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—The Launched of the LL.M. Program, Keio University Law School—

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PREFACE

It is a great pleasure to publish this Commemorative Issue – The Launched of the LL.M. Program, Keio University Law School – and to write a preface to this Issue. Keio University Law School was established in April 2004 and then has produced a large number of legal professions in Japan. And from April 2017, it launched a new legal education course as a graduate school in Japan, exactly a master's degree program in Global Legal Practice, it is called the LL.M. program. This program aims a legal-specific education for legal professions who will hope to get in action in a global field. Therefore it educates all legal-specific subjects in English. This LL.M. program allows students to obtain an LL.M. degree within a single year of instruction. We envisage such global legal professions to be not only Japanese but also non-Japanese, who transcend the parochial national interests of the country to which they belong and, from a truly global perspective, find sustainable common interests and strive to realize them.

The LL.M. program of Keio University Law School focuses on practical, skills-based training, not only via courses specially designed for skill acquisition but throughout its comprehensive curriculum. Internships at a wide range of law firms, companies, and international organizations allow students to apply, add to their knowledge, and contact potential employers. Keio University Law School has tried to cultivate a new field for legal professions who wish to participate in a global range of visions.

This Commemorative Issue should congratulate Keio University Law School on establishing the new LL.M. program. It contains three articles which are written by professors at Keio University Law School. These articles were originally written in Japanese and are now translated into English. They had a lot of influence on the legal-scientific society in Japan, and now we hope that they will have great impacts on the legal-scientific society in the world. It is worth publishing these articles in English at the time of launching the LL.M. program at Keio University Law School.

We would like to express our gratitude to the Faculty of Law at Keio University,

because it has published a series of Keio Law Review and now allows us to publish our articles in this Commemorative Issue as No. 1 of Keio Online Law Journal.

April 2023

KITAI, Isao
Dean of Keio University Law School

MATSUO, Hiroshi
Vice Dean of Keio University Law School and
Director of LL.M. Program

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CONTRIBUTORS TO THIS ISSUE

KATAYAMA, Naoya: Professor of Civil Law, Keio University Law School
YOKODAIDO, Satoshi: Professor of Constitutional Law, Keio University Law School
WADA, Toshinori: Professor of Criminal Law, The University of Tokyo Graduate Schools for Law and Politics

Legal Code & General Principles of Law: Layered Structure of Legal Order & Dynamic Formation of Law

KATAYAMA, Naoya *

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I Introduction – Re-codification & "General Principles of Law"

Amid a Europe-centered trend of re-codification, there is a growing effort focused around contract law to restate "general principles of law"[1], a movement that is expanding to all fields of private law in general[2].

In the 2009 Outline Edition of the "Draft Common Frame of Reference (DCFR)," an academic landmark of the modern era developed and produced by study groups on European private law, an explanation of "Principles" precedes the "Model Rules." There, the approach adopted is not a prescriptive one, but a descriptive methodology wherein the four fundamental principles of freedom, security, justice and efficiency are explained in depth.[3]

* Professor of Civil Law, Keio University Law School

1 Bénédicte FAUVARQUE-COSSON / Denis MAZEAUD/Guillaume WICKER / Jean-Baptiste RACINE / Laura SAUTONIE-LAGUIONIE / Frédéric BUJOLI, *Principes contractuels communs: Projet de cadre commun de référence, Société de législation comparée, titre I: Principes directeurs du droit européen du contrat,* Paris 2008.

2 Axel METZGER (translated by Kunihiro NAKATA), "General Principles of Law in European Private Law"; Yoshikazu KAWASUMI et al., "Present of European Private Law & Japan's Tasks" (Nippon Hyoron Sha Co., 2011), p.383 et seq.; etc.

3 Christian von BAR et al. (translation supervised by Atsumi KUBOTA et al.), "Principles, Definitions & Model Rules of European Private Law / Draft Common Frame of Reference (DCFR)" (Horitsu-Bunka Sha Co., 2013), p.43 et seq.

II "Principles" & "Rules"

So, what are "general principles of law" in the first place? It is difficult to define them, but let us call them a proposition under which principles such as "*favor contractus* (priority of contract execution)", "suitability", "*apparence* (appearance)" do not immediately have the effect of strict legal rules (procedural rules of the court, in particular) but underlie legal rules and function to form new rules through their interpretation, or control the application of such rules. In the laws of jurisdictions heavily influenced by Roman law and common law, such as French Law and German Law, Latin expressions including *"contra non valentem agere non currit praescriptio"* (a prescription does not run against a person who is unable to act ‹to begin the litigation process›) and "*fraus omnia corrumpit* (fraud vitiates everything)" have been preserved as legal maxims.[4] The "Fundamental Principles" stipulated in Article 1 of Japan's Civil Code (namely, the principles of public welfare, good faith, and no abuse of rights) represent the very "general principles of law" laid down as law in the statutory provisions.

