Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure*

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In Japan, the doctrine of abuse of right was first introduced into the substantive law early this century and gradually permeated into civil procedure in the post-War period as a part of the broader principle of good faith. Today, the principle of good faith incorporated in the New Code of Civil Procedure of 1996 enjoys a central position in Japanese civil procedure. Japanese courts have relied on the principle whenever a straight application of a statutory rule would contravene the sense of fairness and justice in situations ranging from the use of civil action to the scope of res judicata.

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I. INTRODUCTION—THE DOCTRINE OF ABUSE OF RIGHT IN JAPAN

The doctrine of abuse of right was first introduced in the field of tort law around the turn of the twentieth century. Japanese civil law scholars studied French theories of the abuse of right as it developed in the nineteenth century and advocated its adoption in Japan.[1] Although the Japanese Civil Code of 1896 had been taken largely from the first draft (1891) of the German Civil Code (BGB) and partly from the French *Code Civil*, it did not have any general provision for the doctrine.[2]

Japanese courts have long been reluctant to adopt the doctrine, but an epoch-making decision was made by the highest court of Japan in 1919.[3] The case involved damage to a historical pine tree caused by smoke from a nearby locomotive operated by the State owned National Railways. The highest court at the time, *Daishin'in* or Grand Court of Judicature, held that the right of the railway was abused when the damage suffered by the owner of the tree reached an intolerable degree by socially accepted standards.[4] Since then, the doctrine has been well accepted in the court as well as in academia. Moreover, the post-War amendment in 1947 to the Civil Code explicitly provided for the prohibition of abuse of right. Thus, Article 1, subsection 3, of the Civil Code now declares, "The abuse of right is not permitted."[5]

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1. Perhaps the first systematic presentation of the doctrine was made in Eiichi Makino, *Kenri no Ran'yo* [*Abuse of Right*], 22 HOGAKU KYOKAI ZASSHI 850 (1904), which introduced the theories of eminent French scholars such as Planiol, Saleil, and Gény. Romanized Japanese title followed by English translation in [ ] indicates a Japanese language source.

2. After the Restoration in 1868, the new Meiji government of Japan first attempted to adopt the French system. Professor Gustav Boissonade, who hailed from Paris, led the drafting of the Code Civil de l'Impire du Japon, but, under the new Constitution of 1889, it was rejected by the first session of the newly created Diet (Parliament) in 1890. Then, the Meiji government turned to the German civil code (BGB) which was still in the drafting stage in Germany. The BGB was supposed to become the newest civil code in Europe. Previous experience with the French code inspired the Meiji government to incorporate many French elements in the basically German structure of the code. For the drafting of various basic codes during the early period of the Meiji era (1868-1911), see YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 41-62 (Anthony Angelo trans., University of Tokyo Press, 1976).

3. Shimizu v. Japan, 25 TAIHAN MINROKU 356 (Daishin'in, Mar. 3, 1919).

4. *Id.* It must be noted, however, that the specific Japanese term for abuse of right, *Kenri no Ran'yo*, was not used by the court. It said, "It was not within the proper scope of exercise of a right and amounted to a tort." *Id.* at 362.

5. MIMPO [CIVIL CODE] art. 1(3) (1896 as amended in 1947).

The same amendment also inserted another provision (Art. 1, sub. 2) that required the exercise of good faith (*Treu und Glauben* in German). However, the relationship between the prohibition of the abuse of right and the requirement of good faith is not entirely clear outside the distinct historical origins of these doctrines in the general Civil Law system. The abuse of right doctrine developed in tort law while the good faith doctrine developed in contract law. However, the Japanese Civil Code provides for these principles as generally applicable throughout the entire Civil Code. Thus, in the application by the court, the two doctrines are relied upon interchangeably. In judicial opinions, we often see the expression "violates the good faith and, therefore, is an abuse of right."[6] Where an otherwise established right such as ownership is in question, abuse of right is usually mentioned, while the good faith principle is often relied upon in interpreting a contractual relationship.[7]

II. DEVELOPMENT OF THE GOOD FAITH PRINCIPLE AND ABUSE OF RIGHT IN CIVIL PROCEDURE

A. Pre-War Situation

The Japanese Code of Civil Procedure of 1890, which was originally patterned after the German code (*Zivilprozessordnung* or *ZPO* of 1877), did not have a general good faith provision or a prohibition of abuse of procedural right. The early view in Japan, being heavily influenced by the German procedural doctrines, was that these principles have no place in procedure, as it was the arena where the parties were allowed to fight fully in accordance with the rules of the Code. In fact, the Code of Civil Procedure itself, especially after the extensive 1926 amendment and the modest changes in 1948, had specific provisions for prohibition of arbitrary or delaying behavior of the parties. Some examples include provisions for penalizing a delaying or obstructing party by taxing with the costs thereby incurred (arts. 90 and 91), for rejection of a late allegation (art. 139), a provision for the forfeiture of the right to belatedly question a procedural error (art. 141),[8] a provision which allows the

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6. For example, see Sanenari v. Kenko Pharmacy GmbH, 32 MINSHj 888 (Sup. Ct., July 10, 1978), Matter of Toma, 347 HANREI TAIMUZU 198 (Sapporo High Ct., Nov. 12, 1976), and Nakahara v. Motoki, 16 MINSHj 1157 (Sup. Ct., May 24, 1962).

7. For a general account in English of the Japanese doctrine of the abuse of right, see Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037 (1975).

8. Articles 139 and 141 were introduced by the 1926 amendment which was intended to expedite the procedure. In fact, the 1926 amendment made the Japanese Code of Civil Procedure

court to find against the party who has intentionally destroyed a document which the other party has obtained a court order to produce (art. 317), a provision punishing the party or his attorney who has disputed the authenticity of an evidentiary document without grounds(art. 331), and a provision penalizing an appellant who brings an appeal for delaying purposes(art. 384-2).[9] It was believed that the introduction of a general rule of a prohibitory nature, outside of those embodied in such specific provisions, would unduly restrict the procedural freedom of the parties.

Procedural theorists knew that the German *ZPO* was amended in 1933 to expressly provide for the duty of truthfulness (*Wahrheitspflicht*). Theorists also knew how the doctrine was developed by German courts, which gave rise to a body of case law in this area. However, the mainstream Japanese proceduralists of the time dismissed the idea as representing the fascist ideology of the NAZI regime.[10]

Japanese courts also seemed to follow the doctrine of procedural freedom under the Code. There is no significant court decision in the pre-War period which explicitly acknowledges the principles of good faith or the prohibition of abuse of a procedural right to be applied to conduct in civil procedure.

