

Judicial Activism of the Japanese Supreme Court in Consumer Law: Juridification of Society through Case Law? *

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I. INTRODUCTION

Judicial system reform has been discussed since 1999 and is in operation based on the Cabinet decision made in 2002, including various amendments to the judicial procedures, reform of legal education and the introduction of lay judges scheduled in 2009.¹ The aim of the reform is the “juridification” (*hōka* 法化) of Japanese society, which means a more prominent role of the judiciary or a larger availability of relief through the judicial process.

If the final goal is “juridification” of society, it is not only the reform of the system that matters. Even under the existing statutory regime, courts can be more generous than before in providing relief by adopting an “activist” approach towards interpretation and application of the law. Indeed, such developments took place in the field of consumer protection in the last few years, by the three Supreme Court judgments discussed below which were decided in favour of the consumers.

Two of these cases were related to a service contract, while the third one concerned the high interest rate on a loan. In this article, they are examined in turn (III., IV.), followed by observations on their implications on the judicial system reform (V.). The idea is that the activism of the Supreme Court as seen from these cases may indicate that the

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1 Regarding the judicial system reform in general, see KAHEI ROKUMOTO, *Overhauling the Judicial System: Japan’s Response to the Globalizing World*, ZJapanR/J.Japan.L. 20 (2005) 7.

judicial system reform did not come out all of a sudden but rather was the result of an ongoing development that paved the way for the reform. In other words, “juridification” of society or pursuit of more relief through the judicial process had been gradually making progress even before the commencement of the judicial system reform and continued to be advanced while efforts towards the more formal system reform were being made. Before making such an argument, however, it will be useful to discuss the role of court decisions in Japanese law (II.).

II. BACKGROUND: THE MEANING OF PRECEDENTS UNDER JAPANESE LAW

As a country that belongs to the civil law tradition, there is no doctrine of *stare decisis* in the strict sense in Japan. The court decision binds only the lower court deciding over the same case.² However, the Courts Act (*Saiban-sho-hô* 裁判所法) itself distinguishes the decision of the Supreme Court overruling its prior decision from other decisions,³ which implies that the judgments of the Supreme Court form case law. Even though, theoretically, there has been a difference of views about whether or not the precedents of the court can be the source of law (*Rechtsquelle*),⁴ the judges themselves are well aware of the need to follow the precedents, sometimes referring to the “professional responsibility” to decide like cases in a like way.⁵

Although today the recognition of the role of precedents in the civil law countries is nothing novel,⁶ commentators have pointed out that the meaning of case law in Japan is closer to American law than to that of most countries in Continental Europe in at least two respects. First, unlike some other jurisdictions that take precedents merely as another source of abstract rules,⁷ case law in Japan has been understood as based on the facts of each case.⁸ The decision by the Supreme Court is always published with the

2 *Saiban-sho-hô* [Courts Act], Art. 4.

3 The Supreme Court consists of three petty benches and ordinary cases are decided by one of the benches, but the decision of the full bench is required when overruling a prior case of the Supreme Court, Courts Act, Art. 10 No. 3. See YOSHIYUKI NODA, Introduction to Japanese Law (translated by Anthony H. Angelo, Tokyo 1976) 126-127; HIDEO TANAKA (ed.), The Japanese Legal System (Tokyo 1976) 48; HIROSHI ODA, Japanese Law (Oxford, 2nd ed. 1999) 66.

4 EMI MATSUMOTO, Adjusting an “imported” (or “received”) law – an approach from the “precedent” in Japanese law, in: Ewoud Hondius (ed.), Precedent and the law (Bruylant 2007) 331-332. See also JOHN O. HALEY / DANIEL H. FOOTE / DAN F. HENDERSON, Law and Legal Process in Japan: Materials for an Introductory Course on Japanese Law, Part II, in: Yukio Yanagida *et al.* (eds.), Law and Investment in Japan (Cambridge, 2nd ed. 2000) 57-58.

