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The Discretion of Judges and the Analogical Application in Japanese Legal Practice

Dyskrecjonalność sędziowska i stosowanie analogii w japońskiej praktyce prawnej

SUMMARY

The Japanese legal system has been radically changed after the Meiji Restoration. Moreover, after the unconditional surrender of Japan, the American law has been partially adopted. The law sources in Japan are – first and foremost – acts, or customary law, such as trade or regional practices. A particular role in the Japanese legal system is played by precedents. The author analyses the precedent issues in the context of the judicial discretion and explains the nature of its exceptionally broad scope. Furthermore, the article examines the process related to applying analogy (*per analogiam* reasoning) by courts as a possible manner of law development.

Keywords: precedent; discretion of judges; *ratio decidendi*; Japanese legal practice

INTRODUCTION

Japanese legal system changed radically in the Meiji Revolution 150 years ago by the reception of the continental laws, and after the unconditional capitulation in 1945 by the reception of the American law partly. Therefore, its legal sources are above all the statutes which were enacted in the hope for the establishment of a new or reborn state, then customary laws such as commercial or regional customs and lastly the reason. But we cannot neglect the important role of the precedents for the development of our legal system. While words in the statutes have inevitably shown the vagueness, obscurity, ambiguity, historical changes gradually, the revision or enactment of statutes is usually not so easy due to struggles between the political parties or various lobbying. The judges have, however, no entitlement to reject a decision because of the lack of the statutes. And there is a strict postulate

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for them to accord their decisions to the constitutional law and other laws, except their consciousness (Article 76 of the Japanese constitutional law). Therefore, the lack of the statutes must be supplied with the judiciary.

In the following sections we refer to firstly various dimensions of the judicial discretion, after the investigation of its background, then the analogical application as a typical example of the discretionary interpretation of the statutes, and lastly examine shortly how the semantic meaning of each word in the statutes works in the legal application.

THE JUDICIAL DISCRETION

In the civil cases, the judicial discretion can be found in the following dimensions.

1. Fact-finding. In the civil cases judges have a wide discretion of which evidence, by whom must be provided, and whether the facts can be considered as "true"[1]. Through the fact-finding process they sometimes distinguish the legal facts of the case from other cases in which the precedents consist. Such "distinguishing" process can be seen so often when the argument of the attorney is rejected. On the other hand, the judiciary treated a central part of a precedent decision as the *ratio decidendi* to formulate a general principle, although the facts and issues were different between the cases[2].

2. Selection of the legal construction. In many non-hard cases we can find the original legal construction which no party insists at the court. For instance, in the case (The Supreme Court, 26 January 1915, LEX/DB 27521865), in which the legal validity of the contract of engagement was at first time acknowledged, or the case about the false pretense by collusion to a third party in good faith (The Supreme Court, 20 August 1954, LEX/DB 27003141), each party justified its demand by the precedent legal construction at that time. Although the choice of a new one would surely have a great influence on the tactics of the offence or defense of each party, the Supreme Court declared abruptly its original legal understanding so frequently. Or in some cases, in which there were some possibilities to lead the same conclusion, the court chose a new legal construction intentionally[3]. Surely the court has the power

[1] The difference of the fact-finding of the same case concerning the "euthanasia" can be seen, for instance, in Yokohama Local Court, 17 March 2009, LEX/DB 28105325, and Tokyo Appeal Court, 28 February 2011, LEX/DB 28135232.

[2] At the issue who can be a mother, what regulates no article of our civil law. See: The Supreme Court, 27 April 1962, LEX/DB 27003141.

[3] A case to be famous for the teleological reduction. See: The Supreme Court, 25 September 1953, LEX/DB 27003280, in which the majority selected the very abstract principle of "the relationship on the trust" in a lease contract as the foundation of continuous contracts, while the minority pointed out its vagueness with double meanings and proposed instead to resolve the case by appealing to the general clause "the abuse of the right".

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to do so, but very regretfully, we cannot understand exactly the real intention of the court by reading merely the text.

3. Distribution of the burden on the evidence. In the legal practice it is very important who, which, and how must demonstrate the fact as true. In the view of a school of "requirement-facts theory" (*Tatbestandslehre* in the civil law) our statutes do not provide enough the criteria for this issue. So, judges must so often search for the criteria outside the statutes. A school of "requirement-facts theory" tries recently to re-interpret the civil law not as primary norms for actions, but thoroughly as norms for adjudication or the reasons for justification of the legal decision. Because the statutes can then offer no right answer to the issue of the distribution of the burden on the evidence clearly, then it seeks for more abstract principles, such as "a (hidden) purpose of the legal institution" and the principle of justice or fairness, or consequential considerations. These trials overlap partly with the supplement of the lack of law. While judgments of unjust or unfair treatments can converge relatively easier to a consensus, their positive implications are still obscure. Then, the final judgment of justice or fairness must be left to a kind of sense of each judge.

