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The Function of Judicial Practice Concerning the Reform of the Japanese Civil Code (Example of "Contract for Work")

Funkcja praktyki sądowej w świetle reformy japońskiego Kodeksu cywilnego (przykład „umowy o dzieło")

SUMMARY

This paper examines the role of judicial jurisdiction in law-making process in statute countries. The analysis focused on the reformed Japanese Civil Code, which entered into force on 1 April 2020, and more specifically on the conflict between the reformed Civil Code and the precedents of previous legal status. The purpose of the paper was to emphasize that it is extremely important to consider the relationship between new rules and previous precedents. By using the reformed rules of "contract for work" in the Japanese Civil Code reform, this article analyzes and explains the meaning of precedent in law-making process.

Keywords: the Japanese Civil Code reform; the role of precedent; law-making process; contract for work

INTRODUCTION

The article aims to consider the function of the judicial jurisdiction (especially precedents) in the revised process of the Code (Law of Obligations), taking the 2017 reform of the Japanese Civil Code as an example. Japanese legal system is based on the civil law system as a statutory legal system. However, precedents by the Supreme Court play an important role and even have factual binding as I mention as follows[1]. Thus, the precedents have essential status especially in the realm of fundamental laws such as the Constitution Law, the Criminal Code or the Civil Code.

[1] H. Oda, *Japanese Law*, Oxford 2009, p. 42.

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In Japan, a new important bill revised was enacted on 26 May 2017 and the new Civil Code (Law of Obligations; hereinafter mentioned as the reformed Civil Code) came into force on 1 April 2020[2]. The Civil Code reform (Law of Obligations) partly revised the existing Civil Code (hereinafter mentioned as the previous Civil Code). The Civil 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"). This reform does not totally make a change the framework of the previous law, but partly modify it. One purpose of the reform has been generally alleged is that precedents put into the Civil Code[3].

Firstly, it would be confirmed that it is possible to consciously make new legal rules which are different from precedents. As I mention later, the reformed Civil Code incorporated a number of new provisions which are largely different from precedents. However, in this paper the situation under discussion is in the case that the precedent of case law is substantially affected even though the legislature is not conscious of changing the legal doctrine of the precedent. In other words, it is such that the change of some provisions strongly influenced the legal doctrine on the existing precedents in completely unexpected form. It means that case law is strongly affected by the statutory law. In this article, I would like to deal with such situations where legal doctrine in precedents would be affected as a result, although such affection is not conscious in the legislative process and the drafting process. I will handle it as one aspect of the relationship between both a text of the reformed statute and precedents concerning the existing statute.

Then my paper is based on the relationship between precedents and legislation in a Japanese legal reform situation. However, I am firmly convinced that my article has a broad utility to examine the meaning of the reform of the codifications in statutory countries. Statutory countries would more or less have to face such kind of situations after the radical change of the Code like the Civil Code.

[2] The Ministry of Justice, *Civil Code Reform*, www.moj.go.jp/ENGLISH/ccr/CCR_00001.html [access: 4.01.2020].

[3] See Y. Yamada, *The Role of Judicial Precedents in Japanese Law-Making Process – on the Japanese Civil Code (Law of Obligation) Reform*, [in:] *Judicial Precedent in Comparative Approach*, ed. L. Leszczyński, A. Szot, „Studia Iuridica Lublinensia" 2018, Vol. 27(1), DOI: http://dx.doi.org/10.17951/sil.2018.27.1.83.

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THE DOCTRINE OF PRECEDENTS AND JAPANESE LAW

1. The legitimacy of the doctrine of precedents in Japan

I will briefly point out what the binding force of the precedents (in a broader sense of this term) in Japan is.

Firstly, when I refer to the word "precedents" or "case law", the word mainly means the Supreme Court's precedent. Secondly, strictly saying Japanese law does not has the doctrine of precedents as far as common law countries have. In Japan, statutes or legislation is institutional formal legal sources. On the other hand, precedent is not formal institutional legal sources. It means that, even if a lower court makes a decision such that the interpretation of the decision is in conflict with the establishing interpretation of the Supreme Court, the decision of the lower court is completely legal in general.

However, I focus on the point that the precedents are *de facto* binding in the Japanese legal system. We often use the word of the legal doctrine or the *ratio decidendi* by the Supreme Court. Japanese lawyers cannot smoothly go on their established practice or legal services unless they know the Supreme Court precedents as well as the statutory texts.

I will cite two legal texts that legitimate the "*de facto* binding force" of Japanese case law. The *de facto* binding power of Japanese precedents can be justified by the two articles from the Court Act[4].