B. Post-War Development

Having seen that the aforementioned German provision was maintained and much emphasized even in post-War Germany after the

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considerably different from the German original by adopting many procedural institutions which did not exist in Germany. The celebrated Austrian Code of Civil Procedure of 1895 had considerable influence upon the 1926 amendment. The Austrian 1895 Code is known as marking a significant departure from the then traditional approach to the civil procedure as a "private affair"; it also influenced the German reform of 1933. *See Introduction* to 17 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 250 (Mauro Cappelletti & Bryant G. Garth eds., Martinus Nijhoff Publishers 1985).

9. These provisions, articles 90, 91, 139, 141, 317, 331, and 384-2, are now superseded by the New Codes of Civil Procedure of 1996 (effective January 1, 1998), by articles 62, 63, 157, 90, 224II, 230, and 303, respectively, without any substantive changes. Old article 384-2 (now art. 303) was introduced during the post-war reform. CODE OF CIV. PROC. arts. 90, 91, 139, 141, 317, 384-2 (1890 as amended in 1926); CODE OF CIV. PROC. arts. 62, 63, 157, 90, 224II, 230, 303 (1996).

10. That the Austrian Code of Civil Procedure of 1895 already had a provision to the same effect was known by the Japanese academia and it is generally believed that the Austrian Code influenced the German 1933 amendment. Interestingly, however, the liberal mainstream Japanese legal academics in the 1930s took a critical stance toward what looked like NAZI legislation. *See, e.g.*, Jun'ichi Nakata, *Sosho jo no Shinjitsugimu nitsuite* [*On the Duty of Truthfulness in Civil Procedure*], 34 HOGAKU RONSO 203 (1936); Hideo Saito, *NAZI Concept of Civil Procedure* (*Nachisu no minso kan*), 4 HOGAKU 447 (1935).

demise of NAZI regime, Japanese proceduralists of the younger generation began advocating the adoption of the good faith principle in civil procedure.[11] They made it clear that the development in Germany was not a product of NAZI ideology, but a culmination of a general trend of "publicization" of civil procedure which began with the Austrian reform in 1895. The Japanese courts, perhaps inspired by the aforementioned post-War amendments to the Civil Code (which adopted an express provision for the good faith principle and the prohibition of abuse of right), also began applying the principle of good faith to procedural conduct of the parties to litigation.

The first on point Supreme Court decision was in 1959.[12] When one of the necessary parties to the case died, the whole proceeding was interrupted by operation of law.[13] The legal successor of the deceased, who happened to be one of the original parties, continued the proceeding without taking formal steps for succession and later moved to have the resulting judgment annulled because of this procedural error. The Supreme Court held that the successor was barred from doing so because it was against procedural economy and "procedural good faith."[14]

The Court cited a 1939, pre-War, highest court decision (Grand Court of Judicature), which had involved similar facts and had been disposed of similarly.[15] Interestingly, however, the pre-War Court did not even mention the good faith requirement. Rather, it relied on Article 141 of the Code, which barred a party from belatedly protesting against a procedural irregularity. Commentators of the 1959 decision agreed that the court could have simply disposed of the case under Article 141.[16] The newly introduced Civil Code provision

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11. One of the most influential protagonists was Professor Teiichiro Nakano. *See* Teiichiro Nakano, *Minjisosho ni okeru Shingiseijitsu no Gensoku* [*Principle of Good Faith in Civil Procedure*], 43 MINSHL HL ZASSHI 851 (1961). For a presentation of his theory in English, see Teiichiro Nakano, *Kinhangen in Civil Suits*, 13 LAW IN JAPAN, AN ANNUAL 74 (1980).

12. *See* Hirata v. Takeuchi, 13 MINSHj 493 (Sup. Ct., Mar. 26, 1959) (presented in more detail later).

13. *See* CODE OF CIV. PROC. art. 208 (1890 as amended in 1926); CODE OF CIV. PROC. art 124 (1996). All proceedings taking place after an interruption are null and void. These proceedings must be repeated after the successor or the opponent party has taken the formal step of a motion for succession. However, proceedings are not interrupted when an attorney represents the party because the attorney can act on behalf of the successor or the personal representative of a party who died or was incapacitated.

14. Hirata v. Takeuchi, 13 MINSHj 493 (Sup. Ct., Mar. 26, 1959).

15. *See* Fujita v. Sano, 18 TAIHAN MINSHj 1083, 1091 (Daishin'in, Sept. 14, 1939).

16. *See* Tsunahiro Kikui, Case Note, 77 HLGAKU KYLKAI ZASSHI 208, 209-11 (1960); Noboru Koyama, *Soshōkōi no Mukōwo Shuchōshienai Jirei* [*A Case in Which One Cannot Assert Nullification of Procedural Act (Prozesshandlung)*], 41 MINSHL HL ZASSHI 445, 447, 452 (1959);

of good faith probably encouraged the Court to openly rely on the general principle of good faith, but its relevance was not yet explicit because it was combined with the consideration of "procedural economy."

The second relevant Supreme Court decision appeared seven years later, in 1966, and clearly relied on the good faith principle.[17] In this case, service of process was attempted upon a deceased defendant. Service upon a deceased person is void and may be ignored; however, the defendant's legal successor appeared in response and defended the action without objection. Citing the 1959 decision, the Court held that the successor was barred from raising the issue of the illegality of the service, "under the principle of good faith," because he had fully defended the action as if it had been directed against him.[18]

As explained in some detail later, during the post-War period of some fifty years, there have been many decisions, at all levels of the court, affirming the application of the good faith principle, and the prohibition of abuse of procedural rights. These decisions demonstrate that the principle has firmly become a part of the arsenal of Japanese civil justice.

It is significant that, on the basis of this development of case law, the New Code of Civil Procedure of 1996 now expressly provides in Article 2 that "parties shall conduct civil actions in accordance with the principles of good faith and trust."[19] The New Code was put in force on January 1, 1998. Over two years have passed since then, and

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Akira Ishikawa, *Soshōkōi no Mukōwo Shuchōshienai Jirei* [*A Case in Which One Cannot Assert Nullification of Procedural Act*], 34 HLGAKU KENKYj 852, 854-57 (1961).