4. Legal interpretation which is of course connected with the issue (2) above mentioned. Usually we count for the literal, logical, systematic, or teleological interpretation as typical canons which are treated as orthodox procedure to get a plausible meaning of statutes. When they do not lead to a desirable conclusion, the Supreme Court applies so often other supplemental methods, such as quotation of general clauses, the reverse interpretation, or the analogical application. Among them the total number of the analogical application at least in the decisions of the Supreme Court, amounts already on November 3, 2017, to 510 cases by the search in LEX/DB.

BACKGROUNDS OF THE CREATIVE LEGAL DEVELOPMENT BY PRECEDENTS

Why can the judiciary then have so wide discretion?[4] We list its backgrounds as bellow.

1. Vagueness of words, many abstract expressions in the statutes, and delegation of the interpretation of the statute to judges. Firstly,

[4] What happened certainly very rarely, but the Supreme Court made decisions in the 1960s even against the literal meaning of the article concerning the restriction on interest. These are regarded as typical *contra legem* interpretations. For instance, The Supreme Court, 11 November 1964, LEX/DB 70000898. On the contrary, it is very hesitative to create a new interpretation about cases regarding the reproductive medicine, such as child's birth by surrogate mother in U.S. (The Supreme Court, 23 March 2007, LEX/DB 28130826) or by using a frozen sperm after the death of the father (The Supreme Court, 4 September 2006, LEX/DB 2811906).

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words as the components of each article are very vague. It may reflect our social custom to avoid a complete and logical investigation of a word in ordinary personal intercourse. The legislator is apt to adopt intentionally, on the other hand, a lot of abstract expressions. He sometimes even omits deliberately the law-making about certain matters or delegates interpretation of general terminologies including general clauses to judges from beginning. He seems to have a great trust in judges who are trained as legal professionals[5].

2. The primacy of consideration of competitive interests. Secondly, the substantial deliberation of the competitive interests is prior to other considerations in legal decisions. Since the 1960s became a trend in the legal methodology a theory of balance of interests which was influenced by the rule-skepticism in America or the *Freirechtsbewegung* in Germany. In its radical view, it is the crucial point which interest should be more respected than a competitive one. The legal construction is nothing other than a theoretical decoration which covers later a substantial decision to be made by intuition or hunch firstly. Such a pragmatic idea is really in collision with a theory which considers a court as a forum of deliberate discussion among each party by the practical reason.

3. Its penetration into legal practice. Thirdly, professional judges were trained at the university by this dominant theory. They support therefore a practical trend to take a concrete and substantial validity of a decision more seriously than a theoretical legal construction which can be established in a strong consciousness of the restriction of each word in the statutes. Of course, we can understand such a trend, because the judges hold responsibility to resolve confused cases legally. But, it promotes another tendency to take a legal construction lightly and, consequently, to write the justification of the decision not so enough in the document.

EXAMINATION OF CONCRETE CASES CONCERNING THE ANALOGICAL APPLICATION

As the list above suggests, there is a wide range of discretion even in a state whose most important legal source must be the statutes. Therefore, the contrast between the legal reasoning by rule and by analogy which was often stressed in the Anglo-American tradition[6] should be accepted not so strictly. In fact, the difference between them is rather uncertain, because we can find the function of the analogy just in the reasoning by rule too.

[5] At this point the introduction of the amateur judges on the heavy criminal case since 2009 belong to the exception.

[6] See: J. Stone, *Legal System and Lawyer's Reasoning*, Stanford University, 1968, p. 313 ff.

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1. Analogy in general

In general, analogy consists in our way of thinking to grasp an unknown something as resemble to another one already known by finding same factors in them, or by the comparison with each other in a whole image like family resemblance. Often it works so creative to discover something new by an astonishing connection between two things which were regarded as separate and different each other until then. We can find its good examples in the literature, sculpture, religious metaphor and so on.

Likely, the analogical way of thinking makes an essential part of legal reasoning, especially in the correspondence of a concrete case to abstract words in the statutes. In the abduction too, to make a rule as a combination between given facts and the conclusion, the analogical way of thinking is necessary[7].

But, when we speak of the analogical application, it means something different from the basis of the normal legal reasoning. Rather, it works to develop the legal creation beyond the limit of each linguistic meaning. The academic professors of the civil law regarded the normal meaning of the word as the limit of legal interpretation, and understood the analogical interpretation or application as a further development of law, in appealing to a theory proposed by, e.g., K. Larenz[8]. The similarity which we find by analogy can be discovered only under a new evaluated viewpoint which we have never imagined.