The first is Article 4 ("Binding Power of Superior Judicial Decisions") of the Court Act. It stipulates that "a conclusion in a judgement by a higher court binds the lower courts with respect to the relevant case. This provision indicates as follows: in the relevant case, a lower court's decision (ex. the high court decision) is appealed to the Supreme Court, and the Supreme Court reverses the lower court's decision and returns it to the lower court. In this situation, the remanded trial (that lower court) is to be bound by the Supreme Court decision reasoning". Thus, the lower court is factually necessary to change the past decisions which the lower court made. If this is not the case, the case will pass back and forth between the Supreme Court and the lower court. However, the application of such binding force is limited to the relevant case.

The second is Article 10 ("Examinations by the Grand Bench and Petty Bench") of the Court Act. It stipulates that "regulations of the Supreme Court determine which cases are to be handled by the grand bench and which by a petty bench; provided, however, that in the following instances, a petty bench may not give a judicial deci-

[4] Act No. 59 of 16 April 1947, www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=% E8%A3%81%E5%88% A4%E6%89%80%E6%B3%95&ia=03&ja=04&ph=&x-=0&y=0&ky=&page=1 [access: 4.01.2020].

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sion: (i) a determination is to be made on the constitutionality of a law, order, rule, or disposition, based on the argument by a party (except when the opinion is the same as that of the judicial decision previously rendered through the grand bench to the effect that the constitutionality of the law, order, rule, or disposition is recognized); (ii) in cases other than that referred to in the preceding item, when any law, order, rule, or disposition is to be decided as unconstitutional; (iii) when an opinion concerning the interpretation and application of the Constitution or of any other laws and regulations is contrary to that of a judicial decision previously rendered by the Supreme Court". The item related to the issue being dealt with is (iii). It means that the Supreme Court must do in the grand bench when changing the decisions of the Supreme Court in the past. There are 15 judges in the Supreme Court of Japan. The Supreme Court of Japan has a grand bench and 3 petty benches. The Grand Court is composed of all 15 members. On the other hand, the 3 petty benches are composed of 5 members. The Supreme Court's decisions of the grand bench and the petty benches are made by majority vote. It leads that the past decision could be changed only when more than 8 judges agree with the change of the past decision in the Supreme Court. This factually makes it difficult to change the Supreme Court's decision in the past.

2. The factual binding of precedents and Japanese legal culture

Moreover, the importance of precedents becomes widespread acknowledge in the legal practice, legal education and legal culture in Japan. The Supreme Court has treated many important interpretations as precedents (case law in a sense of interpretational precedent). Legal professions (Hoso: Judge, Prosecutor and Attorney) generally internally accept legal precedents. In legal education, law school students are studying precedents as having as much value as the text of the statute. For example, the most famous judicial precedent guide book, a collection of important 100 court's decisions, is one of the most important books for students aiming to become a legal profession.

THE REFORMED CIVIL CODE AND THE PRECEDENTS BASED ON THE PREVIOUS CIVIL CODE

1. The accumulation of precedents in the civil law and its legislation

The Japanese Civil Code was created over 100 years ago in the Meiji era. As precedents play an extremely important role in the mentioned way, enormous precedents have been accumulated on the functioning of the Civil Code as well.

It is said that the Japanese Civil Code is produced as the result of comparing many varieties of law. The German Civil Code and the French Civil Code strongly seem

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to have influenced the Japanese Civil Code. Therefore, to understand the text of the Japanese Civil Code, Japanese legal professionals have to be familiar with the text of each provision of the Code but also the judicial precedents accumulated for more than 100 years. It means that it is not easy for the public as laypersons to substantially understand the whole of the Civil Code or to utilize each provision for their purpose. In a consequence, the reflection of the accumulated precedents was often referred to as one of the most important purposes to reform the Civil Code in 2017[5].

2. The reformed Japanese Civil Code and precedents

There is a great deal of complexity about the relationship between the reformed Civil Code and precedents in the law under the previous Civil Code. The part of the precedents was incorporated into provisions of the reformed Civil Code. It means that some legal doctrines on precedents are adapted to the reformed Civil Code, but the other doctrines are not.

We have to separately deal with two cases. One is the case that a legal doctrine on precedents is consistent with a legal doctrine of academic authors. The other one is the case that most academic authors disagree with the legal doctrine on precedents[6].

In former cases such that the court is consistent with academics, the legal doctrines of precedents are generally incorporated into the reformed civil law and then these new articles or revised articles are established in the reformed Civil Code. However, it is not incorporated such that the legal doctrine is not yet mature enough to establish a specified legal rule in legislation even if the legal doctrine becomes mature enough to show it as a court decision.

In latter cases such that the court opinion is different from several academic authors, there could be two types of responses in the reformed Civil Code. One is that the legal doctrine in precedents becomes a legal rule in the Code. The other one is that academic opinions prevail over precedents in courts. This is especially true that the decision of the court not always achieve desired result because the court is more faithful to the text of the article rather than academics. Judges prefer legal stability to specific justice in compare with academics. On the other hand, academics seem to freely interpret the text of provisions to achieve the desired results in compare with courts.

