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## Principles of Equity in the Japanese Civil Law

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# Principles of Equity in the Japanese Civil Law

## Introduction

Social order requires explicit rules and certainty of law. However, equity is the basic norm which is demanded by social life. Equity can be considered to be the method of adjusting the rigidity of legal rules to the changing circumstances of social life.

The humanization of the law is a social demand. Equity may be thought of today as the idea of fairness described as the equilibrium of social relations, of substantial justice, and of humanity.<sup>1</sup>

It was the intention of the legislator of the Japanese Civil Code to find an equitable settlement for every conflict of interest. The fundamental principles of equity as methods for the solution of judicial disputes have become a part of statutory law.

The aim of my essay is to offer a brief account of the general principles as they are applied in the civil law of Japan.

Article 1 of the present Japanese Civil Code, which entered into force in 1948, contains three general principles in the civil law closely related to equity.

Article 1, paragraph 1, establishing the principle of public welfare, provides that:

All private rights must conform to the public welfare.

Article 1, paragraph 2, dealing with the exercise of rights and the performance of duties, provides that:

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\*Judge of the Nagoya District Court.

<sup>1</sup>Koshikawa, *Equity in Japanese Law*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS* ed. by Ralph A. Newman, 1973, p. 425 *et seq.* The space available in this article did not permit a treatment of explanation of the CIVIL CODE article 1 and the problem of civil procedure.

The most eloquent expression of this possibility is found in the *Precepts of Prince Shotoku* (The Constitution of Seventeen Laws) which provided that if the government can bring the people together in a friendly spirit to discuss the conditions and to settle affairs, the truth will be recognised and accepted by both parties and harmony will be restored, and faithfully respect the brotherhood, *THE TEACHING OF BUDDHA*, published by Bukkyo Dendo Kyokai, 4th ed., 1966.

The exercise of rights and performance of duties must be done faithfully and trustily.

Article 1, paragraph 3, accepting the abuse of right doctrine, provides that: No abuse of rights is permitted.

### **I. The Principle of Public Welfare**

The social purpose of the law can be founded on the principle of public welfare. That is why the Japanese Constitution in article 12 provides that the people shall refrain from any abuse of the freedoms and rights guaranteed to the people by this Constitution and shall always be responsible for utilizing them for the public welfare. The analysis of rights in the light of the law could not be shut out from all reference to their social effect. The Constitution posits in article 13 that the people enjoy their rights to the extent that such exercise does not interfere with the public welfare.

This function of the principle of public welfare constitutes the backbone of the civil law. In the sphere of civil law, it takes into account the essential social aspects involved in the existence and exercise of a private right (Civil Code art. 1, para. 1).<sup>2</sup>

As intimated, public welfare reduces the extent of private rights.<sup>3</sup> Article 29 of the Constitution provides that property rights shall be defined by law, in conformity with the public welfare and that private property may be taken for public use upon just compensation therefore.<sup>4</sup>

Under those provisions of the Constitution and the Civil Code article 1<sup>bis</sup>,<sup>5</sup> article 1, paragraph 1 of the Civil Code has only a passive effect in the sense that all private right is always considered to be in harmony with the public welfare, namely does not conflict with the public welfare. It is not possible to refer to article 1, paragraph 1 in a positive way in the sense that all private rights would contribute only to the prosperity of a community. This provision (art. 1, para. 1) establishes the essential principle of public welfare concerning private rights.

In effect, however, the principle of public welfare described above applies to a settlement of conflicts between administrative and individual interests, and to a settlement for individual conflicts which the principle of trustworthiness

<sup>2</sup>PATENT LAW, art. 93.

<sup>3</sup>Cf. *Kobayashi v. Nihon Hatsusoden Kaisha* (Japan Generation and Transmission of Electric Power Co.), Supreme Court, 11 Petty Bench, Dec. 12, 1950, 4 A COLLECTION OF CIVIL SUPREME COURT CASES 625. Public welfare reduces the extent of water rights. The land is under worse water carriage as a result of the construction of the dam. The case connected with river administration (RIVER LAW art. 20).