What, then, distinguishes "principles" from the "rules" stipulated in statutes, such as the rule in Article 709 of the Civil Code ("Damages in Torts")? Matter of Principle by Ronald Dwokin and the Germna concept of "*bewegliches System* (flexible system)" are prominent theories on this relationship between principles and rules.[5]

Let us compare "legal principles" with "legal rules". Rules are comprised of legal requirements and legal effects. In order to effect a certain outcome, all legal requirements need to be satisfied. For example, Article 709 of the Civil Code stipulates that the right to seek compensation for damages is only available where the following legal requirements are satisfied: an "intentional or negligent" act, "infringement of a right or legally protected interest" (illegality), "damage" and "causation". All four of these requirements must be satisfied; the provision cannot be interpreted to mean this right may arise where, for example, the requirement of illegality has been sufficiently met to such an extent (i.e. the infringement of a right or legally protected interest was very serious) so as to render the requirement of an

4 As to "general principles of law *(principes généraux du droit)*" in France, *cf.* ex. Jean BOULANGER, *Principes généraux du droit et droit positif, in Le droit privé français au milieu du XX^e siècle, études offertes* à *George Ripert,* t. I, Paris 1950, p.51 et seq.; Jean-Louis BERGEL, *Théorie générale du droit,* 4^e éd., Paris 2003, n^o 93 et seq. As reference for classifying and analysing "principles *(principes)*" as a source of law, *cf.* Patrick MORVAN, *Le principe de droit privé,* Ed., Panthéon-Assas, Paris 1999.

5 *Cf.* Hiroshi KAMEMOTO, "Rules & Principles in Law" & "Legal Thinking" (Yuhikaku Publishing Co., 2006), p.125 et seq.; Hitohiko HIRANO, "Interpretation of Law & Weighing of Principles," Ritsumeikan Law Review No. 343 (2012), p.1449 et seq.; Takao KATSURAGI, "Legal Philosophy in Free Society" (Koubundou Publishers Inc., 1990), p.98 et seq.; Keizo YAMAMOTO, "Inquest into Theory of Flexible System in Civil Code," Law Annals (Kyoto University), Nos. 1-3, Vol. 138 (1995), p.208 et seq.; Kunihiko OKUBO, "A Thought on Relations between Theory of Dynamic System & Theory of Principles," Kobe Gakuin Law & Politics Review, No. 2, Vol. 31 (2001), p.189 et seq.; etc. As for relations between the Principles of European Tort Law and the "dynamic system theory," refer to Shuhei YAMAMOTO, "Structure & Method of Legal Assessment in Tort Law – Taking Cue from Principles of European Tort Law (PETL) & Dynamic System Theory (1)~(5, Finale)," Law Annals, Nos. 2-6, Vol. 169 (2011).

intentional or negligent act unnecessary or insufficient (relative weighing of requirements[6]). In other words, an "all or nothing" approach is adopted.

Against the above theory of rules, we may compatatively describe principles of law as a framework for balancing various elements. Walter Wilburg, a leading theorist of the "flexible system" approach, posits this framework as a concept that explains and justifies legal effects in a given legal sphere as the result of combined effects of "*Elemente* (elements)".[7] Put abstractly, as Franz Bydlinski explains, instead of an "all or nothing" structure, principles follow a "*Mehr-oder-weniger-Structur* (more-or-less structure)" and are "*komparativ* (comparative)" in character. As such, when applied to situations with various levels of outcomes, such as the calculation of damages, they produce an "*um so mehr* (even more)" outcome, and when applied to situations in which levels of outcome are not available, such as the determination of the nullity of a contract, they produce an "*um so eher* (even better)" outcome.[8]

Allow me explain using a simple example. A notable principle is the theory of "appearance (trust in appearance)".[9] In Japan, there are provisions (rules of law), such as Articles 110, 192 and 478 of the Civil Code, which protect the apparent trust placed by a third party in appearance. Underlying these provisions is the "legal principle" called the theory of appearance. Based on the presence of apparent rights such as to occupancy and registration, two elements are compared: the liability of the right holder involved in the creation of the apparent right, and the trust placed by a third party in the apparent right. If a weighing exercise results in the latter's favor, the third party is permitted to acquire the right. Thus, the principle arising from the theory of appearance is simply a framework for weighing two conflicting elements; the principle itself does not immediately give rise to a certain legal effect. However, this "legal principle" of appearance makes it possible to lay the groundwork for the creation of a new "legal rule" through its interpretation, for example, the rule on the application by analogy stipulated in Article 94, Paragraph 2, of the Civil Code.[10]