When the precedent doctrine is a conflict with the provision of the reformed Civil Code, the enforcement of the reformed Code would make the precedents invalid. This is quite natural and it generally does not lead serious problems because

[5] The Ministry of Justice, *Civil Code Reform*, www.moj.go.jp/ENGLISH/ccr/CCR_00001.html [access: 4.01.2020]. This Civil Code came into force in April 2020.

[6] Y. Yamada, *op. cit*.

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the occurrence of such conflict would have been fully conscious in the process of the Civil Code reform. However, as a result of the reform, serious problems might occur under specific circumstances. It is such circumstance that the effect of the reform has influence beyond the expectation of drafters of the reformed Civil Code. This paper deals with such a case that in the application of the reformed Civil Code, a serious problem seems to occur in the context of the doctrine of the precedent based on the previous Civil Code. I will show the framework of this type of issue in the form of an example of a contract for work (construction contract).

INCONSISTENCY BETWEEN THE REFORMED CIVIL CODE AND THE PRECEDENT ON THE PREVIOUS CIVIL CODE

1. The problem occurred in the "Contract for Work"

I will take up an example of a construction contract in "Contract for Work" (Section 8 Chapter 8 Book 2) and try to examine the situation where it is doubtful whether the reformed Civil Code is ensured consistency with the precedents in the previous Civil Code.

Regarding the revise in the realm of the "Contract for Work", a number of article are removed from the Civil Code. Among them, I would focus on one of the removed provisions in "Contract for Work". It is Article 634 ("Rectification of defect"). Article 634 of the previous Civil Code stipulates that "1. If any defect exists in the subject-matter of the work the person who ordered the work may fix a reasonable period and demand form contractor the rectification of such defect: however, this shall not apply if the defect is not material and its rectification would involve excessive expense. 2. The person who has ordered the work may demand compensation for damages in lieu of or together with rectification of the defect; in such cases, the provisions of Article 533 shall apply mutatis mutandis"[7].

Article 634 is such clause that if the contracted product has a defect, the orderer (the person who has ordered the work) can require the contractor (the person who has duty to accomplish the work) for repair of the defect, and the orderer can also claim damages in place of the repair of the defect.

The text of Article 634 has a number of issues to be interpreted in more than one way. For example, one of the issues is whether the content of a claim for damages in lieu of a defect repair does not include the cost of repairing a defect or

[7] Outline of the Act Partially Amending the Civil Code and Related Acts (Act No. 34 of 2019), www.japaneselawtranslation.go.jp/law/detail/?re=01&dn=1&x=0&y=0&co=1&ia=03&ja=04&yo=%E6%B0%91%E6%B3%95&gn=&sy=&ht=&no=&bu=&ta=&ky=%E6%B0%91%E6%B3%95&page=3 [access: 7.01.2020].

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not. Another is whether damages can be claimed only after considerable period of time have elapsed from claim for a defect repaired, or orderer can make the claim for damages immediately.

According to the related precedents, it has been established that the repair cost is included in this "damage in lieu of repairing the defect"[8]. In addition, the orderer is free to choose the defect repair or the right to claim damages in place of the defect repair. This means that it is not necessary for an orderer to request a primary repair, but can immediately claim damages in lieu of the primary repair. In other words, the orderer does not have to wait for a considerable period of time to request a defect repair as a precondition for damages. The request of primary repair is reasonable and popular when a contractor's insincere attitude has broken the relationship between the orderer and the contractor.

In the consequence of the reform, Article 634 of the previous Civil Code was deleted in the reformed Civil Code. Where does the mentioned precedents doctrine go on? Why did drafter remove Article 634? To resolve the question, we have to observe sale contract provisions and making process about sale contract in the reformed Civil Code. In Section "Sale of Contract" in Civil Code (in both the previous and the reformed Civil Code) there is Article 559 of "mutatis mutandis" that the provision of this section shall apply mutatis mutandis to contracts for value[9]. Article 559 is one of the causes that Section 634 "Contract for Work" as a contract for value was deleted in the process of the reform.

2. The modification of "sale contract" remedies and the applying mutatis mutandis rule to "Contract for Work"

In the reformed Civil Code, provisions of seller's responsibilities have been significantly changed. These are on the situation where the seller delivers the defective product of specific thing to the buyer. In the previous Civil Code, the buyer should deliver it as it is by the text of Article 483 (delivery of specific thing), even if there is a defect in the specific thing like a house or a used car. Therefore, the buyer cannot claim the damages for the defect by the rule of breach of contract, but claim limited damages based on a special rule of "warranty against defects" of Article 570. However, most academics had strongly criticized the interpretation of Article 483 was too dogmatic to keep the interpretation on the text as I mentioned. Some academics insist on more flexible interpretation based on Article 570 as a breach of

[8] Cf. judgement of the Supreme Court of 15 July 1997, *Minshū*, Vol. 51, No. 6, www.courts.go.jp/app/hanrei_en/detail?id=1238 [access: 7.01.2020].