<sup>4</sup>LAND EXPROPRIATION LAW arts. 1, 71, 72, 82-86; FUNDAMENTAL LAW OF ATOMIC ENERGY art. 21.

<sup>5</sup>CIVIL CODE (1 bis) provides that the Code shall be construed from the standpoint of the dignity of individuals and the essential equality of the sexes.

(art. 1, para. 2), and the doctrine of prohibition of abuse of rights (art. 1, para. 3) could not apply.

The protection and welfare of the weak, inexperienced and helpless has been central to equity. Getting the right balance between the weak and the strong is of direct concern to the principle of public welfare.

## **II. The Principle of Trustworthiness (The Principle of Trust and Faith)**

### *A. The Birth of the Principle of Trustworthiness and the Doctrine of the Abuse of Right*

If one begins inter-individual relations with legality of everything in the private sphere, there is the need for going beyond respect for strict law in order to secure social harmony. That harmony cannot be reached merely by setting legal norms.

In the vindication of individual rights, equity plays a role in adjusting the legal situation of written law to the requirements of a specific individual case. The rigidity of written law as a just solution to be reached in specific situations has been giving way to the birth of the principles of trustworthiness and of the doctrine of the abuse of right.

In Japanese law the idea of equity has long been recognized as a source of legal principles and equity means the general idea of fairness and justice. Thus the Japanese Civil Code includes Article 1, paragraphs 2 and 3 which are comparable to the famous Article 2, paragraphs 1 and 2 of the Swiss Civil Code.

### *B. Distinction Between the Principle of Trustworthiness and the Doctrine of the Abuse of Right*

Particular personal relationships require of the parties a degree of reciprocal trust. Article 1, paragraph 2 of the Civil Code applies to the juridical relationship persons have entered on the basis of a legal or contractual disposition.

The word "trustworthiness" is frequently used loosely; application of the principle of trustworthiness was soon extended even further. Legal decision and some authors<sup>6</sup> admit that article 1, paragraph 2 applies to all juridical acts in general way. To be still more precise, each right and duty, in all of its aspects and to its full extent, is subject to the principle of trustworthiness. For, the analysis of the exercise of a right or the performance of a duty in the light of the purpose of the legal norm could not exclude all reference to its social effect.

However, the word "trustworthiness" essentially implies particular personal

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<sup>6</sup>Supreme Court, May 24, 1962, 16 A COLLECTION OF CIVIL SUPREME COURT CASES 1157; MASO ISHIMOTO, ABUSE OF RIGHTS, Hanrei-enshu Minpo-sosoku, 1973, p.1ff.

relationships. "Abuse of rights" expressed in article 1, paragraph 3 applies only to juridical acts which have no such special relationship between the parties. These two precepts must be kept separated one from another. Social order requires precise rule. So, the principles of equity also need to be further elaborated. The application of those general provisions of article 1 should be divided according to each function.

### *C. Provisions Referring to Trust and Faith*

The Code provision which contains the principle of trustworthiness (art. 1, para. 1) also provides solutions by referring to the "tenor of the obligation" (arts. 415, 493), and other elements (arts. 730, 820). The term "trust and faith" is used in many provisions of Japanese statute law (e.g. the Agricultural Land Law art. 20, para. 2; The Securities and Exchanges Law art. 71, para. 2; the Construction Contractors Law, art. 18; the Real Estate Broker Law art. 31).

### *D. Application of the Principle of Trustworthiness*

#### 1. PARTICULAR RELATIONSHIPS

The principle of trust expressed in article 1, paragraph 1 applies not only to precontractual relations between parties who are negotiating before entering into a contract, but also to interpretation of legal relations and to their completion.