5 See the argument of Judge Tsugio Nakano, cited in MATSUMOTO, *supra* note 4, 333-335.

6 EWOUH HONDIUS, General Report, in: Hondius (ed.), *supra* note 4, 12-14.

7 Cf. HONDIUS, *supra* note 6, 16.

8 See the discussions by Shigetô Hozumi, translated and reproduced in TANAKA (ed.), *supra* note 3, 144-146. This attitude may have derived from American law, as the importance of

facts of the case and refers to the relevant facts before stating the conclusions, except when the reason for appeal has no serious merit. Besides, a number of lower court decisions are also published, mostly in private law reports, and often commented and cited in academic works. Secondly, sometimes the court, through the pronouncement of cases, boldly adopts a policy that is not apparent from the statutory text or the legislative history.⁹ These two features form the background that could allow “judicial activism” to take place.

III. ADVANCING THE LEGISLATIVE INTENT

1. *Language school (NOVA) case*

As regards some kinds of long-term service contracts, including that of a language school,¹⁰ amendments were made to the Law on Certain Kinds of Commercial Transactions (*Tokutei shô-torihiki ni kansuru hôritsu* 特定商取引に関する法律) in 1999 so that consumers are assured of their right to terminate the contract during the term.¹¹ The rationale of this regulation is that a consumer may wish to discontinue the service contract because of being unsatisfied with the quality of the service, which is not accurately predictable before the conclusion of the contract, or may become unable to enjoy the service due to an unforeseen cause, such as the transfer of the consumer’s workplace. As opposed to the right of cooling-off,¹² the provider of the service (such as the language school) is entitled to retain the payment for the service already provided plus a certain amount of termination charge. The termination charge shall not be more than the amount prescribed in the regulation.¹³

studying case law was first emphasised in Japan by Izutarô Suehiro (professor of civil law at the Imperial University of Tokyo), who travelled to the U.S. for research because he was prevented from studying in Europe due to World War I. See MATSUMOTO, *supra* note 4, 332. See also the declaratory writing of Suehiro, translated and reproduced in TANAKA (ed.), *supra* note 3, 146-150.

- 9 Commentators sometimes describe Japanese courts as “flexible” and even “anti-positivism” when developing case law. See ODA, *supra* note 3, 9-11, 51-52; MATSUMOTO, *supra* note 4, 327.
- 10 Other kinds of service contracts regulated are: beauty salon; tutor dispatch; preparatory school; PC training school; marriage matching service. *Tokutei shô-torihiki ni kansuru hôritsu sekô-rei* [Cabinet Ordinance implementing the Law on Certain Kinds of Commercial Transactions], Art. 12 and Schedule 5.
- 11 The Law on Certain Kinds of Commercial Transactions, Art. 49.
- 12 The right of cooling-off is also assured to the consumer in a long-term service contract, exercisable within eight days from the receipt of the written contract. The Law on Certain Kinds of Commercial Transactions, Art. 48. Therefore, the right to discontinue is relevant after the ninth day of the service contract.
- 13 The amount shall be 50,000 yen or 20% of the price of the service for the remaining term, whichever is smaller, Cabinet Ordinance implementing the Law on Certain Kinds of Commercial Transactions, Art. 15 and Schedule 5.

The defendant in the case, a well-known school for foreign languages, adopted the “point system” in order to promote its school. Upon enrolment, a student was required to purchase “points” which had to be exchanged for language lessons. The more “points” the student purchased at once, the cheaper the unit price was. When the student discontinued, the defendant applied a rule that, at face value, was in compliance with the regulation under the Law on Certain Kinds of Commercial Transactions: the student was entitled to a refund, while the defendant was entitled to retain the termination charge and the fee for the lessons already taken. However, the fee for computing the refund was not the unit price actually paid by the student but the price that would have applied had the student purchased only as many points as the student actually consumed by the time of discontinuation.¹⁴ The plaintiff, one of the students, purchased 600 points at 1200 yen per unit and decided to discontinue after using 386 points (taking 386 lessons). Because the unit price for purchasing up to 400 points was 1550 yen, the defendant was entitled to retain 400 times 1550 yen (which was 651,000 yen) besides the 50,000 yen of the termination charge under the rule. The plaintiff, having been refunded according to the rule, raised this suit alleging that the rule was in breach of the regulation and void. He argued that the defendant was only entitled to 386 times 1200 yen as “the fee for lessons already taken” and should make an additional refund for the difference. The Court of Appeals decided in favour of the plaintiff.