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6 The "correlation theory" weighs aspects of two elements – i.e., the act of infringing interests and the nature of the interests infringed. Regarding one requirement (that of illegality) in a relative manner does not mean the relative comparison of two requirements. The theory is thus narrowly construed as a logical of interpretation of "legal rules" but, in substance, it is similar to the flexible judgment of the elements of the "flexible system" theory, addressed below. For the "correlation theory," refer to Kazuo SHINOMIYA, "A Thought on 'Correlation Theory'" in "History & Tasks of Civil Jurisprudence" compiled by Ichiro KATO (University of Tokyo Press, 1982), p.263 et seq.; Ryohei HAYASHI, "Positioning of Correlation Theory in Tort Law" in "Evolution of Civil Code/Trust Law" compiled by Ichiro KATO & Hiroshi MIZUMOTO (Koubundou Publishers Inc., 1986), p.189 et seq.; etc.

7 *Cf.* YAMAMOTO, *op. cit.* (*5), p.219 et seq.; OKUBO, *op. cit.* (*5), p.192 et seq.; etc.

8 *Cf.* OKUBO, *op. cit.* (*5), p.194, etc. For the "comparison proposition," refer to YAMAMOTO, *op. cit.* (*5), pp.253-256, etc.

9 It is called the theory of *"Rechtsschein"* in Germany and the theory of *"apparence"* in France. *Cf.* Ryoyu KITA, "Theory of Superiority of Appearance" (Chikura Publishing Co., 1976), Seiko NISHIYAMA, "System of Apparent Authority Appointment by Mandate in Relation to Doctrine of Apparent Authority in French Law (1) & (2)," Osaka University of Economics & Law Annals, No. 4 (1980), p.31 et seq., No. 5 (1981), p.37 et seq., etc.

10 *Cf.* Hiroki NAKAYA, "Function of Article 94, Civil Code," Points of Contention over Civil Code (2007), p.65 et seq.; Hideaki KANDA, "Limits to Analogical Application of Article 94, Paragraph 2, Civil

The four fundamental principles of freedom, security, justice, and efficiency[11] as provided by the Draft Common Frame of Reference of European private law can be understood to be an extraction of the very elements that constitute "legal principles". There, it is presumed that these principles may "conflict with one another". Justice may conflict with security/efficiency (e.g. the statute of limitations), freedom may conflict with justice (e.g. the law of contract), there may be conflict between two types of freedoms (e.g. freedom to act and freedom from discrimination), or there may be conflict between two types of justice (e.g. equal treatment and protection of the weak). These principles sometimes "overlap". Accordingly, there are many provisions (legal rules) that can be explained using multiple principles.[12]

III "Guiding Principles of Law" & "Corrective Principles of Law"

There are two kinds of "legal principles" or "general principles of law." Let us turn to French law for an explanation.

In France, "general principles of law *(principes généraux du droit)*" are defined as "rules of law *(règles du droit)*", which "are not natural laws but regardless of whether they have taken a statutory form, are applied according to court precedents and have fully general nature".[13] General principles of law are classified into two categories: "guiding principles of law *(principes directeurs du droit)*" and "corrective principles of law *(principes correcteurs du droit)*". The former is a set of principles effecting social order *(ordre social)* such as the principle that one shall not be taken to not know law, the principle of a matter already judged *(res judicata)*, the principle of equality before the law, and the principle of the non-retroactivity of law. The latter is a set of principles, including the principle of *"fraus omnia corrumpit* (fraud vitiates everything)," the principle of *"nemo auditur propriam turpitudinem allegans* (no one shall be heard who invokes his own turpitude)", and the principle of *"bonne foi* (good faith)", without which legal solutions (*solutions légales*) will go against justice *(injustes*) or cause inappropriate (*inadaptées*) situations to arise.[14] Therefore, these principles are regarded as constituting a "system of self-defense of law *(mécanisme d'autodéfence du droit)*" underlying the jurisprudence of the legal system to achieve the ultimate purposes of law such as moral order, harmonization of various societal relations, and justice.[15]

Code," Meiji Law Journal, No. 6, Vol. 80 (2008), p.135 et seq.; etc.