17. Kumagai v. Nishimura, 20 MINSHj 1173 (Sup. Ct., JULY 14, 1966).

18. *Id.* at 1175.

19. The whole provision (art. 2) reads, "Courts shall make efforts to secure that civil actions be conducted with justice and speed, and parties shall conduct civil actions in accordance with the principle of good faith and trust." As to the new Code of Civil Procedure of 1996, see generally Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997); JOSEPH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 457-75 (Kluwer 1996). Full texts of the new Code and accompanying Rules of Civil Procedure translated into English are found in HATTORI & HENDERSON, CIVIL PROCEDURE IN JAPAN (Taniguchi, Reich & Miyake eds., 2d ed. 2000), *and* KITAGAWA, DOING BUSINESS IN JAPAN, app.6A (Matthew-Bender 1998) (Code only). The same translations of the Code and Rules by Masatoshi Kasai are available in a book form, in which the original Japanese text is shown together with the English version, see HOSOKAI, EIWA TAIYAKU NIHON NO MINJISOSHOHO DO-KISOKU [ASSOCIATION OF JURISTS IN PUBLIC SECTOR, CODE AND RULES OF CIVIL PROCEDURE OF JAPAN, ENGLISH AND JAPANESE VERSIONS JUXTAPOSED] (HMSMkai 1999).

there are a couple of reported court decisions which have relied on the new provision.[20]

III. THE GOOD FAITH PRINCIPLE AND ABUSE OF RIGHT IN CIVIL PROCEDURE

A. Relationship Between the Good Faith Principle and Abuse of Right

The abuse of right has often been discussed in conjunction with the good faith principle. As mentioned earlier, courts sometimes have held that a certain act of a party is contrary to the principle of good faith and, therefore, constitutes an abuse of (procedural) right. Once again, as in the substantive law, the demarcation between the good faith principle and the prohibition of abuse of right is unclear. On a theoretical level, academic opinions are divided on this point.

According to one theorist, the abuse of right should be understood as an application of the principle of good faith.[21] Another argues that the abuse of right is out of place because the question is among the parties and the court, who have already entered into a special relationship of trust where only the principle of good faith should apply.[22] Still another asserts that the relationship among the three actors in civil procedure, namely the two opposing parties and the court, is not always such that it justifies the application of the good faith principle. The doctrine of abuse of right should have independent application in appropriate cases.[23]

The last view is probably more practical and seems to have been adopted by most courts as well. For example, bringing a civil action for the sole purpose of harassing the defendant can be viewed as an abuse of right leading to a dismissal of the action and possibly giving rise to a claim for damages as a matter of substantive law. However, if there has been a certain pre-existing relationship between the parties, the institution of an action may also be regarded as a violation of the good faith principle. In this situation, the violation of good faith, in the world of substantive law, may result in an abuse of

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20. *See* Kono v. Otsukawa, 1004 HANREI TAIMUZU 260-61 (Tokyo Dist. Ct., May 29, 1998) (concerning the exclusion of improperly obtained evidence, as explained later).

21. Teiichiro Nakano, *Principle of Good Faith in Civil Procedure*, *supra* note 11, at 883.

22. Kokki Yamakido, *Minjisoshō to Shingisoku* [*Civil Procedure and Good Faith Principle*], *in* 2 KENRI NO RAN'YL [ABUSE OF RIGHTS (Vol. 2)] 265 (SUEKAWA SENSEI KOKI KINEN [IN MEMORIAL OF SEVENTIETH ANNIVERSARY OF PROFESSOR SUEKAWA] (1962).

23. Kaoru Matsuura, *Tōjisha no kisei genri tositeno singisoku* [*The Good Faith Principle as a Regulatory Principle of the Parties*], *in* 4 KMZA MINJISOSHM[COLLECTED STUDIES IN CIVIL PROCEDURE (Vol. 4)] 251 (KMbundo 1990).

procedural right. It is conceivable that a violation of procedural good faith constitutes an abuse of procedural right. If so, a theoretical question arises as to whether both a violation of the good faith principle and an abuse of procedural right can occur cumulatively or if they are mutually exclusive. Whatever the theoretical relationship between the two doctrines may be, the expression of "abuse of right" has normally been used by the courts when a recognized procedural right, such as the right of action, is at issue.

It is true, however, that in many cases in which the good faith principle was applied by a Japanese court, the court could have held that it was an abuse of procedural right. It seems safer, therefore, to say that the broader principle of good faith, both substantive and procedural, gives rise to a claim of abuse of procedural right in appropriate situations. For this reason, I shall broadly discuss the application of the good faith principle rather than narrowly limiting the scope to the abuse of procedural right as applied by Japanese courts.

B. Persons Bound by These Principles—Parties and Courts or Parties Only?

There has been some discussion as to the person or persons to whom the principle of good faith or the prohibition of abuse of right should be addressed. Should it be addressed only to the parties and their attorneys, or also to the court? The traditional view, which equates the litigation with a private transaction between the parties, limits the application of the principle to between the parties only, and the court is in the position to give a decision on the basis of such transaction. However, when we look to the constant interaction among the plaintiff, the defendant, and the court, there is no reason why the court or judge should be excluded from a relationship requiring good faith.[24] All the participants in litigation (the parties and the court) rely upon the good faith of one another. Lack of good faith, or an abuse of right committed by a judge, will give rise to state liability for damages, although there is no case where such state liability has been found by the court itself. This may be because the Japanese courts assume that good faith is required from the party vis-à-vis the other party and the court, and not vice versa. As quoted

24. Yasuhei Taniguchi, *Minjisosho niokeru Shingisoku* [*Principle of Good Faith in Civil Procedure*], *in* 1 CHUSHAKU MINJISOSHL HO [COMMENTARY ON CODE OF CIVIL PROCEDURE] 47, 50 (Koji Shindo & Takeshi Kojima eds., Ykhikaku 1991).

above, the New Code provision does not include the court in the good faith provision.

IV. TYPES OF APPLICATION OF THE GOOD FAITH PRINCIPLE IN CIVIL PROCEDURE

Violations of the good faith principle can take different forms. Three typical forms usually mentioned are: (A) contradictory procedural behavior, (B) improper creation of a favorable procedural context, and (C) abuse of procedural right.

