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Part 3. Studia Iuridica Lublinensia vol. XXVII, 1, 2018
DOI: 10.17951/sil.2018.27.1.83

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The Role of Judicial Precedents in Japanese Law-Making Process – on the Japanese Civil Code (Law of Obligation) Reform

Rola precedensów sądowych w japońskim procesie stanowienia prawa – reforma japońskiego kodeksu cywilnego (prawo obligacyjne)

SUMMARY

Despite the fact that the Japanese legal system is based on legal provisions, the precedent law plays an essential role in this country. Therefore, judicial judgments exert impact on both the judicial and the academic practice. The author analyses the role of precedents in the law-making process with regard to the reform of the Japanese Civil Code and presents prospective changes as well. The ongoing discussion on the amendments to the Civil Code is justified by the fact that since the new provisions of law were adopted, numerous precedents have been established, which needs to be taken into consideration.

Keywords: precedent; Japanese law-making process; Japanese Civil Code; law of obligation

INTRODUCTION

The Japanese legal system is based on statutory laws. At the same time case law also is important in the Japanese legal system[1]. What is the relation between judicial precedents and statutory laws in the Japanese legal system? This paper aims to examine the role of precedents in legal system based on statutory laws. For this purpose, I employ "Japanese law-making process" which was completed in 2017 to discuss. It is law-making process for reforming the bill of the Civil Code (law of obligation).

[1] H. Oda, *Japanese Law*, Oxford Press 2009, DOI: https://doi.org/10.1093/acprof:oso/9780199232185.001.1, p. 42.

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The bill of the Civil Code (law of obligation) was enacted at 26th May 2017 and the Civil Code (law of obligation) come into effect within three years after the date promulgated (2nd June 2017). The Code Reform covers the range of contract law (a part of Book 1 General Provisions and Book 3 Claim except Chapter 3 Management of Affairs without Mandate, Unjust Enrichment, and Unlawful Act). The Civil Code reformed in May 2017 (hereinafter mentioned as the reformed law) does not totally make a change the existing Civil Code (law of obligation) (hereinafter mentioned as the existing law) but partly modify the existing law. Then one purpose of the reform has been generally alleged said that precedents put into the Civil Code. How precedents play the role in the Japanese Civil Code-making process?

THE CHARACTER OF THE JAPANESE LEGAL SYSTEM AND PRECEDENT'S POSITION IN THE SYSTEM

1. The Japanese Legal System as the Civil Law System

As mentioned, the Japanese legal system is based on statutory laws. It means that the Japanese legal system belongs to the civil law system as well as the Polish legal system. In the Western World, there are the two prominent legal systems. There are the civil law system and the common law system. The civil law system was originally administered in the Roman Empire. In the civil law system, the body of law is derived from codes or statutes, rather than from judicial decisions.

In Japan, there are six fundamental codes. We call those codes "Roppo". "Roppo" express six laws in Chinese characters. The "Roppo" is composed of six laws: the Constitution, the Civil Code, the Criminal Code, the Commercial Code, the Civil Procedure Code and the Criminal Procedure Code. Each of them holds a high position as general law among the related statutes in its field. For instance, the Civil Code is "general law" among civil related statutory laws.

Statutory laws are legally binding upon courts in Japan[2]. If a judge of inferior court made a judgment which breaks any statute law, the judge of the superior court should reverse the decision of the inferior court. The reason is that this decision would be illegal. For example, a judge of High Court should reverse a decision such that District Court judge makes against a statutory law. Then even if both parties do not appeal to reverse the decision of district court, such judgment against statute law is still illegal.

[2] Article 76 section 3 of The Constitution of Japan prescribes that "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws". See: www.japaneselawtranslation.go.jp [access: 10.01.2018] for Japanese Law Translation Database.

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2. Factual binding of judge-made law in Japan

Contrary to legal binding of statutory laws, the judgments of superior courts aren't binding upon the judgments of lower court as a general rule. Nevertheless, it is allegedly said that judge-made laws, especially those of supreme courts, are binding factually.

One reason why it is said supreme court judgment has factual binding is that the Court Organization Law of Japan (hereinafter mentioned as the Court Organization Law) guarantees the factual binding by Article 4 and 10.

Firstly Article 4 (*Binding power of superior court*) said that a conclusion in a decision of a superior court shall bind courts below in respect of the case concerned.