11 Even though four principles are identified, this does not mean all have equal value. "Freedom, security and justice" are objectives in and of themselves, whereas "efficiency" is a means of attaining the objectives and "is more mundane and less fundamental than the others". But "law is a practical science" and efficiency "underlies a number of the model rules and cannot be fully explained without reference to it". *Cf.* Christian von BAR et al., *op. cit.* (*3), p.43.

12 von BAR et al., *op. cit.* (*3), p.44.

13 BERGEL, *op. cit.* (*4), no 74, p.100; etc.

14 BERGEL, *op. cit.* (*4), no 86, pp.108-109.

15 *Cf. ex.* Jacques GHESTIN / Gilles GOUBEAUX, *Traité de droit civil, Introduction générale,* 4e éd.,

"General principles of law" function as the basis of all legal structures. Therefore, "rules of law *(règles du droit)* can only be enacted *(édicitées)* and can only evolve *(évoluer)* in accordance with general principles (*principes généraux*)".[16] Ergo, awareness of this ability of principles to change a legal system is crucial. Essentially, general principles are realised and applied to specific cases, which are preserved and established through precedents to become pillars of other legal structures, contributing to the creation of new legal rules or in other words, effecting the transformation of a legal system[17].

IV Legal Epistemology & "Legal Principles"

As highlighted in the above insight, the significance of "legal principles" lies in its ability to control applications of law through these interaction with "legal rules", which can lead to the creation of new laws. It is useful to analyse these dynamism from the perspective of legal epistemology *(épistémologie juridique)*. This point is described by the Frenchman François Gény as the following process of "constant regeneration *(la constante régénération)*" of rules of law:[18]

> (1) Acquire one legal provision *(un texte)* or a combination of provisions *(un ensembre de textes)*.
> (2) Extract from the provisions one principle *(un principe)*.
> (3) Elicit new specific applications *(nouvelles applications concrètes)* of this principle.
> (4) Establish these applications within new rules of law *(nouvelles règles de droit)*.

Here, we see the process of how "general principles of law" may create legal rules and transform a legal system. Comparing a principle *(un principe)* to a tree trunk *(le tronc de l'arbre)*, Gény claims that "the trunk produces robust and abundant fruit by stretching resistant roots broadly underground," an expression through which he (i) refers to the upwards transition of legal rules to high-level principles, and (ii) suggests that applications of principles enriches the law. According to Gény, "intuition" and "trial and error *(tâtonements)*" are necessary for (i), and "logic *(logique)*" is important for (ii).[19]

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avec Muriel FABRE-MAGNAN, Paris 1994, n° 760, p.746; Jean-Louis BERGEL, *Méthodologie juridique,* Paris 2001, p.382; Nicolas RONTCHEVSKY, *L'effet de l'obligation,* Paris 1998, n° 119, p.71; etc.

16 BERGEL, *op. cit.* (*4), n° 84, p.106.

17 BERGEL, *op. cit.* (*4), n° 84, p.107.

18 *Cf.* Francois GÉNY, *Méthode d'interprétation et sources en droit privé positif,* 2e éd., revue et mise au courant, t. I, nouveau tirage, Paris 1932, nos 20 et seq., p.41 et seq.; *surtout*, nos 22 et 23, pp.43-47. *V. aussi*, Jean BOULANGER, *Principes généraux du droit et droit positif,* in Études offertes à G. Ripert, t. I, Paris 1950, n° 16, p.63; BERGEL, *op. cit.* (*4), n° 85, pp.107.

19 GÉNY, *op. cit.* (*18), n° 22, p.45.

V Tolerance of Exceptions in "Legal Rules"

To dynamically comprehend the creation of new laws from the perspective of legal epistemology, it is necessary to pay attention to the role of "exceptions" to "legal rules" (and to the legal order in general). In France, for example, the academic dissertation titled The Exception in Private Law *(L'exception en droit privé)*[20] by author Jean-Marc de Moy, presents a model for the "dynamic *(dynamique)*" comprehension of "the principle-exception relationship *(la relation principe/exception)*".[21]

De Moy defines "an exception" as "all things that permit exclusion of a legal rule which would ordinarily be applied but which cannot achieve its goal in the certain specific case".[22] An exploration of the relationship between principles and exceptions reveals that a set of rules *(ensemble normatif)* contains particular regulations *(régulation particuliére)* and that the set comprises one "principle" and one or more "exceptions". We can see here the dynamic *(dynamique)* character of exceptions.[23]

In any individual case wherein a judge excludes the application of legal rules, one of two circumstances are presumed.[24]

On the one hand, there are those situations where "principles" should not be applied as a matter of form; namely, this is a situation of an "exception" produced by way of legal "fiction". Specific examples include that of appearance *(apparence)*, simulation *(simulation)* and presumption *(présemption)*[25].