A. Prohibition of Contradictory Behavior

This situation arises when a party takes a position which is contradictory to his previous position, upon which the other party has already relied and acted accordingly. Generally speaking, contradictory allegations may be advanced as alternatives and any allegation may be changed until the conclusion of the hearing. In Japan, the hearing is customarily held in installments during a long span of time, ranging from two months to two years or more. Legally imposed restrictions on this freedom include: (1) the court may dismiss a late allegation which would cause delay and could have been brought earlier and (2) a plaintiff may change the claim or the cause of action only to the extent that the new claim concerns the same underlying transaction and no serious delay would result therefrom.[25]

Therefore, the good faith principle works outside of these legal provisions, that is, in the area where there is no explicit provision permitting contradictory conduct or the application of these provisions should be avoided for some reason. There are several court decisions which fall in this category. The cases are akin to those of estoppel (*kinhangen* in Japanese) in Common Law.[26] Some of the better known cases follow:

> i. *C* attached to the movables, which were supposed to have belonged to *D*, the debtor. *T* sued *C* to have the attachment lifted, alleging that the attached movables already belonged to *T* because of the assignment of *D*'s business to *T*, and *T* has produced prima facie evidence

25. *See* CODE OF CIV. PROC. arts 157, 143 (1996). In addition, the new Code of Civil Procedure of 1996 now provides in article 156 that the parties must present their allegations "timely." This is an important philosophical change from the old Code. But, in practice, the question is how to enforce effectively this requirement.

26. "*Kinhangen*" in civil procedure has been analyzed as an expression of the principle of good faith in Professor Nakano's English article. Teiichiro Nakano, *Kinhangen in Civil Suits*, *supra* note 11.

of the assignment. Convinced that the assignment had intervened, *C* sued *T* for payment of the debt, owed by *D* to *C* before the alleged assignment. *T* now changes his position and denies the assignment. In this case, the Supreme Court held that, "it goes without saying that such a change of position is generally contrary to the principle of good faith."[27]

ii. As already mentioned above, when one of the necessary parties died during pending litigation and one of the surviving parties happened to be the successor of the deceased, all the surviving parties appealed without taking formal steps for succession of the deceased party. The appellants lost the case on the merits and appealed to the Supreme Court, contending that everything they had done in the appellate instance below was null and void because of the lack of formal succession. The Supreme Court held that such an allegation is not permitted because it is not only against the procedural economy, but it also violates the principle of good faith.[28]

iii. This case was also mentioned before. A complaint addressed to *A* was filed with the court, and the complaint and summons were sent to *A*'s address by mail as a formal service of process. *A* died before the service was effected by delivery of the service documents to a family member of the deceased. As a matter of law, such service upon a deceased person is void and the action must be dismissed. In this case, the heir of *A* took the formal steps for succession and fully defended the action, although the succession was not legally possible because *A* had never become a party because of his premature death.[29] After having lost in the first and second instances, the heir appealed to the Supreme Court, contending that the succession was null and void. The Supreme Court held that the heir, who actively participated in the proceedings below to defend on the merits, was not allowed under the principle of good faith to dispute the validity of his own acts of defense.[30]

iv. When a creditor attempted to seize a debtor's movables held by *B*, *B* pointed to certain pieces of movables as being the debtor's. When the seizure was completed, *B* sued the creditor (by way of a *Drittwiderspruchsklage*) in order to have the seizure lifted by contending that the seized property in fact belonged to *B*. The Supreme Court did not allow such an action as it was contrary to the principle of good faith.[31] In

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27. Kinoshita Lumber Corp. v. Uemura, 27 MINSHj 890 (Sup. Ct., July 20, 1973). However, the Supreme Court concluded that under the special circumstances of this case *T*'s change of position was justified.

28. Hirata v. Takeuchi, 13 MINSHj 493 (Sup. Ct., Mar. 26, 1959).

29. Heir's succession would have been valid if his father had died after having received the service.

30. Kumagai v. Nishimura, 20 MINSHj 1173 (Sup. Ct., July 14, 1966).

31. Kôshi Shôji Corp. v. Itô, 20 MINSHj 179 (Sup. Ct., Feb. 1, 1966); *see also* Chen v. Takanashi Koki Corp., 845 HANREI JIHL 78 (Tokyo Dist. Ct., June 18, 1976); Maehara v. Buko Corp., 857 HANREI JIHL 88 (Tokyo Dist. Ct., Jan. 27, 1977). In the language of these decisions, technically speaking, there is some ambiguity as to whether the courts found a violation of procedural rather than substantive good faith. However, the cases have been generally understood by commentators as dealing with the procedural good faith.

this case, the court could have characterized it as a case of abuse of right of action, but no such term was used in the opinion.

B. Improper Creation of Favorable Procedural Context

When a party utilizes a procedural or substantive possibility in order to achieve a procedurally favorable result which otherwise could not be obtained, the court usually rejects such an option and does not accord the desired effect. Some examples which clarify the rule include:

i. A plaintiff may join several claims in one action and, according to the venue provision, he or she may bring such an action in the venue which is otherwise proper for only one of the joined claims.[32] This provision has been interpreted as also applying to the joinder of defendants, with some qualifications.[33] Thus, the holder of an unpaid promissory note sues the drawer of the note and the first and second endorsers before the court of the jurisdiction in which the second endorser is domiciled. This court was convenient for the plaintiff, while the drawer and the first endorser lived too far away from the jurisdiction in which the plaintiff was domiciled. As soon as the action was officially received by the court, the plaintiff withdrew the action against the second endorser. The court found that the second endorser had been joined only for the purpose of creating competence in a convenient court and condemned this as an "abuse of the plaintiff's right to select the forum."[34]

ii. An insolvent creditor sued a debtor, who, realizing his weak case, bought from a third party a claim against the plaintiff for only 6% of the face value at the very last stage of the proceedings. The debtor then raised a set-off defense against the creditor. The court held that such a set-off was an abuse of right in light of the principle of good faith.[35] This case may be understood as a case of abuse of substantive right of set-off. However, it is also possible to view the case as one under the procedural category, namely, that the defendant created a procedural context which enabled him to raise a set-off defense.

iii. This is a case under the New Code. A husband sued the alleged lover of his wife for alienation of affection. The defendant produced, as

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32. CODE OF CIV. PROC. art. 21 (1890 as amended in 1926); CODE OF CIV. PROC. Art. 7 (1996) (old art. 21 modified as stated in note 33).