#### 2. THE EFFECT OF CHANGE IN CIRCUMSTANCES

In cases of leases, the principle of trust would become applicable to clarify change in circumstances, taking into account the purpose of the law and the mutual trust which the parties owe to one another.<sup>7</sup>

In the area of monetary obligations, the Supreme Court leaves the creditor to bear the entire burden of the consequences of deterioration in monetary value.<sup>8</sup>

There is no general principle dealing with the inequality of the performances which occurs after the contract has been made.

Social or natural catastrophes change the economic or social facts which are subject to the principle of risk-sharing of the contract. The application of the principle of trust could not justify the influence of natural or social catastrophes.

<sup>7</sup>See, LEASED LAND LAW art. 8 bis.

<sup>8</sup>Jisuke Iwanari v. Toyosuke Kurihara, Supreme Court, 11 Petty Bench, April 6, 1956, 10 A COLLECTION OF CIVIL SUPREME COURT CASES 342. Cf. the theory of nominal value in the area of monetary obligations. An exemption clause or a liability limitation clause is not subject to the principle of trust established in the CIVIL CODE art. 1 para. 2. Unless such a clause violates the public order prescribed article 90, it should be effective; it is usually a kind of autonomous norm. See also, Koshikawa, *ibid.* 427.

### 3. LAW OF OBLIGATIONS

The precept of trust and faith does not apply to the debtor alone, but also to the creditor. Furthermore, the Civil Code in article 1, paragraph 1 establishes the principle of trust as the criterion not only of exercising of rights and performing of duties, but also of interpreting contracts.<sup>9</sup> In the case of contract, the actual will of the interested parties must be sought. If this subjective interpretation fails to disclose any real will, an objective interpretation must be put upon the contract in conformity with the principle of trust. Account must be taken of the presumed will of the parties which manifests itself in the purpose and arrangement of the contract.

#### RESCISSION

In case of notice to quit because the owner needs his house or his land himself, the lessee of a dwelling or land may sue for continuation. The judge must decide the case according to the principle of trust by balancing the social and economic interests of the parties concerned.<sup>10</sup>

If the delay appears to be a trifling one, a rescission of the contract based on the delay cannot be justly exercised in the framework of the principle of trust.<sup>11</sup>

#### THE SECONDARY CONTRACTUAL DUTIES

The principle of trust finds an important application in creating accessory duties beyond those which are expressly laid down by contract or law.

First, there are the accessory duties of protection which appear mainly in relations of a personal nature. In fulfillment of the contract such as work contracts, lease, and sale, creditor and debtor must not injure the person, property or other legal assets of the other party.

Second, the principle of trust may impose upon a party the duty to inform important conditions to the other party.

### 4. FAMILY LAW

The care or the maintenance of the surviving husband or wife is a question of mutual obligation.<sup>12</sup> The nature of maintenance obligations among relatives living together implies that they must be adapted to fluctuations in the cost of

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<sup>9</sup>International Tourist Company v. Dai Kurota, Supreme Court 11 Petty Bench, July 5, 1957, 11 A COLLECTION OF CIVIL SUPREME COURT CASES 1193.

<sup>10</sup>RENTED HOUSE LAW art. 1 bis; LEASED LAND LAW art. 4, para. 1.

<sup>11</sup>Referring to delay payment of the rent (CIVIL CODE art. 601), Supreme Court, April 24, 1951, 5 A COLLECTION OF CIVIL SUPREME COURT CASES 301, July 28, 1964, the same collection 18 vol., p. 1220, June 12, 1969, *Horitsujiho* no. 569, p. 41; referring to sub-lease (CIVIL CODE art. 612), Supreme Court, Jan. 30, 1953, *ibid.* 7 vol., p. 116, Dec. 20, 1956, *ibid.* 10 vol., p. 1581, June 15, 1972, *ibid.* vol. 26, p. 1015.