On the other hand, there those situations where "principles" should be applied as a matter of form, and the exceptions stem from such principles. Typical examples are those exceptions from legal rules that result from the existence of "fraud *(fraude)*," reflected in legal maxims such as *"*fraud vitiates everything *(fraus omnia corrumpit)*" and "fraud constitutes an exceptions to all provision".[26]

A function of "exceptions" identified by de Moy is that of their role in adapting the application of rules to factual situations *(situations due fait)* (in some cases, this function modifies the norms of principles and categorises competing norms into principles and exceptions). According to his analysis, in this way, "exceptions" indirectly realise the ultimate

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20 Jean-Marc DE MOY, *L'exception en droit privé,* Collection du Centre Pierre Kayser, Aix-en-provence 2011.

21 DE MOY, *op. cit.* (*20), n^{os} 726 et seq., p.337 et seq., *surtout*, n^{o} 753. At around the same time, this author also wrote about a similar dynamic theory (*Cf.* Naoya KATAYAMA, "Fundamental Theory on Fraudulent Acts" <Keio University Press, 2011>).

22 DE MOY, *op. cit.* (*20), n^{o} 1, p.17.

23 DE MOY, *op. cit.* (*20), n^{os} 7-8, p.20.

24 DE MOY, *op. cit.* (*20), n^{o} 547, p.238.

25 DE MOY, *op. cit.* (*20), no 566, pp.253-254. These are associated with what is done generally by judges, which is the following: determination of the legal characters of facts *(qualification des faits),* interpretation of rules of law *(interprétation des règles juridiques)*, and a framework concept defined by law (*notions-cadres,* i.e. the discretionary provisions).

26 DE MOY, *op. cit.* (*20), nos 388-389, p.175

goal of law *(finalité du droit)*, that is, to adapt norms to effect specific justice *(justice concrète)*. When rules are applied to facts, many of these facts are in "a similar situation *(situation analogue)*" accounted for by the norms, but often, some of these facts are in "a particular situation *(situation particulière)*" and the simple application of principles brings about "injustice *(injustice)*." Here, "exceptions" serve to bridge the gap between justice and injustice, correcting the incompleteness of general rules. If "principles" function to achieve legal security *(sécurité juridique)*, it may be safely said that "exceptions" function to achieve "equity *(équité)*".[27]

By way of the above analysis, de Moy points out that "the principle-exception relationship *(la relation principe/exception)*" is not a "static *(statique)*" relationship, but a "dynamic *(dynamique)*" one. In accordance with changes in the social climate and the subsequent standards of morality, what used to be regarded as "principles" can be derogated to "exceptions" and conversely, values once deemed as "exceptions" can acquire the position as "principles".[28]

In the following two sections, I will examine in turn "legal fictions" as an example of the extension of legal rules, and the "special circumstances" structure as an example of the contraction of legal rules.

VI "Legal Fiction" as Extension of Rules of Law

In the evaluation of a legal system, the "legal fiction"[29] is an important yardstick. Let us examine as an example the theory of "things" which may be the object of rights.

Japan's Civil Code provides for "things" in Chapter IV, Part I (General Provisions), and stipulates as a "Definition" (Article 85) the following: the term "Things" as used in this Code shall mean a tangible thing. A prevailing theory defines "tangible thing" as a "thing that exists external to human beings and occupies a part of space" or, simply put, it is refers to liquids, gases and solids (a theory of "tangible things"[30]). It follows from this that "intangible things" including energy (natural power) such as electricity and light, rights such as the right to claims, intellectual property such as copyrights and patents, and know-how are precluded from constituting "things" under the Civil Code.

A narrowing of the scope of what may constitute "things", thus limiting the scope of possible objects of rights, to tangible things is an approach that can be found in the laws of civil law jurisdictions that have adopted the Pandekten system of law, such as German and Japanese law. But this approach is rare in terms of comparative law.

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27 DE MOY, *op. cit.* (*20), n^{os} 625-642, pp.283-290.

28 DE MOY, *op. cit.* (*20), n^{os} 726 et seq., p.337 et seq.

29 For "legal fiction," refer to Izutaro SUEHIRO, "Izutaro SUEHIRO (IV) Utility of Fiction (2nd edition)" (Nippon Hyoron Sha Co., 1980); Saburo KURUSU, "Law & Fiction" (University of Tokyo Press, 1999); etc. SUEHIRO's "Utility of Fiction" above says in part: "A look at the history of legal development proves that 'fiction' played the role of a mediator indeed in legal evolution" (p.20).