33. This interpretation is now codified by *Code of Civ. Proc.* art. 7 (1996), incorporating articles 7 and 38 to provide that more than two parties can be joined in a forum. However, one of the joined parties must have proper venue and the claims for or against the joined parties must be "common" in nature (such as joint and several liability) or based on the same grounds in fact and in law (such as joint tort situation).

34. Kaneno v. Yokoi, 19 KL MINSHj 428 (Sapporo High Ct., Sept. 19, 1966). It must be noted that the jurisdiction or venue is fixed as of the time of filing an action. CODE OF CIV. PROC. art. 15 (1996).

35. Arima Corp. v. Sakurai, 498 HANREI TAIMUZU 163 (Osaka Dist. Ct., Feb. 7, 1983).

> evidence, plaintiff's personal memorandum which had been stolen by his wife from the plaintiff's possession. The court excluded this document saying that its production as evidence would be contrary to the principle of good faith declared in Article 2 of the New Code of Civil Procedure.[36] This was probably the first case in which the new Article was applied by a court. The conclusion is significant because Japanese civil procedure does not recognize the institution of the admissibility of evidence as Common Law does. There have been discussions as to the grounds for which illegally obtained evidence can be excluded.[37] The principle of good faith has been proposed by many academics as the most suitable solution and was adopted in this case by the court. This case may be classified under the abuse of right as well.[38]

C. Abuse of Procedural Right

There are several areas in which the abuse of procedural right is most frequently discussed and affirmed by the courts.

1. Abuse of Right of Challenge

A party may file a challenge when there is a good reason to fear a judge's prejudice against him. When a challenge is filed, the matter must be decided by a panel of judges that does not include the challenged judge.[39] This is because, as an age-old saying goes, "nobody can become the judge of his own case." However, it sometimes happens that a party repeats a groundless challenge only for the purpose of delaying the process. The question is whether this can be regarded as an abuse of right of challenge and may be summarily dismissed by the very judge who has been challenged. The Code of Civil Procedure did not, and does not, have any provision granting such summary dismissal, while the Code of Criminal Procedure (Art. 23) does. Although there has been no Supreme Court decision on this point, it is well established by many lower court decisions that the challenged judge may dismiss a challenge on the spot when he or she regards the motion as a patent

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36. *See* Kono v. Otsukawa, 1004 HANREI TAIMUZU 260-61 (Tokyo Dist. Ct., May 29, 1998).

37. For a summary of the discussion, see Takeshi Kojima, *Mudan* (*Himitsu) Rokuon Tēpu no Shōkonōryoku* [*Admissibility of Secretly Recorded Audiotape*], *in* 2 MINJI SOSHO-HO HANREI HYAKUSEN [SELECTED ONE HUNDRED CASES IN CIVIL PROCEDURE WITH COMMENTS (Vol. 2)], 272 (Koji Shindo et al. eds., rev. ed., 1998) and materials cited there.

38. *Cf. id*. at 273.

39. *See* CODE OF CIV. PROC. art 24 (1996); *id.* art. 25(1)(3).

abuse of right.[40] However, the matter still remains controversial and the New Code of 1996 failed to incorporate the case law into an explicit statutory provision because the organized bar, long critical of the practice of summary dismissal, strongly opposes it.

2. Abuse of Motion for Rescheduling of Hearing

Under the old Code of Civil Procedure, when both parties did not appear at a scheduled hearing and neither party moved within three months for a rescheduling of the hearing, the action was deemed withdrawn.[41] The New Code has not only shortened the period to one month but also made it clear that an action shall be deemed withdrawn if both parties do not appear in two consecutive hearings (art. 263). For various reasons, both parties may wish to repeat nonappearance and file motions for rescheduling for an extended period in order to keep an action alive without having any hearing. A typical and perhaps legitimate reason is that a negotiation for settlement is going on between the parties. Courts have sometimes responded to this situation, however, by dismissing a motion for rescheduling of hearing. For example, in an extreme case, thirteen scheduled hearings had been wasted because of nonappearance of both parties, although one had been rescheduled each time upon a motion by either party. The court dismissed the fourteenth motion as an abuse of right. In this case, the court admitted that there might have been a good reason for the parties to do this but it concluded that the delay thus caused was intolerable because it would harm the public's faith in the justice system.[42] There are several other decisions to the same effect.[43]

Another solution in this situation is to give a final judgment on the merits based on the allegations and evidence so far offered to the court. The Supreme Court has approved this approach,[44] and the New Code has expressly provided for such a possibility (Art. 244). This

40. *See, e.g.*, Matter of Toma, 347 HANREI TAIMUZU 198 (Sapporo High Ct., Nov. 12, 1976); Matter of Kurokawa, 886 HANREI JIHL 42 (Tokyo High Ct., Mar. 31, 1978); Sata v. Ohara, 402 HANREI TAIMUZU 78 (Tokyo High Ct., Sept. 26, 1979); Matter of Shibuya Kensetsu Corp., 1022 HANREI JIHL 68 (Tokyo High Ct., Oct. 8, 1981); Shibuya Kensetsu Corp. v. Takashimaya Jktaku Corp., 1048 HANREI JIHL 114 (Tokyo High Ct., May 25, 1982).

41. *See* CODE OF CIV. PROC. art. 238 (1890 as amended in 1926).

42. Kato v. Sakurayama, 435 HANREI JIHL 29 (Nagoya Dist. Ct., Sept. 30, 1965).

43. *See, e.g.*, Takayasu v. Miki, 22 KAMINSHj 599 (Mito Dist. Ct., May 10, 1971), *rev'd*, 659 HANREI JIHL 60 (Tokyo High Ct., Feb. 22, 1972); Matter of Kamei, Osaka Dist. Ct., Feb. 25, 1974 (not reported), *rev'd*, 789 HANREI JIHL 43 (Osaka High Ct., Jan. 8, 1975).

44. *See* Matsuda Corp. v. Matsuda, 20 MINSHj 1914 (Sup. Ct., Nov. 22, 1966).

provision applies also when only one of the parties does not appear and the appearing party moves for a final judgment.