<sup>12</sup>CIVIL CODE art. 752.

living.<sup>13</sup> The rights of parents over their children cannot be exercised for purely personal ends. The purpose of the law determines essentially the content of the rights of parents.<sup>14</sup>

## 5. CORPORATION LAW

The principle of trust is applicable to the relations between corporations and their members, and furthermore, to the relations among shareholders of a company with limited liability and members of a corporation or association; a corporation and its members or shareholders must act towards each other in accordance with the principle of trust.

### III. The Doctrine of Abuse of Right

#### A. *The Nature of Abuse of Right*

Article 12 of the Constitution prohibits the abuse of rights, and in the sphere of civil law, the Civil Code (article 1, paragraph 3) provides that no abuse of rights is permitted. The same code prohibits also in article 834 abuse of parental power. No legal provision, however, contains a definition of the term "abuse of right."

"Abuse of right" may be defined as an improper exercise of one's right contrary to social order. The prohibition of the abusive exercise of formal rights restrains an improper exercise of right. According to the Civil Code (article 1, paragraph 1), the exercise of rights must be confined within the limits required by the public welfare. Any abuse of a right is an act undermining the existence of any right. The prohibition of the abuse of right makes the given disposition ineffective in conformity with the positive social order. Abuse of right thus destroys its juridical efficacy. A person who exercises his right with the sole intention of damaging another person or for a purpose other than that for which it was granted, has abused his rights. Furthermore, even where a right is used in such a way that the interest to be served is strikingly disproportionate to the damage to be caused, it is presumed to be abused.

Courts and legal writers usually consider when making use of formal rights is considered as a violation of the principle of trust and as an abuse. However, the social bond is becoming the demarcation line of equitable principles, not only in the application of the terms right and duty, but also in determining what those terms mean. The principle of trust would constitute a sufficient ground for protecting individuals in the case of particular personal relations. On the other hand, there is no need for a recourse to the prohibition of the abuse of right in the contractual field. While the principle of trust in the exercise of legal rights

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<sup>13</sup>CIVIL CODE art. 730.

<sup>14</sup>CIVIL CODE art. 820.

or in the fulfillment of duties established in article 1, paragraph 2 applies to the particular relations in the sense which are in conformity with the trust and faith which the parties can expect of one another, the doctrine of abuse of right explained in article 1, paragraph 3 applies only to areas of law such as ownership, intellectual property and unfair competition.

Space permits only a limited study of the criteria of abuse of right in a typical case.

#### *B. The Sole Intention of Injuring Another Person*

Here the exercise of one's right may be characterized by having no other purpose but to injure or annoy another person. The doctrine of abuse of right forbids the use of one's rights for the sole purpose of injuring another person,<sup>15</sup> as already noted.

#### *C. Inconsiderate, Excessive Self-Interest*

Even when a person has a subjective interest in the exercise of his right, it is deemed inequitable and inconsiderate in regard to the justified interests of another person, when the damage to be caused can easily be avoided by a modified exercise of the right which would justify the same interest in an equally effective manner.

#### *D. Clear Disproportion of Interests*

A mere disequilibrium of interests could not of itself be an abuse of right; but too broad an exercise of right in connection with a too limited interest of others could be so considered.

### RELATIONS OF NEIGHBORS

The rules concerning relations of neighbors have their source in the notion of proportionality of interests. The doctrine of abuse of rights is the only means of adjusting conflicts between owners of neighboring property. Ownership is described by article 206 of the Civil Code as the right freely to use, take the profits of, and dispose of the thing owned unless it is forbidden by laws and ordinances.

A landowner who exercises his rights with the sole intention of damaging the interests of a neighbor, has abused his right.

### THE AREA OF SERVITUDES

The exercise of an easement is considered as an abuse if it causes considerable disadvantage to the owner of the charged land out of all proportion to the

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<sup>15</sup>Great Court of Judicature, Oct. 5, 1953, 14 A COLLECTION OF CIVIL GREAT COURT JUDICATURE CASES 1965.



respective small benefits for the holder of the right. If useless servitude results from a change in circumstances in the locality, the exercise of the right is also considered as an abuse.