[9] The term "applying mutatis mutandis" means applying a rule of one provision to another case to be made the necessary modification. Applying mutatis mutandis is very popular method in Japanese legislation. I guess it is also popular in other civil law systems.

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contract neglecting the text of Article 483. However, the court did not agree with the opinion of academics, although the reasonableness of the interpretation by the court is not always guaranteed in the opinions of precedents.

In such background of need of the remedy for the defect on sale, Article 570 was deleted and Article 483 was modified substantially in the reformed civil law making process. In Section 8 of Sale Contract, Articles 562 and 563 establish a new remedy framework for the defect of contract as the following explanation. Moreover, scope of the damages on Articles 415 and 564 are clarified in the context of Sale Contract.

After the reformed Civil Code come to enforce, it is natural that the precedents on Sale Contract would be amended substantially. The reason is why new Articles (562, 563 and 564) substitute for Article 570 (of the previous Civil Code) on trouble about defect of product in a sale contract. The new framework is as follows: when a buyer find the defect of the sale object, the buyer firstly claims to make the subsequent performance like repair, substitute performance or making up a deficiency, after then claims damages on Articles 415 and 564. Although these rules are very different from Article 570 of the previous Civil Code, they are reasonable in the context of Sale Contract. However, if we apply these new articles to "Contract for Work" with the use of Article 559 of "mutatis mutandis", we should considerably examine the consequence of it.

In the use of mutatis mutandis of Articles 562, 564 and 415, it would be a considerable interpretation that in "Contract for Work" an orderer firstly claims to make the object repair and secondary claims to pay compensation for repair. On the other hand, this consequence is a conflict with the precedents on the previous Civil Code. As we mentioned above, Article 634 of the previous Civil Code is not unreasonable rule as Article 570 of the previous Civil Code.

After I checked the records of the legislative process of the reformed Civil Code, some drafters pointed that it would be controversial to largely delete a number of provisions in "Contract for Work" with the use of mutatis mutandis of provisions in Sale Contract. Unfortunately, this critic would be not accepted in the product of the reformed Civil Code. I have to add the observation that I cannot confirm specific discussions about the issue of Article 634 in the government record of the Civil Code making process[10]. It means that Article 634 issues addressed in this presentation did not appear specifically in the drafting committee's arguments. The drafters seem to not always realize such a problem. After the reformed law enacted, some scholars came to point out this issue.

[10] The Ministry of Justice, *Civil Code Reform*, www.moj.go.jp/ENGLISH/ccr/CCR_00001.html [access: 4.01.2020].

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CONCLUSION

In this paper, I have no project to develop specialized interpretations about remedies on "Contract for Work" in Japanese law. What I would like to convey in this paper is a general point to be noted that in law-making process we should take into consideration the relationship between the precedents and the new rules, especially when we insist to delete an existing rule in the reformed process.

I would emphasize the consideration when the method is applied mutatis mutandis. It leads to come front of unforeseen situations in the legislative process unless we pay close attention to consider precedents. Japanese law often uses the technique of mutatis mutandis. However, when deleting the statute which used to be by the method of mutatis mutandis, it is necessary to carefully consider what happens to the precedent doctrine that the statute interprets. In the process of the Japanese Civil Code (Law of Obligations) reform, unfortunately, it seems to be that such consideration is insufficient. These Japanese experiences would become an important lesson for statute law countries like Poland.

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STRESZCZENIE

W niniejszym artykule zbadano rolę orzecznictwa sądowego w procesie powstawania prawa w systemie prawa ustawowego. W toku analizy skoncentrowano się na zreformowanym japońskim Kodeksie cywilnym, który wszedł w życie z dniem 1 kwietnia 2020 r., a konkretnie na konflikcie między zreformowanym Kodeksem cywilnym a precedensami z poprzedniego stanu prawnego. Celem artykułu było rozważenie związku między nowymi przepisami a poprzednim orzecznictwem. Korzystając ze zreformowanych zasad „umowy o dzieło" w kontekście japońskiej reformy Kodeksu cywilnego, w niniejszym artykule przeanalizowano i wyjaśniono znaczenie precedensu w procesie stanowienia prawa.

Słowa kluczowe: japońska reforma Kodeksu cywilnego; rola precedensu; proces stanowienia prawa; umowa o dzieło

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