The Supreme Court upheld the decision by the Court of Appeals and held the rule of the defendant invalid.¹⁵ Noting that the purpose of the law lay in assuring the freedom of the consumer to discontinue a long-term service contract, the Court held that the fee for the lessons taken by the time of discontinuation should be the same as the unit price actually paid upon enrolment and that the rule of the defendant, which provided a higher “fee” only applicable in computing the amount of refund, was void as contrary to the regulation of the Law on Certain Kinds of Commercial Transactions, since such a rule deterred consumers from exercising the right to discontinue the service contract.

2. *University fee case*

Another kind of suit also is illustrative for the changing role of the judiciary in consumer law. After entry into force of the Consumer Contract Act (*Shôhi-sha keiyaku-hô* 消費者契約法), many suits were brought before courts claiming for taking back the fees paid to a university that the student did not choose to enter. The social background is that the

14 Actually the rule of the defendant was a little more complex. This was the reason why, as described in the following paragraph, the defendant retained 651,000 yen (400 points at the unit price of 1550 yen) and not 709,275 (386 points at the unit price of 1750 yen) in the case of the Supreme Court judgment. Consult the text of the judgment, *infra* note 15, for details.

15 *Saikô Saiban-sho* [Supreme Court], 3 April 2007, Minshû 61, 967. An English translation is available at <http://www.courts.go.jp/english/judgments/text/2007.04.03-2005.-Ju-.No..1930.html>.

entrance into universities is highly competitive in Japan and students usually apply for several universities of various levels and choose one from among those that admit his or her entrance. While waiting for the results of later applications, a student may, for the time being, pay the required fee to the university that already issued admission in order not to let that admission expire. It was customary among universities not to repay such fees, once paid in, whether or not the student later decided to choose another university. The plaintiffs (students) in the above-mentioned lawsuits claimed that such fees could not be retained by the university after the Consumer Contract Act was in force.

Some of these cases were appealed to the Supreme Court in 2006. The Supreme Court applied the regulation of liquidated damages and civil penalties in the Consumer Contract Act¹⁶ and held retention of the fees partly, but not wholly, void.¹⁷ To be more precise, the Court first distinguished the entrance fee from the tuition fee among the payments made by the student in response to admission to the university.¹⁸ Having referred to the right to be educated protected under the Constitution,¹⁹ the Court stated that the choice of a student about which university to study at should be respected to the utmost extent and that the student should be free to leave the university without cause at any time. Then the Court requalified the behaviour of a student to forego the admission and choose another university as a cancellation of a contract for education with the university that came into effect by the completion of the admission procedures (including the payment of fees). Under this understanding, the Court held that the university was entitled to retain the entrance fee as compensation for the student's right to be admitted to the university, while there would be no reason for the tuition fee to be retained when the student cancelled the contract for education.

As regards the policy of the university not to repay the fee once paid in, which was disclosed in the university's brochure for admission, the Court qualified it as liquidated damages or a civil penalty in case of cancellation by the student. According to the Consumer Contract Act, liquidated damages or a civil penalty in a consumer contract is void to the extent that it exceeds the amount of average loss to be incurred by the business operator as a result of cancellation of the contract by the consumer.²⁰ Though having held that the burden of proof was on the consumer with regard to the amount of "average loss", the Supreme Court found that a university does not incur any loss if the

16 Note that under Japanese law, the distinction between the liquidated damages and civil penalty is not relevant with regard to their validity and both may be fully enforced but for the regulation by the Consumer Contract Act. See *Minpō* [Civil Code], Art. 420.

17 *Saikō Saiban-sho* [Supreme Court], 27 November 2006, *Minshū* 60, 3437. An English translation is available at <http://www.courts.go.jp/english/judgments/text/2006.11.27-2005.-Ju-.No..1158%2C.1159.html>.