Judges have been complaining about the inefficiency and added work caused by various types of nonappearances of parties. On the other hand, the parties to a litigation seem to have a legitimate interest in keeping an action alive while negotiating a settlement. The statute of limitation is tolled while an action is pending. Once an action is dismissed or deemed withdrawn, the statute may run because the action is deemed not to have been pending at all.[45] Maintaining many sleeping cases certainly disturbs the business of the court, but it serves the purpose of the civil justice to encourage a settlement and decide when settlement efforts have proven to be a failure. A good balance must be struck between these two conflicting interests.[46]

Thus, when both parties do not appear repeatedly, there are two alternatives from which the court may choose: to dismiss a motion for rescheduling as an abuse of right, or to give a final decision on the merits according to the Code provision. If the former is chosen, the action is deemed withdrawn, thereby making it possible for the plaintiff to bring the same action again unless the statute has run. If the latter is chosen, the only remedy for the losing party is an appeal to the higher court.

3. Abuse of Right to Appeal

The losing party often files an appeal solely for the purpose of delaying the final judgment. The Codes of Civil Procedure, both old and new, have a provision for discouraging this (old Code Arts. 384-2 and 409-3, new Code Arts. 303 and 313). When the appellate court affirms the judgment below and finds that the appeal was filed solely for the purpose of delaying the final judgment, the appellate court may order the appellant to pay the court a penalty of up to ten times the filing fee for the appeal.[47] These provisions were originally added

45. CIVIL CODE art. 149 (1896). However, it is generally understood that the statute of limitations is still tolled for another six months by virtue of Civil Code article 153 which gives a six-month tolling effect to a simple demand, because a withdrawn action can be regarded at least as a demand.

46. Therefore, sometimes decisions of dismissal have been reversed on appeal. For examples, see *supra* note 43.

47. The filing fee is prorated to the amount in controversy to be paid initially by the plaintiff or the appellant and eventually born by the losing party. Appellate filing fees for the second instance are 1.5 times as much and fees for the third instance are twice as much as the first instance filing fee, which is, depending on the size of case, between 1% (for a small case up to 300,000 yen, roughly $2,850) and 0.2% (for a large case over 1 billion yen, roughly $9.5 million) of the amount claimed. COURT COSTS LAW, Law No. 40 of 1971, arts. 3(1), sched. 1.

by the post-War amendment of 1948.[48] There have been several published cases which applied this provision.[49] The provision penalizes an appeal filed solely for delaying the conclusion of a case. If an appeal is filed for any other improper purpose, such as for harassing the other party, however, it seems that the provision cannot apply and the general principle of abuse of right of appeal must be relied upon.

A recent Supreme Court decision illustrates such a situation. A patent applicant brought an appeal to the Supreme Court from a Tokyo High Court decision that upheld a Patent Office's decision to reject plaintiff's patent application. The alleged ground for the appeal was that the appellant had already withdrawn his patent application and the decision below had to be quashed. The Supreme Court held that the appellant abused the right of appeal and dismissed the appeal. The reason was not clearly stated, but it was, perhaps, because the same result could have been easily obtained by withdrawing the original action.[50]

4. Abuse of Right of Action

The right to bring an action in court is guaranteed by the Japanese Constitution (Art. 32), but every right is subject to the prohibition of abuse of right. The Supreme Court has held that an improper exercise of right of action may give rise to tort liability without the mention of the abuse of right doctrine.[51] This case can be interpreted as dealing with the abuse of right of action. In view of the importance of the right of action, its abuse should be found sparingly. The standard of judgment certainly varies with time. In pre-War times, an action by a son against his parent was found by the pre-War highest court, the Grand Court of Judicature, as an abuse under a

48. Old Code articles 384-2 and 409-3 were enacted perhaps under an influence of American occupation which tried to introduce an adversarial nature to Japanese civil procedure to strengthen the first instance procedure. For the post-war reform, see generally Yasuhei Taniguchi, *Between Verhandlungsmaxime and Adversary System—In Search for Place of Japanese Civil Procedure*, *in* FESTSCHRIFT FÜR SCHWAB 487, 499 (Peter Gottwald & Hanns Prütting eds., C.H. Beck 1990).

49. Matter of Ninomiya, 25 KAMINSHj 901 (Tokyo High Ct., Nov. 11, 1974); Ando v. Shiomi, 510 HANREI TAIMUZU 127 (Takamatsu High Ct., Oct. 18, 1983).

50. Sharp Corp. v. Director of Patent Office, 857 HANREI TAIMUZU 107 (Sup. Ct., Apr. 19, 1994). When an action is withdrawn, the already entered judgment becomes null.

51. Hirohara v. Nagano, 42 MINSHj 1 (Sup. Ct., Jan. 26, 1988). The court held that to sue despite a clear knowledge that no claim existed against the defendant was a tort although the present case was not such.

strong Confucian influence.[52] Under the post-War Constitution, which guarantees equality under the law, such an interpretation is no longer acceptable.[53]

(a) Under the present Constitution, the Supreme Court has held the following two actions to be an abuse, or contrary to the good faith principle:

> i. The first case concerns an action for declaration of non-existence of a shareholders' meeting of a private corporation (equivalent to a German GmbH). *A* ran a pharmacy business, in the form of a GmbH, but it was not profitable. *A* held a dominant portion of shares and managed the company as he liked. He sold his shares to *B*, who made the company very profitable in three years. *A* then regretted his actions and brought a suit against the corporation for declaration of non-existence of the shareholders' meeting which approved the assignment of the shares.[54] It is not unusual for a privately owned small company not to follow the required legal steps strictly except for formalities of corporate registration. In this case, the High Court (second instance) found for the plaintiff, saying that the irregularity could not be ignored,[55] but the Supreme Court reversed. It found that *A* was in a good position to hold a shareholders' meeting to obtain the agreement of other shareholders and, moreover, that a considerable time (three years) had passed since the assignment of shares. It then went on to conclude that *A* was violating the good faith principle toward *B* and his action was morally unacceptable as being an abuse of the right of action.[56]

When we talk about the abuse of right of action, we must distinguish it from the abuse of the substantive right which is asserted in an action. Where an abuse of right of action is found, the action must be dismissed as impermissible, but, if an abuse of the underlying substantive right is found, a judgment on the merits must be given in

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52. Sato v. Sato, 22 TAIHAN MINSHj 620 (Grand Court of Judicature, July 12, 1943). The court held, "unless absolutely necessary, such action is not permissible as contrary to the spirit of our beautiful family system and violating our people's traditional moral feeling based on the filial piety. . . ." This ruling can be understood against the nationalistic social condition during the Pacific War, which was being fought at the time.

53. Japanese family law and succession law were completely rewritten after the War (Civil Code Books IV & V as amended by Law No. 222 of 1947) and the "beautiful family system" was legally abolished.