Let it suppose the following. A judgment of the low court like District Court has been reversed by a superior court like High Court to appeal. Then the case is remanded to the same low court. The low court judge should make judge according to the decision by the superior court although the decision is against the lower court opinion which has been reversed in the superior court. Therefore as long as the low court judge makes judgment to the case in question, the decision of the superior court is always binding upon the low court judges. Then I would confirm that legal interpretation which a superior court judge give in a case is not binding upon a low court judge in difference case. Legal binding power of superior court on Article 4 is confined to the case in question.

Secondly, Article 10 seems to have great importance for binding in fact rather than Article 4. Article 10 (*Examinations of the Grand Bench and Petty Benches*) said that:

> Regulations of the Supreme Court shall determine which cases are to be handled by the Grand Bench and which by Petty Benches; however, in the following instances, a Petty Bench cannot render a decision; (1) Cases in which a determination is made of the constitutionality of a law, ordinance, regulation or disposition, as a result of the contention of a litigant (excluding cases where the opinion is the same as that of a decision previously rendered through a Grand Bench in which the constitutionality of the law, ordinance, regulation or disposition is recognized); (2) Cases other than those mentioned in the preceding item when the unconstitutionality of a law, ordinance, regulation or disposition is recognized; (3) Cases in which an opinion concerning the interpretation and application of the Constitution or of any other law or ordinate is contrary to that of a decision previously rendered by the Supreme Court.

Here we are interested in (3) of the Article 10. This section indicates that the case should be handled by Grand Bench when the decision of the case is contrary to a decision previously rendered by the Supreme Court. Grand Bench of the Supreme Court is composed of 15 judges which are all the members of the Supreme Court. It means that it is impossible to make a modification to a previous decision of the Supreme Court unless 8 judges (majority of 15 judges) agree on the decision. It results from the cause of this regulation that it is clearly more difficult to modify a decision of the Supreme Court. This legal binding power of the Supreme Court

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is not legal power but factual power because a low court judge legally makes a decision contrary to the former decision of the Supreme Court, even if such decision will be disaffirmed.

3. Significance of judge-made law

What I observed in the previous section is one reason for explaining factual binding of precedents. I would show another reason. This observation is related to court institution in Japan. Significance of judge-made law is also related to function of precedents in Japanese society, especially society of legal professional. Judgments of the Supreme Court are respected and followed as factual source of law by lawyers. Judges often interpret legislations and find new rules on legislation in Japan. Text of legislation in Japanese law is generally of somewhat abstract representation. Such judgments as a result of law-finding by court are published in court reports. These court reports are made not only by public institutions like the Precedents Committee of Supreme Court but also by private companies like legal book publishing companies. Therefore important cases spread to the body of lawyers immediately. Judges and attorneys confirm both legislations and precedents related whenever they approach legal problem. Therefore judge-made law has great influence on Japanese legal practice.

Courts vary in importance with the level. Then the strength of binding power of judgment varies according to the level. The superior court decision, especially Grand Bench of the Supreme Court has generally more important rather than the lower court decision. The newer court decision would have stronger power at the same level. When the same sort of court decisions were frequently repeated, the court decision would have stronger power.

When law teachers teach a legal subject in a faculty of law or a law school, they are eager to teach not only legislation or code but also case law or precedent. That is to say, it means that precedent is significant in legal education as well as statute laws.

4. Significance of judge-made law in the Civil Code

As I mentioned, judgments of the Supreme Court are respected in Japan and have important roles in every field of Japanese legal practice and academic. However, judgments in cases related to the Civil Code especially seem to be to a large extent significant in comparison with the other code. Judgments of Supreme Court crucially are important. Additionally, those of High Court or District Court have an important role for legal practice and academic. This is partly because the articles in Civil Code contain a general and abstract expression. Then this is partly because it is impossible that the articles in Civil Code are previously arranged to adjust many

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varieties of cases in the highly complex contemporary society. There has been a lot of important precedents in Civil Code area and new rules often emerge from case law. This results is that the whole of Civil Code could be not understood unless we study not only text of Civil Code but also case law about Civil Code.

THE JAPANESE CIVIL CODE (LAW OF OBLIGATION) REFORM AND THE ROLE OF PRECEDENTS IN THE LAW-MAKING PROCESS

1. The summary of the Civil Code reform process

The Japanese Civil Code was enacted in 1897. The Civil Code consists of five Books; General Principles, Property, Obligations, Family, and Inheritance. Although the part of Family and Inheritance were reformed after the Second War, the rest part of Civil Code has mainly been not changed, except for small modifications. It means that most part of the Code remains unchanged over 100 years[3].