In Japanese law no general rule obligates the owner of a servitude to exercise his right in the least harmful fashion. However, one must admit that the prohibition of abuse of right can be violated if this use causes harm to another.

#### UNFAIR COMPETITION

The idea of proportionality of interests appears in matters of unfair competition. One who copies a trade name from his competitor within the same town shall be presumed to use it with the purpose of unfair competition.<sup>16</sup>

Unfair competition is considered as an abuse of the right to freedom of economic competition. The purpose of the law of unfair competition is to ensure equality in competition and to protect the consumers. The law of prevention of unfair competition<sup>17</sup> is not regarded as subject to article 1, paragraph 2, because of the absence of any special relationship between rivals.

In July 1975, the Supreme Court ruled that a retail price designation by distributors would not obstruct free price competition and is not justifiable even if it is considered necessary and rational for some businesses. Manufacturers and distributors must be given reasonable prices for their products, but this should be done not through a practice of posting retail prices but through a reasonable cooperation, taking into account also the justified interests of the consumer.

#### EQUITABLE UTILIZATION

Each person is entitled, within his own land, to a reasonable and equitable share in the beneficial uses of the waters of a transboundary basin. Persons have the responsibility to ensure that activities within their land do not cause damage to the environment of other persons. Here one finds the first attempts to apply the doctrine of abuse of right, but the status of abuse of right as a typical solution is far from established even today. The principle of equitable utilization is an essential in the environmental problem, with consideration given to a division of the resource in a way that is as fair as possible to all parties.

#### *E. Impermissible Resort to a Formal Defect*

#### CASES OF TRANSFER OF PROPERTY NOT YET ENTERED IN THE LAND REGISTRY

Article 177 of the Civil Code provides that the acquisition or loss of, or any alteration of rights in immovable property cannot be invoked against a third

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<sup>16</sup>COMMERCIAL CODE arts. 20, 21, 22.

<sup>17</sup>Law No. 14 of 1934.

person until it has been registered in accordance with the provisions of law concerning registration of property.

Where the seller of an immovable property induces the buyer to conclude the purchase agreement without regard to the form requirements of article 177, the Supreme Court has ruled that the abuse of right could be invoked against the buyer who invokes the defect of form, even though inscription in the land registry has not taken place.<sup>18</sup> The formal requirement laid down by the law tends to protect both the parties and the community interest.

#### THE DISREGARD OF LEGAL ENTITY

Article 43 of the Civil Code provides that a juristic person has the rights and duties, subject to the provisions of laws and ordinances and within the scope of its objectives as determined by the articles of incorporation or by the act of endowment. The juristic person is liable for its debts or damages done to other persons by its directors, with its assets, not the assets of its members. In Japanese law, juristic persons are strictly separate from their individual members. Exceptions are made, such as when application of this principle of separation would result in conditions violating the precept of equity, because the recourse to legal separateness would be considered as abuse of formal legal position. The Supreme Court disregards the separate legal entity of the juristic person in such cases.<sup>19</sup>

#### ABSENCE OF SELF-INTEREST

It is an abuse of rules of form if the creditor demands an entry in the land registry which, according to another legal provision, would have to be deleted. Such proceedings are considered as an abuse in seeking to protect an interest not entitled to protection.<sup>20</sup>

#### F. *Altruistic Nature*

Parental power is deemed to be altruistic on account of its nature. This explains why article 820 of the Civil Code provides that a person who exercises parental power has the right and incurs the duty of providing for the custody and education of his or her child; and article 834 provides that if a father or mother abuses parental power, the Family Court may, on the application of any of the child's relatives or of a public procurator, adjudge the forfeiture of the parental power.