54. GmbH is different from Stock Corporation in that an assignment of share requires consent of all other shareholders. It is generally understood that this kind of action must be brought against the corporation although the real party in interest is *B* and that *B* is bound by a resulting judgment. This conclusion is justifiable because *B* himself defends the action as the representative of the corporation. If not, he can intervene to assist the corporation (*Nebenintervention*).

55. Sanenari v. Kenko Pharmacy GmbH, *reprinted in* 32 MINSHj 901 (Hiroshima High Ct., Okayama Branch, Sept. 30, 1977).

56. Sanerari v. Kenko Pharmacy GmbH, 32 MINSHj 888, 892 (Sup. Ct., July 10, 1978).

favor of the defendant. The Supreme Court treated the aforementioned case as one of the abuse of right of action, perhaps because of the special nature of this kind of action. According to the prevailing view, this type of right of action is not based on any specific substantive right, but it is procedurally recognized to protect the interest of the plaintiff.[57] In any event, this is a significant case in which the Supreme Court expressly found an abuse of right of action.

ii. The second Supreme Court case represents a practical expansion of res judicata by using the good faith doctrine.[58] The facts of the case follow: Immediately after the War, there was a large scale land reform in which the farming lands owned by non-resident landlords were taken by the state for nominal compensation and sold to the tenant farmers on the same land. Thousands of lawsuits were brought by the former landlords against the state or against the present owner. In this case, a former landlord *A* sued present owner *B* for return of the land to *A* on the ground that *A* had bought back the land from *B*. After lengthy litigation, *A* finally lost the case.[59] Some twenty years after the initial acquisition of the land by the state, *A* again sued *B* for the return of the land to *A*. This time *A* sued on the ground that the initial acquisition of the land by the state was null and void and, therefore, the land had never been transferred to the state or to *B*.

Technically speaking, the causes of action regarding these two lawsuits were different; the former based on a contract of sale and the latter based on *A*'s ownership which always remained with *A*. This means that res judicata of the former judgment, would not affect the second action. For this reason, the first instance court did not rely on res judicata, but gave a judgment on the merits in favor of *B* on the ground of successful adverse possession.[60] *A* appealed and the second instance court reversed and dismissed the action as contrary to good faith and impermissible.[61] The Supreme Court affirmed.[62] Admitting that the causes of action were distinct, the Court held that the two actions were essentially the same in purpose and the cause of action of the second action could have been easily joined in the first. In view of the fact that twenty years had passed, the Court concluded that the second action should not be permitted in light of the principle of good faith. The Court did not mention the abuse of right of

57. There are some lower court decisions which condemned a similar action involving a corporate resolution as an abuse of right of action. *See* Tsuchiya v. Hiroshima Bloodbank Corp., 552 HANREI JIHL 76 (Hiroshima High Ct., Dec. 17, 1968); *see also* Ugi v. Japan Student Kaikan Corp., 1259 HANREI JIHL 122 (Kagoshima Dist. Ct., July 29, 1987). For the procedural-substantive ambiguity, see *supra* note 31.

58. Enomura v. Miyoshi, 30 MINSHj 799 (Sup. Ct., Sept. 30, 1976).

59. This decision is not reported.

60. Enomura v. Miyoshi, *reprinted in* 30 MINSHj 806 (Osaka Dist. Ct., Nov. 28, 1970).

61. Enomura v. Miyoshi, 26 KL MINSHU 487 (Osaka High Ct., Dec. 14, 1973).

62. Enomura v. Miyoshi, 30 MINSHj 799 (Sup. Ct., Sept. 30, 1976).

action. However, commentators agree that this case can be better understood as a case of abuse of right of action.

This decision attracted much attention among the Japanese proceduralists because it expanded the scope of res judicata in practice, while keeping a traditional narrow definition. Some commentators, who had advocated expanding the scope of cause of action and, accordingly, the scope of res judicata in general, welcomed the conclusion of the decision. However, they were disappointed at the same time by the reasoning adopted by the Court.[63] Other commentators wondered if the very institution of res judicata should be justified by the principle of good faith.[64] Thus, the scope of res judicata might be better defined not by the formal scope of the cause of action, but by the more flexible general principle of good faith or perhaps by the doctrine of abuse of right.

The Supreme Court, therefore, set a standard, and there have since been many lower court decisions which barred a second action on a technically different cause of action.[65] The Supreme Court's reliance on the good faith principle in dealing with the former adjudication situation has been reiterated by a recent 1998 decision involving a splitting of a cause of action.[66] In 1962, the Supreme Court held that a plaintiff might sue for a portion of a claim and later sue for the balance if he made clear in the first suit that he was suing only for a portion.[67] This decision has been generally interpreted as holding that the plaintiff is permitted to split a monetary claim and to bring a second suit for the balance regardless whether he lost or won the first one.[68] The recent decision has qualified the 1962 decision by

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63. For a summary of various views of commentators, see Tsuyoshi Hara, *Shingisoku (4)—Hanketsu no Kōryoku* [*Principle of Good Faith (4)—Effect of Judgment*], *in* 1 MINJI SOSHL-HO HANREI HYAKUSEN [SELECTED ONE HUNDRED CASES IN CIVIL PROCEDURE WITH COMMENTS] 32 (Koji Shindo et al. eds., rev. ed., 1998).

64. YASUHEI TANIGUCHI, KL JUTSU MINJISOSHL HO [NARRATIVE OF CIVIL PROCEDURE] 343 (Seibundo 1987).

65. For more recent examples, see Mori v. Kyoei Kykshoku Center Corp., 1324 HANREI JIHL 75 (Tokyo Dist. Ct., Dec. 20, 1988); KMo v. Shinsei ShMkai Corp., 1368 HANREI JIHO 74 (Tokyo Dist. Ct., Apr. 16, 1990).

66. Taisei Kensetsu Corp. v. TMshu Kaihatsu GmbH, 52 MINSHj 1147 (Sup. Ct., June 12, 1998).

67. Maekawa v. Shiga SMkotochi Corp., 16 MINSHj 1720 (Sup. Ct., Aug. 10, 1962). The procedural strategy of "partial claim" is often employed in order to save the initial filing fee. The claim can be enlarged by paying additional fees later when, in the course of litigation, the prospect of winning becomes hopeful. The caveat is that the statute of limitation is tolled only for the amount claimed.