The discussion among academics marked the beginning of reform of the Civil Code. Firstly some scholars initiated to discuss the issue of reform about 25 years ago[4]. The discussion is continuing. As the result, a few academic groups like the Committee of Reform of Civil Law (law of obligation) undertook to make a draft of reform about 10 years ago[5]. It would be certain that the steady accumulation of discussion among these commissions contributed to the discussion of the Working Group on the Civil Code Law of Obligation in Legal Council which I mention below.

As mentioned, in Japan the precedents, especially those in Civil Code have great influence to legal practice. Consequently, a lot of new rules emerge from case laws. Such precedents have been accumulated since the Civil Code were enacted before over 100 years. These precedents are very familiar with legal professionals like an attorney at law. However, it is almost impossible for lay people (except the persons usually concerned to understand the content of the Civil Code article in unique special situation), unless lay people confirm the related precedents to a provision in question. It seems to be unreasonable demand for them. Therefore

[3] The text of the Civil Code was modernized in 2004.

[4] JAPL (the Japan Association of Private Law) had the annual conference of "100 Years Memorial after Enacted the Civil Code and the Challenge toward the Reform of Law of Obligation and that directions" in 1990.

[5] Japanese Civil Code (Law of Obligations) Reform Commission (Minpo [Saiken Ho] Kaisei Kento Iinkai) started in 2006. The activities of Japanese Civil Code (Law of Obligation) are confirm in English on website of the Group at http://wwr7.ucom.ne.jp/sh01 [access: 10.01.2018]. One year before Japanese Civil Code (Law of Obligations) Reform Commission started, the Study Group of Reform of Japanese Civil Code (Minpo Kaisei Kenkyu Iinkai) started in 2005. The members of both groups were partly overlapping.

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it repeatedly had been insisted in and discussed among some academics that the Civil Code should be reformed to put precedents into the Code.

In such situation, the Minister of Justice consulted with the Legislative Council of the Ministry of Justice for the revision of the Law of Obligation by consultation No. 88 on October 28, 2009. This consultation is as follows:

> The Minister of Justice considers that provisions of law of obligations in the Civil Code, the basic code of private law, need to be reformed especially focusing on those provisions governing contract which are deeply relate to people's daily life and economic activities. This comes from the viewpoint that the Civil Code provisions need to correspond to the changes of social economy since its legislation so that they become more understandable to the public. Accordingly, the Minister of Justice requests the Legislative Council to present the basic policy of the reform.

On the consultation, the Minister of Justice requests the Legislative Council to present the basic policy of the reform[6]. In response to this consultation, the general assembly of the Legislative Council decided at the same meeting to establish Working Group on the Civil Code Law of Obligation (hereinafter mentioned as the Working Group) for this mission in November. The Working Group hold the first meeting on November 24, 2009[7]. The conference was called once or twice a month. After the Working Group had discussion on about 200 of issues over 6 years, the meeting closed on February 10, 2015, at the 99 meeting and submitted the Report Draft for the Civil Code (law of obligation) Reform to the General Assembly of the Legislative Council. Then the Assembly decided this as the Report for the Civil Code (law of obligation) Reform on February 24, 2015.

The Bill (Part of Civil Code Reform) were introduced to the ordinary session of the Diet on March 31, 2015[8]. The deliberation in the Diet mainly focused on newly created rules rather than the generated rules incorporated of precedents. For instance new rules in Prescription, new rules about Obligations of Guarantee, Formulaic general condition (*teikei yakkan*) and so on. New rules means that the provision does not correspond to a provision of the existing Civil Code to be applied. New rules were created not to depend on such precedents interpreting the existing Civil Code.

After the deliberations of several times (10 days) in both Judicial Affairs Committee of House of Representatives and House of Representatives[9], the Bill passed the House of Representatives on May 14, 2017. The House of Representative made

[6] www.moj.go.jp/ENGLISH/ccr/CCR_00003.html [access: 10.01.2018].

[7] www.moj.go.jp/ENGLISH/ccr/CCR_00002.html [access: 10.01.2018]. The Working Group is composed of 19 commissions (two officials from the Ministry of Justice, seven academics, two judges, two attorneys, and so on) and 20 secretary (four officials from the Ministry of Justice, eleven academics, two judges, two attorneys, and so on). *Ibidem*.

[8] The bill were carried the deliberation on over to the next session of the Diet.