30 *Cf.* Hideo HATOYAMA, "Overview of Japanese Civil Code: Supplemented Edition" (Iwanami Shoten, 1930), p.239; etc.

In contrast, from an academic perspective, France's Civil Code, unlike Roman law, is characterised by an approach focused around the concept of "property *(les biens)*" instead of "things *(res, choses)*" in its Book 2 titled "property law *(le droit des biens)*". The relevant provision of the French Civil Code stipulates that "all properties *(tous les biens)* are movables or immovables" (Article 516). However, the concept of "movables" is "an open category" and France has recognised within its definition of "movables" new types of property (intangible goods) created as a result of a developing society, property such as intellectual property, customers (business property), and securities portfolios.[31] The concept of "property" under the French Civil Code is dependant upon a thing's relationship with "humans" rather than the identity of the "thing" itself (the object) and bears a similarity to the concept of "rights".[32] Property is something that has "utility" (economic value) for humans and therefore, the distinction between tangible, intangible and collective goods is made in a relative manner.

In Japan, Dr. Sakae Wagatsuma has argued that "restricting things in law to tangible things in physics does not suit today's social and economic climate". He states, the "inability to consider collective property as things also gives rise to various inconveniences" along with the question on energy, asserting that "the notion of things should be expanded to define tangible things in law as those things that may be exclusively controlled under law".[33] An argument gaining steam in recent years claims that "modern society has produced new 'goods' (such as time and information) not traditionally regarded as the object of rights, so the Civil Code must provide a theory that responds to such developments".[34]

Has the Japanese Civil Code's limitation of the scope of things to tangible things completely precluded intangible property from becoming the object of rights? A concept that plays an important role in the answering this question is that of "legal fictions" that serve as exceptions to rules. The provision in Article 245 of the Penal Code stipulating that "electricity shall be deemed to be property" is widely known. In commercial affairs, there is a need for business operators, for example, to access a supply of funds by pledging as collateral fixed assets for business use, including intangible assets offered as collective goods. Given these needs, since the enactment of the Factory Mortgage Act, the Mining Mortgage Act and the Railway Mortgage Act in 1905, shortly after the Civil Code was put into place, Japan has established and expanded various foundation mortgage schemes. Consequently, it has become possible for companies to pledge as collateral tangible and intangible fixed assets or corporate facilities, offered collectively, to obtain loans. The legal technique used here is the

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31 *Cf. ex.* Pierre VOIRIN, *La composition des fortunes modernes au point de vue juridique,* in Rev. gén. droit, 1930, p.103; etc.

32 *Cf.* Naoya KATAYAMA, "Property -- bien & patrimoine" in "200 Years of French Civil Code" compiled by Ichiro KITAMURA (Yuhikaku Publishing Co., 2006), p.181; etc.

33 *Cf.* Sakae WAGATSUMA, "General Provisions, Civil Code (Lecture I on Civil Code): New Edition" (Iwanami Shoten, 1965), p.202.

34 *Cf.* Kazuo SHINOMIYA & Yoshihisa NOMI, "General Provisions, Civil Code [8th Edition]" (Koubundou Publishers Inc., 2010), p.157. Also refer to "Collective Comprehension of Property &Law of Property," NBL No. 1030 (2014), p.46 et seq.

one of "foundations,"[35] which is by its nature a "legal fiction".

Take the Factory Mortgage Act as an example. Extending the concept of added and integrated things (Article 370, the Civil Code), the law provides that a factory mortgage covers "machinery, tools and other goods for factory use installed on the land (building)" (Article 2, Paragraphs 1 and 2). Furthermore, the law recognises the establishment of "foundations" (Article 8 and thereafter). A factory foundation can be established (Article 11) using all or part of the land and the following equipments and rights related to the factory (Item 1); machinery, tools, electric poles, electric cables, rails and other accessories (Item 2); surface rights (Item 3); leasehold rights to things (Item 4); industrial property rights (Item 5); and the right to use a dam (Item 6). Article 14, Paragraph 1, stipulates that factory foundations are deemed immovables. Using this "fiction," a factory foundation may be regarded as a thing (immovable) to be registered in a registry (Article 19), allowing it to become the object of industrial property rights and mortgages (Paragraph 2). By registering the ownership of a factory foundation, things constituting part of the foundation (those that belong to the factory foundation) are barred from disposition (Articles 29, 33).[36] Thus, the use of factory foundations is a legal technique that conceptualises the tangible and intangible fixed assets (profitmaking apparatus) necessary for a business' operation into a single thing (immovable) by way of "fiction".[37]