2. Concrete decisions

Which decisions applying the analogical interpretation are there then? We can indeed recognize the analogical interpretation in the following cases although the court says nothing about it clearly:

1. A decision to treat an accused guilty who used electricity without contract with the company (21 May 1904, LEX/DB 27531444). By the way, the "thing" which was an object of the theft, was regulated in the civil law in those days as something to be physically captured.
2. Many cases concerning the engagement. Our legislator wrote intentionally nothing about the engagement in our civil law. In Meiji era, the court rejected decisively the legal validity of the engagement because it would lead an inappropriate consequence for a partner to have to marriage bound by a reservation several years ago, while only an agreement just at the time of the notification of the marriage must be essential. In the decision of 26 January 1915 (LEX/

[7] See: A. Kaufmann, *Analogie und „Natur der Sache": Zugleich ein Beitrag zur Lehre vom Typus*, [in:] *Rechtsphilosophie im Wandel*, Frankfurt a. Main 1972, pp. 272–320; *idem*, *Die Rolle der Abduktion im Rechtsgewinnungsverfahren*, „Ars Interpretendi" 2003, Bd. 5, pp. 303–316.

[8] K. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin–Heidelberg 1991, pp. 381 ff.

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DB 27521865), the Supreme Court, however, recognized finally the validity of the engagement by analogical understanding between the reservation of marriage and trade, but only with compensation of the damage, not the compulsive marriage as the accomplishment of the reservation as its legal effect.

For the short of space, I mention only cases concerning the Article 94 sub-clause 2 of the civil law in which the court itself declared the analogical application.

3. Sketch of the academic debates as to the precedents related to Article 94

According to the academic research the Supreme Court had declared clearly at first time on 20 August 1954 (LEX/DB 27003141) that the Article 94 sub-clause 2 of the civil law could be applied analogically to a case in which effect of the false pretense by collusion to a third party in good faith was at issue[9].

The decision said as follows:

> […] the defendant handed 13,500 yen to her husband Isaku, to let his mistress, Tama, use a house after he begged her to do so earnestly. He handed the money to Tama and she bought it from its former owner, Kikuzo. She registered officially, for convenience, in her name, as if she had become a new owner after she talked with him about this problem. But it did mean that the true owner became not yet Tama but really the defendant, and Tama was only a tenant with no rent. By the way, if in such a fact-finding, the transfer registration of the house from Kizuko to Tama who was no real owner, would be on the will of the defendant, it would be same with a case in which she would have registered falsely on the collusion with Tama without a real intention of the transfer, after she would once have registered her name as a new owner and then transferred it to Tama. Therefore, the court applies the Article 94 sub-clause 2 to this case analogically. The defendant cannot compete with a third party in good faith because Tama is no real owner.

In this case, Tama insisted that the house was transferred to her from the defendant. The appeal court (28 December 1950, LEX/DB 27205219) denied her claim and recognized the defendant as the real owner. The Supreme Court, on the contrary, changed the legal construction and grasped the case as an example of the false pretense by collusion to a third party in good faith. It opened the way to protect the interest of the third party in good faith, even when a holder of the property would not correspond to the reality.

[9] The Article 94 sub-clause 1 states that an expression of the will conspired with another partner has no legal validity. Sub-clause 2 of the same Article states that the invalidity of the expression of the will mentioned in the former clause cannot compete with a third party in good faith.

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4. How to understand this decision?

There are at least two possibilities to understand this case.

1. We read the text of the decision literally so that the Supreme Court applied the Article 94 sub-clause 2 to a case of the false registration of the estate analogically. So, we return to the sub-clause 1 and investigate how resemble are facts which the word in the Article implies, to the concrete fact. If it would be the crucial point whether an analogical relation between the expression of the will to register his own estate falsely in the name of another person, and the estate registration as its owner once and then a transfer registration falsely, then the analogy would be recognized between the expression of the will and the registration. It is, however, doubtless to say, that there is a deep conceptual difference between them. The one is a necessary factor to bring legal effects, and the other is merely an action which reflects it. There is no analogical relation between their intrinsic characters but at best a relation of reference. If such a relation is nevertheless treated as analogical, it is based on something else than the intrinsic characters in the fact.

2. In another understanding of the decision, the court rather made a conventional proposal to bring two different things into a legally important relation, to get the same legal effect. Although there is surely, if not necessarily, something similar between cases, the plausibility of the analogical application, however, depends mainly on its practical and material effects; namely the priority of the safety of the estate dealings in comparison with the competing interest of the true owner. The similarity or analogy is in a sense "functional" to this purpose.