18 When distinguishing the two kinds of fees, the Court referred to a statutory provision in the regulation of universities (*Gakkō kyōiku-hō sekō kisoku* [Ministerial Order implementing the Law on School Education], Art. 4 (1) No. 7).

19 *Nihon koku kenpō* [Constitution of Japan], Art. 26.

20 The Consumer Contract Act, Art. 9.

cancellation is made before the end of March but does suffer a loss in the amount equal to the tuition fee in case the cancellation is made after 1 April, as the university cannot be prepared for cancellation by the student after that date under the current practice in Japan.²¹ By this judgment, the Supreme Court established a rule that the university is normally entitled to retain the entrance fee no matter when the student makes the cancellation, but was not justified in refusing to repay the tuition fee unless the cancellation is made after 1 April.²²

3. *Examining the policy behind the decision of the court*

Although both cases dealt with termination of a contract related to education, the policy implications of the decisions are different. In the language school case, the policy was obvious when the legislator made the 1999 amendments. The freedom of the consumer to discontinue the service contract prevailed over the interest of language schools in hedging the risk of fluctuation of the number of students by binding the consumer for a long term. When the language school attempted to evade the law by devising its rule on refund, the Supreme Court stepped in and squashed it.

The university fee case was much different in that there was no industry-specific regulation. The consumer relied on the general rule of the Consumer Contract Act and the Supreme Court, by interpreting such a general rule, created a balance between the consumer (student) and operator (university). In the course of such balancing, the Court qualified the legal relationship between a student and university, requalified the nature of the university's policy of no repayment as liquidated damages or a civil penalty, and even introduced some fictitious finding of loss incurred by the university when the student made the cancellation. The result was the carefully considered balance, distinguishing the nature of fees and timing of the cancellation.

The language school case deserves to be called judicial activism, as the court employed the purposive, rather than textual, interpretation of the statute. Its impact was so large that the operator later went bankrupt and was forced to cease its business. However, the court in the university fee case was even more activist in the sense that it adopted a policy that was not apparent from the legislator's intent. Such activism of the Supreme Court may have been in line with the general policy purpose of "juridification" of the society, or making relief through the judicial process more available.

21 The academic year in Japan commences on 1 April. Therefore, it is very unlikely that the student will change his mind and choose another university after that date.

22 As the criteria is whether the university can be prepared for cancellation by the student, the date of 1 April is not relevant under special circumstances. In fact, one of the plaintiffs in the case of the Supreme Court judgment applied a special undertaking under the *suisen nyûshi* [admission by recommendation of high schools] system that the defendant university was the first priority for him. The Court held the average loss to the university, which relied on such an undertaking, to be the amount of the tuition fee on whichever day the cancellation is made.

IV. OVERRIDING THE BALANCE MADE BY THE REGULATOR: INTEREST RATE REGULATION

1. *Historical background*

The regulation of interest rates for loans has been a controversial issue for decades.²³ The Interest Rate Restriction Law (IRRL, *Risoku seigen-hô* 利息制限法) provides the cap over the interest rate at 15, 18 or 20 percent, depending on the amount of the principal, and nullifies any excess interest. However, the IRRL before the amendments of 2006 (to be in force by June 2010) also provided a leeway that payment made “voluntarily” by the borrower may be retained by the lender. The Supreme Court judgments in 1964 and 1968²⁴ overruled the legislative intent of the IRRL by holding that the excess interest paid by the borrower was to be treated as repayment for the principal and any payment exceeding the amount of the principal constituted unjust enrichment of the lender that should be returned to the borrower.²⁵ In response to such judicial activism in the 1960s, the Diet introduced the new regime of the Moneylenders Control Law (*Kashikin-gyô no kisei-tô ni kansuru hôritsu* 貸金業の規制等に関する法律) in 1983, which secured the moneylenders’ entitlement to excess interest up to 40.004 percent per year paid “voluntarily” by the borrower as long as the lender was registered, had delivered to the borrower documentation of contract details and receipts for payments and complied with other requirements under the Moneylenders Control Law. The intent was to give “good” lenders that comply with the regulation, as distinguished from “bad” lenders, the privilege of benefitting from the excess interest over the cap of the IRRL, which was called a “grey zone.”²⁶ The upper limit of the “grey zone” was lowered to 29.2 percent in 1999.

