal homonym (the use of common words with uncommon meaning)
Legal synonym
Legal antonym
Terms of art

SYNTAX
Chushi-ho (continuous form)
Legal grammatical structure
Grammatical Metaphor (nominalisation & passive)
Negation
Repetition
Complete sentence
Sentence structure
Sentence length
Sentence type (statement and command)

DISCOURSE
Anaphora

Conjunction
Substitution
Ellipsis
Lexical cohesion
Vagueness
Preciseness
Logic

These characteristics are far from completeness. The actual analysis of cases will modify the characteristics and eventually bear the characteristics of Japanese legal languages.

VII. Conclusion

In this paper I have proposed Linguistic Legal Model, which is aimed to analyse the discrepancy between lay people and legal experts. The Model is consists of two analyses: Layer Analysis and Register Analysis. Layer Analysis explores the structure of law and society whereas Register Analysis examines the structure of language and law.

The present Register Analysis has been conducted based on the studies of English legal language. In order to obtain a more substantial scheme of Register Analysis for the situation of Japan, the analyses of several writs of judgement of Japanese cases will be needed. Although there are similarities between Japanese and English legal languages, our different legal system and different cultural background seem to have produced distinctive Register characteristics.

Layer Analysis also needs to capture the changing legal system of Japan. Jury system of Japan has been suspended since 1943. This indicates separate three Layers in Japan. However, a bill for *saibanin seido* (peer-judge system) will be introduced into the Japanese Diet next year. *Saibanin seido* indicates a new legal system to add civilian peers to the judges during the trials and hearings. Unlike jury system in Common law countries, civilian peers join with the judges in determining the outcome of the case, i.e. sentencing and judgement. Just like the jury system, these peers would be selected among eligible voters. It seems to me that the new system will lower the fence of each Layer and its respective norm. It would be interesting to observe the change of Register, if some produced.

Although the present study is far from complete, Linguistic Legal Model has proposed one possible analysis of the present legal situation of Japan. The Model will continue to be

modified in consideration of actual cases and changing legal system.

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NOTES

1. *Shuukan Shinchou* vol. 47 (12 December 2002), vol. 48 (19 December 2002), vol.49 (26 December 2002).
2. Tokyo High Court (1990.9.30)
3. *Readers English-Japanese Dictionary contains* 270,000 words and it has been considered as one of the dictionaries with the largest number of words in Japan.
4. Solan notes that last antecedent rule is a principle of law which is widely applied in federal as well as local courts in America. In the Anderson case it is defined as such that a limiting clause is to be confined to the last antecedent, unless the context or evident meaning requires a different construction. However, there are also exceptional cases in which last antecedent is interpreted as a compound phrase and it is thereby taken as a whole. The problem is that the court does not clarify when to apply a regular last antecedent rule and when to use exceptional case.
5. The translation is from EHS Law Bulletin Series.
6. Ibid.
7. *9-tei Minji Hanketsu Kian no Tebiki* (Ninth Edition, Guide to Draft Civil Case Judgement) edited by Shihou Kenshuusho (Legal Training and Research Institute) uses the term *zairai-youshiki* (conventional style) for Guide Style.
8. ‘Whiz’ is a short form of ‘which is’. ‘Whiz’ deletion therefore indicates the missing of relative pronouns and ‘copula’ (Be) verbs, for example ‘questions of fact “which are” submitted to you’. The other type of deletion, complement deletion, means the omission of the complementizers ‘that’ or ‘which’, as shown in the following example,‘if you are convinced (that) it is erroneous’.
9. 被告人は無情性、自閉症、粘着性、自己顕示欲性、嗜虐性等の傾向を主微とする精神病質者である。(*Hikokunin wa mujousei, jiheishou, nenchakusei, jikokenjiyokusei, shigyakusei tou no keikou wo shubi to suru seishinnbyoushitsusha de aru.*)
10. 被告人はむしろ無情性、自閉症、粘着性、自己顕示欲性、嗜虐性等の傾向を主微とする精神病質者と見るべきである。*(Hikokunin wa mushiro mujousei, jiheishou, nenchakusei, jikokenjiyokusei, shigyakusei tou no keikou wo shubi to suru seishinnbyoushitsusha to miru beki de aru.)*

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