The precedents have developed from (1) to (2) gradually as the following cases of the Supreme Court indicate.

5. Expansion of the analogical application to other cases except estate registration

Later, the Supreme Court applied the Article 94 to other cases, e.g., a building preservation registration about a house which was not registered at all until that time, not in the name of the authentic holder (18 March 1966, LEX/DB 27001216), house ledger (16 April 1970, LEX/DB 27000732) or fixed assets ledger (28 June 1973, LEX/DB 21043081). If we can grasp the legal implication of the court in the meaning (1) above mentioned, the last case has a serious difficulty, because the fixed assets ledger has nothing to do with the will of the owner. Only the meaning of (2) above mentioned can explain the logic of the decision.

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6. Collusion – abandonment of similar concepts; in advance or after the action, clear or secret, true owner or merely holder

The literal meaning of the Article 94 seems to require an agreement of two parties in a collusion before the expression of the will. But, we can neglect the slight difference of the clear or non-clear expression of the will, or the will in advance or after, when a true owner leaves the false pretense. Those cases can be included in the ordinary sense of the word "collusion". So, the decision of 22 September 1970 (LEX/DB 27000689) is not a case of the analogical application, although the court said so clearly.

The decision of 24 July 1970 (LEX/DB 27000700) concerns a reverse case. The issue was the will of the holder who was not a true owner. The Supreme Court says that the Article 94 can be applied "analogically" to a case in which a holder does not know the pretense of estate registration. However, the holder sold the estate to a third party in the real case, so that he had to be aware of that he was a false holder, at latest at the time of a sale contract. The issue whether and when the acknowledgement of the will of the holder is necessary to judge the existence of the collusion, has nothing to do with the possibility of the analogical application.

7. Arrangement of the precedents by academic professors

The academic professors arranged the zigzag process of the decisions about resemble cases regarding the Article 94, by classifying them into three types: (a) a type of false pretense by the owner himself, (b) by another person except the true owner, (c) a type of non-correspondence between the will and the pretense. On the other hand, a practical lawyer formulated in 1997 two necessary conditions for the application of the Article 94 sub-clause 2 which had been established by the precedents, as follows: (a) a third party comes into the contract to have a property of the estate in good faith of its appearance in the registration, (2) a true owner is liable to make the appearance as if a false holder in the registration were a real owner. Since several years the court has become however to be more deliberately in the judgment of the liability, to guarantee the right of the true owner (e.g., 13 June 2003, LEX/DB 28081751).

CONCLUSIONS

In this paper, we started with the confirmation of the wide discretion of judiciary in various dimensions. Then, we paid attention especially to the analogical application to which the Supreme Court so often appealed in his decisions, as the further development of law. However, it does not mean that it works thoroughly arbitrary. The judges are surely very conscious of the limits to their decisions. They must always consider the postulates of abstract legal principles like justice

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or fairness, the consistency of the precedents which are built by a cooperation between academic and practical lawyers, systematic arrangement of legal logic or evaluation, and above all the meaning of each word in the article, if any.

Among them, I myself would like to stress the semantic meaning of the word in legal rules. I understand it not as the relation of the word and real something referred by it, but a starting point for our way of thinking or arrangement of matters around us. By the implications of each word, we can certainly spin a story imagined by it or, if necessary, exclude anything from its penumbra. In Japanese legal practice is, however, remarkable the priority of the pragmatic considerations which promote the trend to attach more emphasis on the same legal effects than the confirmation of the similarity of the requirements when it speaks of the analogical application. Then, the limit of the legal application seems to be searched for rather in the nature of the affairs. And the negative reaction of the intuition leads to verbally abstract principles, not any rules as a combination of clear requirements and effects.

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STRESZCZENIE

Japoński system prawny radykalnie zmienił się po rewolucji Meiji, a po bezwarunkowej kapitulacji – częściowo przez przyjęcie prawa amerykańskiego. Źródłami prawa w Japonii są przede wszystkim ustawy, a także prawo zwyczajowe, takie jak zwyczaje handlowe lub regionalne. Szczególną rolę w japońskim systemie prawa odgrywają precedensy. Autor analizuje problematykę precedensów w kontekście dyskrecjonalności sędziowskiej i wyjaśnia, dlaczego ma ona tak szeroki zakres. Ponadto w artykule wskazano na proces związany ze stosowaniem analogii przez sądy jako możliwy sposób rozwoju prawa.

Słowa kluczowe: precedens; dyskrecjonalność sędziowska; *ratio decidendi*; japońska praktyka prawna