2. *Supreme Court decision and its impact*

A series of Supreme Court decisions since 1999, however, narrowed the room for lenders to benefit from the “grey zone” by adopting a stricter interpretation of the require-

23 The interest rate regulation is not exclusively an issue for consumers. Indeed, the borrower in the Supreme Court case of 2006 appears to be a small business operator. However, the impact of the recent cases, including the judgment of 2006, has been significant on consumer borrowers and lenders focused on consumers (*Shôhi-sha kin'yû*), which may justify this issue to be discussed in the context of consumer law developments.

24 *Saikô Saiban-sho* [Supreme Court], 18 November 1964, *Minshû* 18, 1868; *Saikô Saiban-sho* [Supreme Court], 13 November 1968, *Minshû* 22, 2526.

25 See ODA, *supra* note 3, 9-10; MATSUMOTO, *supra* note 4, 327-329; ANDREW PARDIECK, Japan and the Moneylenders – Activist Courts and Substantive Justice, *Pacific Rim Law & Policy Journal* 17 (2008) 529.

26 SÔICHIRO Kozuka / LUKE NOTTAGE, Re-regulating Unsecured Consumer Credit in Japan: Over-indebted Borrowers, the Supreme Court and New Legislation, in: Deborah Parry *et al.* (eds.), *The Yearbook of Consumer Law 2009* (Surrey 2008) 197.

ments under the Moneylenders Control Law one by one.²⁷ In the end, the Supreme Court decision of 2006 held that the payment of excess interest made under a loan contract with an acceleration clause could not be “voluntary”, since the borrower would be placed under the de facto pressure to pay the excess interest.²⁸ The same decision also held the Ministerial Order of the Cabinet Administration Office (Financial Services Agency) to be contrary to the mandate by the Moneylenders Control Law and void, as the Ministerial Order allowed the lender to indicate the loan number in place of the date of making a loan required by the law.²⁹

3. Policy behind the decision

The Diet reacted promptly and finally abolished the “grey zone” by amending the Moneylenders Control Law into a renamed Moneylenders Law (*Kashikin-gyô-hô* 貸金業法). The activism of the Supreme Court preceded the reform in favour of the borrower by the legislator, rather than *vice versa*.³⁰ On its face, the Court enforced the Moneylenders Control Law rigorously so as to scrutinize “good” lenders privileged under the law from “bad” ones. However, as any lender conscious of securing its loan could hardly spare the acceleration clause, the Court in fact denied the possibility to benefit from the “grey zone”. Another part of the judgment on the validity of the Ministerial Order had a huge adverse impact on the nonbank lenders retrospectively because the lenders that had complied with the Ministerial Order were suddenly deprived of their privilege to retain the grey zone interest. Thus the Supreme Court appears to have departed from the intent of the legislator of 1983 and tipped the balance created by the regulator in favour of the borrowers.

The question of policy in this case can be all the more controversial because there is an argument that stricter regulation over the interest rate cap will end up being detrimental to the borrowers by lessening the availability of loan. As a counterargument, it may be maintained, for example, that the demand for unnecessary loans is created by the marketing of the lender, or that consumers need protection from their own unreasonable behaviour due to optimism or other biases.³¹ However, it is not clear which of these

27 For further details of the case law developments since 1999, KOZUKA / NOTTAGE, *supra* note 26; PARDIECK, *supra* note 25.

28 *Saikô Saiban-sho* [Supreme Court], 13 January 2006, Minshû 60, 1. An English translation is available at <http://www.courts.go.jp/english/judgments/text/2006.01.13-2004.-Ju-.No..1518.html>.