[9] See: www.moj.go.jp/ENGLISH/ccr/CCR_00001.html [access: 10.01.2018].

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no change except merely technical change such as the date. After the deliberations of several times (6 days) in both Judicial Affairs Committee of House of Councilor and House of Councilor, the Bill passed the House of Councilor on May 26, 2017. Any change were not done in the House of Councilor. Finally, the Bill were proclaimed on June 2, 2017. Further, this legislation should be executed within 3 years after the proclamation.

2. The role of precedents in the law-making process

As mentioned above, the aim of Civil Code Reform is considerably to make the Civil Code provisions more understandable to the public. The aim could be allegedly accomplished by incorporation of precedents with the Civil Code provision. However as I addressed above, the content of the Civil Code reform is not only to put precedents to statutory form as statutory law, but also to create new rules which are based on precedents. As we have seen, a number of new rules as new rules in Prescription, new rules about Obligations of Guarantee, Formulaic general condition (*teikei yakkan*) are created in the reformed Civil Code. We should not ignore those affair that a lot of new rules also are created.

Then as matter of fact, what I examine in this paper is the role of precedents in the law-making process. This is mainly because that the material of the Japanese Civil Code reform is profoundly interesting in that the role of precedents clarify and classify.

2.1. The classification of precedent from two perspectives

In over 100 years a large number of precedents are accumulated gradually and shared in legal professionals. All the established precedents, however, have been incorporated to the reformed Civil Code in this time. Moreover, all the established precedents should be incorporated to the reformed Civil Code as referred below. That to say, it is the first perspective whether established precedents are incorporated into the reformed Civil Code.

We can approach to classify precedents from a different perspective. That is the perspective such that there is conflict among legal professionals. Some precedents are almost entirely agreed with academic theory as prevailing theory. On the other hand, there might be serious conflict between court opinions and academic opinions. If such precedents against the academic theory put in statutory form in this situation, such opposing view would be almost utterly excluded. Therefore it would be difficult to reach consensus on making such provision in the Working Group. It is the second perspective whether there is agreement with issue in established precedent among legal professionals or not.

We can draw a chart as the following Figure A from these two perspectives.

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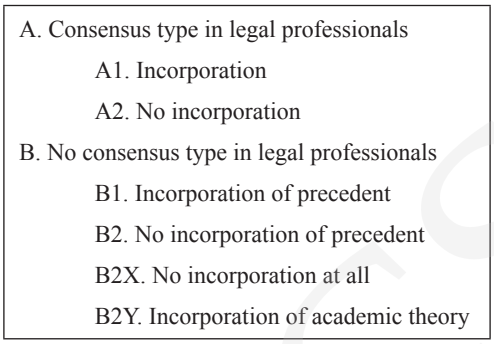

Figure A.

Precedents are generally classified under two categories as A and B. In A, there is almost entirely consensus between court opinions and academic theories. On the other hand, in B there are basically conflict between court opinions and academic theories.

Then A type precedents are also classified under two categories as A1 and A2. In A1 the doctrine of the precedents are incorporated into the new Civil Code. In A2 the precedents are not incorporated in statutory form in spite of consensus among precedents and academics.

Then I would go on the classification of B. So, B type precedents are classified under three categories as B1, B2X, and B2Y.

Firstly, B1 is case that the precedents are incorporated into the new Civil Code in spite of the objection of academic theory.

Secondly, the precedents are not incorporated in statutory form because of disagreement among precedents and academics.

Thirdly, the academic theory against precedents is incorporated in the reformed Civil Code. It is slightly difficult to distinguish B2Y case from such case to be created new rules although we mainly focus on not created rule but precedents. I am afraid that we have to recognize boundary cases. Anyway, I can realize B2Y as such following cases. There had been somehow conflicts about interpretation of the existing provision of the Civil Code between precedent and academics. Additionally, the prevailing academic opinions has been adopted in the reformed Civil Code in this time.

2.2. A1 and A2

The A1 case is very typical one to achieve the role of precedents. On the other hand, the A2 is apparently more controversial. Why the Working Group should not make draft to incorporate such precedents although the academic almost entirely agree to precedents. That is crucial point in the role of precedents. As paradoxical as

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it may seem, there is enough reason not to incorporate precedents in case although the necessity of incorporation of precedent are recognized. Such reason is that it is difficult or almost impossible to clearly make statutory form from precedents. This difficulty is particularly specific for (be often the case with) the general clause as good faith or the analogy cases. What the A2 cases suggest is that the doctrines of some type of precedent are considerably based on the facts in a case. In other word, such doctrines are strongly combined with the facts of the case. We have to wait to incorporate the precedent doctrine into statutory form until the doctrine became mature enough to get statutory form. It might be not guaranteed whether time will come to became mature or not.

