HOKKAIDO UNIVERSITY

Title	葛藤する法廷（２）：『法律新聞』の描いた裁判官・民事訴訟・そして近代日本
Author(s)	水野, 浩二
Citation	北大法学論集, 67(5), 47-107
Issue Date	2017-01-31
Doc URL	https://hdl.handle.net/2115/64413
Type	departmental bulletin paper
File Information	lawreview_vol67no5_03summary.pdf, Summary of Contents

Hokkaido University Collection of Scholarly and Academic Papers : HUSCAP

"Muddling through" of Modern Japanese Judges and Civil Procedure: Images in *Horitsu Shimbun* (1900-1926) (2)

Koji Mizuno*

In *Horitsu Shimbun* during the period of Meiji Civil Procedure Code (1891), we can recognize consensus among legal practitioners (judges and attorneys alike) that in proof-taking also, as in fixing issues, party-control principle should be mitigated and judge should intervene more actively in order to clarify "truth". Practitioners were aware of what led to "untruthful" judgements: judges exercised their directive power too formalistically and passively in proof-taking, technical problems in procedure were not little, practice of preventive law was not yet so widespread even in commerce…. In *Horitsu Shimbun* attorneys and judges proposed quite often practical ideas in order to improve this situation and approach "truth". Sometimes they tended to rely on paternalism and long for ideal, "wise and warm-hearted" judges, but it was only a natural reaction for practitioners who were confronted against "mission impossible", i.e. accommodate modern western law to Japanese society in too short a time. In fact, some of their proposal were going to be accepted in civil justice reform at the end of Taisho-era (e.g. Taisho-revision (1926)), although stance of lawmakers was quite moderate as compared to that of practitioners.

In lawmakers' consideration toward Taisho-revision, judge's directive power was linked with oral discussion (*Mündlichkeit*): they thought judge could fix issues, take evidence, and approach "truth" better by communicating orally than relying on written elements (*Schriftlichkeit*). Among practitioners, however, merits of oral discussion remained hardly recognized, because hearing had come to be done under Meiji Civil Procedure Code mainly in writing in order to make procedure quicker, therefore practitioners had no actual interest in how to realize oral discussion.

* Professor. Hokkaido University Graduate School of Law