29 Moneylenders Control Law, Art. 17, prior to 2006 amendments.

30 For the whole process, see SÔICHIRO KUZUKA / LUKE NOTTAGE, The Myth of the Cautious Consumer: Law, Culture, Economics and Politics in the Rise and Partial Fall of Unsecured Lending in Japan, in: Johanna Niemi-Kiesiläinen / Iain Ramsay / William Whitford (eds.), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Oxford, forthcoming).

31 For these arguments and counterarguments, see KOZUKA / NOTTAGE, *supra* note 30.

arguments the Supreme Court relied on, or whether the Supreme Court ever considered such arguments at all.

V. CONCLUSION

Recent cases of the Supreme Court in the field of consumer law may be explained as judicial activism. Not dwelling on the textual application and interpretation of statutory provisions, the Supreme Court sometimes advances the legislative purpose and prevents an attempt to circumvent the regulation, sometimes taking a step further and creating a new balance between the consumers and business operators or even changing the existing balance contrary to the original legislative intent.

These case law developments appear to share the same goal as the judicial system reform: “juridification” of the society, or making judicial relief more available. It is noteworthy that such developments in case law rather precede judicial system reform. The regulation of long-term service contracts was added to the Law on Certain Kinds of Commercial Transaction in 1999; the Consumer Contracts Act was enacted in 2000; and a series of cases that gradually narrowed the room for a lender to benefit from the “grey zone” interest under the IRRL started at the end of 1990s. This may imply that the judicial system reform does not stand alone but forms a part of the process of gradual transformation of Japanese society.³²

On the other hand, the problem of policy is also raised by the recent activism of the Supreme Court. Since the judgments are based on the finding of facts not justified by the more general policy analysis, the question may arise about whether and how the policy taken by the court is justified. The issue will become more obvious if the judicial system reform succeeds in the “juridification” of Japanese society, with a larger number of lawyers and an enlarged accessibility to the judicial process, resulting in a greater role of the judiciary in society. Thus, in order to consider the meaning of the judicial system reform, one needs to study the developments in case law more seriously, and therefore not merely look at the changes to the regime.

32 The idea of “gradual transformation” as characteristic of the changes in Japanese society originates from LUKE NOTTAGE, *Perspectives and Approaches: A Framework for Comparing Japanese Corporate Governance*, in: Luke Nottage / Leon Wolff / Kent Anderson (eds.), *Corporate Governance in the 21st Century: Japan’s Gradual Transformation* (Cheltenham 2008).

ZUSAMMENFASSUNG

Die aktuelle Reform des japanischen Justizsystems zielt auf die „Verrechtlichung“ der Gesellschaft beziehungsweise darauf, der Öffentlichkeit den Zugang zu juristischen Lösungen zu erleichtern. Jedoch sind japanische Gerichte auch schon vor Inkrafttreten der vielbeachteten Gesetzesreform einige Probleme, etwa im Bereich des Verbraucherrechts, aktiv angegangen, und haben Verbrauchern großzügiger Abhilfe gewährt als früher. In einer der in diesem Beitrag analysierten Entscheidungen wählte der Oberste Gerichtshof in Bezug auf einen langfristigen Dienstvertrag eine Auslegung des Gesetzes, die der gesetzgeberischen Absicht entgegenkommt. In einer anderen Entscheidung legte das Gericht die Beziehung zwischen der Universität und dem Studenten großzügig als Verbrauchervertrag aus, um zugunsten des Verbrauchers Verbrauchervertragsrecht anwenden zu können. Andere Entscheidungen wiederum interpretierten das Gesetz zur Regulierung des Geldverleihs zunehmend enger, was schließlich zu einer Revision des gesamten Gesetzes führte. Die Reform des Justizsystems sollte also nicht isoliert betrachtet, sondern in den größeren Zusammenhang des japanischen Rechtssystems gesetzt werden. Dies gibt den Gerichten eine bedeutendere Rolle bei der Weiterentwicklung des Rechts durch Urteile, als für ein Land in der Tradition des kontinental-europäischen Rechtskreises allgemein angenommen wird.

(Übersetzung durch die Red.)