2.3. B1, B2X, and B2Y

I would focus on B2Y in which the academic theory against precedents is incorporated in the reformed Civil Code. As matter of fact, you can find out that in a number of important topics the academic theories incorporated in the reformed Civil Code. It might be apparently surprised for us in consideration of precedent strongly binding force in Japanese legal practice. For instance, the nature for liability of defect of "the specified good" significantly changes contractual liability from statutory liability. The B2Y case might seem decrease precedent's status of precedent to the extent if such provisions have not reason enough to legitimate such provision. No enough reason means to ignore the role of precedents. Therefore the working group addresses many variety of reasons to legitimate B2Y. One reason is the tendency from dogmatic theory to contractual theory based on contract party's autonomy in the Japanese Civil Code Reform. Another reason would be to fit to the global standard in private law[10].

CONCLUSIONS

As we have seen, Japanese judicial precedents concerning the Civil Code are considerably important to the application of law. Then the precedents partly are incorporated into the reformed Civil Code enacted in 2017. The purpose to incorporate judicial precedents would be to make the Civil Code more understandable for all citizens including lay people. From this perspective we can say that such purpose would be realized to some extent. In such aspect the judicial precedent has fulfilled the role in Japanese law-making process. On the other hand, all precedent does not become provision in the reformed Civil Code even when legal profes-

[10] T. Uchida, *New Age of Law of Obligation – Basic Policy of the Civil Code (Law of Obligation)* (*Saikenhou no Shinjidai – Saikenhou Kaisei no Kihon Houshin*), Kobundo 2009.

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sional and academics mostly recognize the need to incorporate the precedent. The main reason is that the doctrine of precedents do not become mature enough to be submitted as a form of provision in legislation. In such case, judicial precedents would continually make development toward provisions of legislation. It means that court decision gradually generates law on facts of case.

Such type of rule-making process as mentioned would be most desirable for making law especially making private law. That to say we would call "the Generated Law in law-making process". "The Generated Law" could be contrasted with "the Created Law in law-making process"[11]. "The Created Law in law-making process" means that the legislative body independently creates provisions of legislation not to depend on precedents.

Indeed under special circumstances "the Created Law in law-making process" might be required even in the Civil Code-making process. But there's almost no doubt that they strongly require more persuasive reason in contrast with the provision based on a precedent when they create the provision of the Civil Code not to depend on judicial precedents.

Finally, I would like to refer how to resolve the problem about legitimacy of democracy when we recognized the key role of judicial precedents even in the statutory system or European legal system. That to say I already offer the answer for the question as above stated. In private law "the Generated Law in law-making process" should be the process in principle.

As we have addressed, the deliberation in the Diet mainly focused on new rules rather than incorporation of precedents. This fact shows importance of precedents in the Civil Code. Additionally, I would like to indicate as a reason why the Generated Law is factually respected in the Civil Code-making process that legal doctrines in the Civil Code mainly are not only theoretical but non-political except some issues. In that sense, the role of precedents in the Civil Law Reform might be subtly different from the public law or the Criminal Code.

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[11] Y. Yamada, *Theme Legal Philosophy of Legisprudence: Reconsideration of Legisprudence* (*Teidai Rippou no Houtetugaku – Rippougaku no Saiteii*), "The Annals of Legal Philosophy" 2014, pp. 1–7.

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STRESZCZENIE

W Japonii prawo precedensowe odgrywa znaczącą rolę, mimo że japoński system prawny jest oparty na przepisach ustawowych. W związku z powyższym wyroki sądowe oddziałują zarówno na praktykę prawniczą, jak i akademicką. Autor publikacji analizuje rolę precedensów w procesie tworzenia prawa w odniesieniu do reformy japońskiego kodeksu cywilnego, a także przedstawia kierunki zmian. Trwająca od lat dyskusja nad nowelizacją kodeksu jest podyktowana tym, że od momentu ustanowienia przepisów powstało wiele nowych precedensów, które należy wziąć pod uwagę.

Słowa kluczowe: precedens; japoński proces tworzenia prawa; japoński kodeks cywilny; prawo obligacyjne