On the other hand, a railway foundation established pursuant to the Railway Mortgage Act is comprised of tracks (and related property such as land for railways and tools and machinery belonging to it) (Article 3, Item 1), factories, warehouses, etc. and other buildings and premises required for construction work and transportation, as well as tools and machinery belonging to them (Item 2), surface rights, registered leasehold rights, and easements (Item 5), and rolling stock (and tools and machinery belonging to it) (Item 6). Such a foundation is not an immovable but is deemed a single thing (Article 2, Paragraph 3), allowing it to become the object of industrial property rights and mortgages (Article 4, Paragraph 4). Public notice is given through registration (Article 27, Paragraph 1). Unlike a factory foundation, which is established by integrating a factory and its premises, both valued at a high price, into an immovable, a railway foundation is characterised by tracks of a higher monetary value than buildings and their premises, and by treatment of the various goods necessary for railway operation as one integrated thing.[38]

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35 *Cf.* Koji OMI, "Evolution of Japanese Civil Code (2): Special Legislation - Mortgage Laws" in "100 Years of Civil Code (I) General Observation" compiled by Toshio HIRONAKA & Eiichi HOSHINO (Yuhikaku Publishing Co., 1998), p.184 et seq.; Kenzaburo KOZUMI, "Foundation Mortgage System & German Legal System," NBL No. 847 (2006), p.8 et seq.; etc.

36 *Cf.* Eiji SAKAI, "Commentary on Special Laws: Factory Mortgage Law" (Dai-ichi Hoki Co., 1988), p.86 et seq.; etc.

37 A similar character can be found in other foundations such as: "mining foundations" (Article 3, Mining Mortgage Act), "fisheries foundations" (Article 6, Fisheries Foundation Mortgage Act), "port transport business foundations" (Article 26, Port Transportation Business Act), "road transport business foundations" (Article 19, Road Transport Business Mortgage Act) and "tourism facilities foundations" (Article 11, Tourism Facilities Foundation Mortgage Act).

38 Similarly, there are "railway track foundations" (Article 1, Railway Track Mortgage Act, 1909 Law No.

As described above, "foundations" governed by the various mortgage laws are classified roughly into two groups: foundations that are immovables and foundations set up as "things".[39] In either case, it represents a mass of tangible and intangible goods (profitmaking apparatuses) necessary for business operations, but as it is only deemed a thing through legal fiction, it thus maintains economic integrity.

From the perspective of legal epistemology, it may be appropriate to claim that the extensive use of exceptions by application of "legal fictions" suggests the need for a review of the legal rules through legal principles and, eventually, for the reconstitution of a legal system through re-codification.

VII "Special Circumstances" as Contraction of Legal Rules

There are many means of excluding the role of legal rules, which are underpinned by "principles", when they should be applied. On the one hand, there are methods to prevent the occurrence of legal effects presumed by legal rules, such as by employing general corrective principles of law (such as the principles of good faith and no abuse of rights) or the theory of "fraud *(fraude)*", even in cases where a certain legal rule should be applied as a matter of form. On the other hand, in Japan, there exists a judicial doctrine of "special circumstances". We shall examine this here.

An example of the adoption of the "special circumstances" structure in a judicial ruling is an old famous precedent dubbed the "too bad, too bad" verdict (precedent of the Court of Cassation of May 30, 1927) issued by the Supreme Court's pre-war predecessor, the Court of Cassation, regarding the inheritance of consolation money.[40] The first Supreme Court case to recognise "special circumstances" was the top court's ruling of September 25, 1953[41], which restricted the termination of a leasehold contract on the basis of assignment/subleas-

28) to which the Railway Mortgage Act is applied mutatis mutandis, and "canal foundations" (Article 13, Canal Traffic Act) to which the 1909 law is applied mutatis mutandis.

39 *Cf.* Koji OMI, *op. cit.* (*35), p.191; etc.

40 *Cf.* Court of Cassation precedent of May 30, 1927, in Law Newspaper No. 2702, p.5 (more precisely, the pre-war Supreme Court ruling overturned an original verdict on the basis of the following reasoning: "As described before, the original decision recognised the fact that the victim Hirokichi died shouting "too bad, too bad" and appeared to have judged that this did not represent expression of his intention to claim consolation money, and ruled that the above words did not show his intention to claim consolation money against the assailant unless there were special circumstances in which, for example, the victim regretted his fault stemming from such words. In short, the appeal is illegal, lacking justifiable reasons, and this court does not see any reason to hand down its own decision directly".)