68. For various views, see Hiromi Naya, *Ichibu Seikyū to Zangaku Seikyū* [*Partial Claim and Claim for Balance*], *in* MINJISOSHO NO SL TEN [ISSUES OF CIVIL PROCEDURE] 144 (Yoshimitsu Aoyama & Makoto Itoh eds., 3d ed., Yuhikaku 1998).

holding that a plaintiff who lost the first action for a portion of a claim is not allowed to sue later for the balance because it is contrary to the principle of good faith.[69]

The Court did not mention res judicata, but nevertheless addressed the doctrine. It held that the balance of the claim had been found without merit in the previous action and that the plaintiff's allegation in the second action was contrary to such finding.[70] Following the 1962 decision, the Court apparently assumed the position that the balance did not constitute the cause of action of the first action. If so, then technically, the doctrine of res judicata could not be relied upon because it is intended to prevent a second claim on the same cause of action. This is the reason why the Court had to resort to the good faith principle in order to reach a "just" result. However, if res judicata is generally defined as the effect of a former adjudication upon a later action, then the Court has made the principle of good faith an important component of the Japanese doctrine of res judicata. It seems also possible to detect a theoretical affinity for res judicata with the abuse of right by using the good faith principle as a bridging concept.

(b) Although the Supreme Court has not ruled on the issue, there was a recurring kind of action in which the doctrine of abuse of right of action was sometimes relied upon by lower courts. The background of the cases was rather unusual: When the Korean War occurred during the occupation of Japan by the Allied Forces, MacArthur's headquarters ordered a purge of the members of the Japanese Communist Party and its supporters from important positions in the public and private sectors (known as the Red Purge). Because of the "super-constitutional" effect of this order, many people were forced to resign "voluntarily" and accepted customary "quit money." Long after the occupation and purge ended in 1952, many of those workers sued their original employer for reinstatement. Some courts held that the action itself was an abuse or against the principle of good faith,[71] while most other courts found an abuse of substantive right (or a substantive violation of good faith) and gave a judgment on

69. Taisei Kensetsu Corp. v. TM4hu Kaihatsu GmbH, 52 MINSHj 1147 (Sup. Ct., June 12, 1998).

70. *Id.* at 1150.

71. For examples, see Igarashi v. Japan Nat'l Ry., 251 HANREI TAIMUZU 237 (Tokyo Dist. Ct. June 30, 1970); Tsureyama v. Governor of Osaka, 444 HANREI JIHL 94 (Osaka Dist. Ct., Dec. 27, 1965).

the merits against the plaintiff[72] or, without finding any abuse, decided for the plaintiff.[73] These cases raised a difficult question of the demarcation between the procedural abuse and substantive abuse as well as a basic question of any abuse at all.

V. CONCLUSION AND SOME OBSERVATIONS

A brief review of the Japanese cases dealing with various types of the neglect of good faith or of the abuse of a procedural right has revealed that the concept of good faith or abuse of right can have various interpretations in the field of civil procedure. The explicit general provision for the principle of good faith, now included in the Code of Civil Procedure Article 2, can handle a wide range of situations.

Even without such a provision, Japanese courts have accumulated a considerable amount of precedents. There are still a good deal of theoretical questions to be clarified, for example, the question of the relationship between good faith and the abuse of procedural right and the distinction between a procedural abuse and a substantive abuse in law. Nevertheless, an important and indispensable role of these doctrines in the administration of civil justice cannot be doubted.

What really concerns us is the standard upon which we must administer the doctrines. Such a standard can and must vary as society and the economy change. We have already seen this in the example of a son's suit against his parent, as mentioned before. A post-War Supreme Court decision concerning an abuse of the right of execution seems instructive of the point.

The Supreme Court has held that a victim of a traffic accident, with an execution title, abused his right of execution when he seized the property of his debtor, the heir of the tortfeasor.[74] The unusual background of the case was as follows: *V*, who was running a small business with a man-pulled wagon, collided with an automobile and was severely injured. *V* sued the driver and recovered a judgment in 1951. In 1953, the driver committed suicide, by jumping in front of a running train, because of a strong sense of repentance and regret. His

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72. For example, see Naruse v. Mitsui Mining Corp., 14 RL MINSHj 1255 (Fukuoka High Ct., Sept. 26, 1963); Daiei Red Purge Case (parties' names not reported), 252 HANREI TAIMUZU 281 (Osaka High Ct., Apr. 30, 1970).

73. For example, see L uchi v. Japan Monopoly Pub. Corp., 490 BESSATTSU RMDMJUMPO 14 (Hiroshima Dist. Ct., May 7, 1963); Goto v. Japan Tel. & Tel. Corp., 20 RL MINSHj 504 (Tokyo Dist. Ct., June 6, 1969).

74. Nakahara v. Motoki, 16 MINSHj 1157 (Sup. Ct., May 24, 1962).

parents inherited the son's debt. *V* completely recovered from the injury and his business became much more prosperous than before the accident. Nevertheless, more than six years after the judgment, V started an execution of the judgment against the parents of the deceased driver's parents. The first and second instance courts allowed the execution relying on the straightforward application of res judicata.[75]

The Supreme Court reversed and did not permit *V* to do so because it was an abuse of right of execution. The decision reminds us of a Canadian professor's characterization of the Japanese justice system as one of motherly mercy, while, he says, the Western law is paternally harsh as represented in the maxim, "*Fiat justitia, ruat coelum*."[76] This Supreme Court decision seems to confirm his observation. However, even in Japan, the decision was controversial when it was published. Today, under completely different social conditions, it must be even more so. The standard of judgment, as to the good faith and abuse of right, has shifted and will shift further as society and its moral standards change. When we compare our system with those of other countries, differences can be more numerous. However, it is also true that there is an irreversible trend of cultural unification in progress in the contemporary world. Our task in comparative law in the area of civil procedure is to identify the currently valid standard in our own system and a universal standard accepted in all systems. We have much to learn from each other in this interesting field of procedural law which is so interestingly "culture bound."

75. First instance decision is only partly printed in 16 MINSHj at 1178 (Tokushima Dist. Ct., date not reported). The second instance decision is printed in 16 MINSHj at 1180 (Takamatsu High Ct., Sept. 7, 1957).

76. J.C. Smith, *Ajase and Oedipus: Ideas of the Self in Japanese and Western Legal Consciousness*, 20 U.B.C. L. REV. 341 (1986).