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<sup>18</sup>Supreme Court May 24, 1963, 17 A COLLECTION OF CIVIL SUPREME COURT CASES 639, Sept. 3, 1968, 22 A COLLECTION OF CIVIL SUPREME COURT CASES 1817.

<sup>19</sup>Supreme Court, Feb. 27, 1969, 23 A COLLECTION OF CIVIL SUPREME COURT CASES 511.

<sup>20</sup>Nagoya District Court, July 22, 1975. Kaiichi Okada v. Akiko Hibino and State.

Public interest or a third party's rights play an important role in respect to the personal status of an individual.

#### G. *Laches* (*Verwirkung*)

As in other legal systems, laches means failure to do a thing at the proper time, namely unreasonable delay in making a claim or asserting a right. Such delay will bar a party from bringing a legal remedy, although the statutory limitation period has not yet expired for asserting a right. The factual conditions for an application of the principle of laches (*Verwirkung*) are on one hand the absence of adequate excuses for the delay in exercising the right and on the other hand trust and faith on the part of the one who invokes the *Verwirkung*. The concept of laches is very important in intellectual property especially the laws of trademarks, patents and copyrights, and unfair competition. For, in these matters, the inaction of the creditor causes the debtor unnecessary damage. The Supreme Court admits the concept of *Verwirkung* in the field of leases.<sup>21</sup>

### IV. Equity in the Law of Civil Procedure

Article 1 of the Civil Code is applied in civil procedure, whose equity also appears.

#### A. *The Civil Judge's Latitude*

Japanese courts are obligated to solve all disputes. The Constitution, in article 76, paragraph 3, provides that all judges shall be independent in the exercise of their conscience and shall be bound only "by this Constitution and the laws." The judge has to decide according to his own conscience. The expression "this Constitution and the laws" must be understood in the sense of the law, which leaves room for solutions inspired by inference from reason.<sup>22</sup> The Law for Conciliation of Civil Affairs (article 1) also provides that civil disputes shall be settled by inference from reason. And, again, article 1 of the Civil Code has a general scope, in that it permits the judge to study every case submitted to him from the point of view of the principles of public welfare, trust and abuse of rights.

#### B. *Judicial Remedy*

Equitable remedies are flexible and discretionary. Equity, which describes the equality of social relations, balances both the essential circumstances of the

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<sup>21</sup>Supreme Court, Nov. 22, 1955, 9 A COLLECTION OF CIVIL SUPREME COURT CASES 1781, Dec. 16, 1955, *Hanreijihō* no. 65, p. 8.

<sup>22</sup>Koshikawa, *ibid.*, p. 425.

parties and the needs of the case. This has already been evidenced in cases of estoppel (acting in reliance).<sup>23</sup>

Provisional attachment and provisional disposition<sup>24</sup> are granted in light of the balance of convenience.

### *C. Litigation Rights*

Resort to the right of litigation is considered as an abuse when it is exercised not for true satisfaction of interests, but only as a method of damaging somebody else.<sup>25</sup>

### *D. Evidence*

In Japanese law where oral evidence is allowed, as in other systems, equity has a role to play. Thus, the Code of Civil Procedure (article 317) provides as follows:

Should a party, with the object of hindering its use by the other party, destroy a document which he is bound to produce, or otherwise render it unfit for use, the court may deem the allegation of the other party relating to such document to be true.

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<sup>23</sup>Supreme Court, March 26, 1959, 4 A COLLECTION OF CIVIL SUPREME COURT CASES 492, Feb. 1, 1966, 20 A COLLECTION OF CIVIL SUPREME COURT CASES 179.

<sup>24</sup>CODE OF CIVIL PROCEDURE art. 737 ff.

<sup>25</sup>Supreme Court, May 24, 1962, 16 A COLLECTION OF SUPREME COURT CASES 57, Sept. 6, 1968, 22 A COLLECTION OF CIVIL SUPREME COURT CASES 1862.