41 Supreme Court precedent of September 25, 1953, Minshu Vol. 7, No. 9, p.979. For the "act of disloyalty" theory and the "theory of trust relationship," refer to Sumitaka HARADA, "Article 612, Civil Code (Unauthorized Assignment/Subleasing of Leasehold)" in "100 Years of Civil Code (III) Individual Observations (2) Claims" compiled by Toshio HIRONAKA & Eiichi HOSHINO (Yuhikaku Publishing Co., 1998), p.397 et seq.; Tomohiro YOSHIMASA, "Function & Outlook of Theory of Destruction of Trust Relationship," NBL No. 983 (2012), p.40 et seq.; etc.

ing without permission and established the so-called "act of disloyalty" theory. It was held that "even where a lessee allows a third party to make use of or take the profit generated by a leased thing without obtaining the approval of the lessor, the right to terminate the contract based on this Article (612) does not arise where there are special circumstances that makes the lessee's act short of an act of disloyalty." In other words, a leasehold is a continuous contract in the long term concluded by a person (lessee) and is of a strictly personal nature *(intuitu personae)*. Therefore, the lessee's assignment/subleasing to a third party without permission constitutes an "act of disloyalty" against the lessor (Article 612, Paragraph 1); the Civil Code provides that in such a case, the lessor may terminate the contract without notice (Paragraph 2). This is a "principle". If this principle is applied as it is, it may give rise to not-so-reasonable outcomes in some cases, depending on specific facts of the case. For example, a lessee may sublease a contract to a family member who lives with them, or being a judicious person they may assign the leasehold to that person. In these hypothetical cases, the change in the lessee is only a nominal issue and it can be safely said that there is no change of the lessee in effect. Against this background, the Supreme Court held that unauthorized assignment/subleasing is an act of disloyalty in principle and therefore entitles the lessor may terminate the contract. However, they additionally held that the right to terminate does not arise in case where the existence of "special circumstances" makes lessee's act short of an act of disloyalty.

The Supreme Court's use of the "special circumstances" structure, as described above, has the following significance: first, by making the "principle-exception" relationship clear, it clarifies the party responsible for making assertions and where the burden of proof lies in in the event of litigation ("special circumstances" must be asserted and proved by the party who seeks to deny the application of a principle); second, abstract/formal justice and concrete justice/appropriateness (equity) may be regulated by positing the two as principles and exceptions. On the latter point, it is possible to liken this relationship to that between common law and equity under English law.

Since the Supreme Court ruling, the number of judgements adopting the "special circumstances" structure has increased sharply. According to the TKC Law Library database (as of August 5, 2014), there are a total of 22,975 such precedents (including 21,447 civil cases), of which 1,687 are Supreme Court judgements (including 1,494 civil cases). A statistical and chronological comparison of precedents offers interesting data useful in examining the judicial community's response to society. For example, between 1965-1975 when Japanese society was enjoying rapid economic growth, the judicial doctrine experienced comparative progress, with an overhelming 359 Supreme Court precedents utilising the "special circumstances" structure throughout this period.[42]

In the sphere of international civil litigation, the Supreme Court's adoption of the "spe-

[42] For reference, the number of Supreme Court precedents (civil cases) is as follows: 1945-54: 25, 1955-64: 280, 1965-74: 359, 1975-84: 248, 1985-88: 98, 1989-97: 198, 1998-2007: 226.

cial circumstances" structure[43] has triggered open debate over the merits of the "special circumstances" theory as a framework of judgement for exceptional treatment of decisions on international jurisdiction. The theme has been reflected in the slogan "from special circumstances to a natural forum", under which there has been much debate.[44]

From a comparative law perspective, the debate over the enactment of the new Dutch Civil Code, which gives a great deal of discretion to judges is instructive.[45] Further, it has been said that an important element in movement towards legal unification and re-codification on a global scale lies in the fusion of civil and common law. In this regard, it is expected that comprehensive research will be conducted on the "special circumstances" structure used by the courts of Japan to examine the creation and establishment by of legal rules by judges in under the principles of civil law (statute law).

VIII Conclusion – Layered Structure of Legal Order & Dynamic Formation of Law

This article analysed the relationship between "legal principles" and "legal rules" within the context of the Europe-centered movement towards to re-codification of private law and proceeded to explore the "the principle-exception relationship" inherent in "legal rules".

The article then clarified the relationship between the statutory provisions in Articles 424 to 426 of the Civil Code stipulating the right to demand the rescission of fraudulent acts and the general French law principle of the *fraude* theory (*fraus omnia corrumpit)*, identified the following dynamic *(dynamique)* model[46] ― (1) formal legal rules as principles → (2) *fraude* as exceptions → (3) objectification *(objectivation)* through the easing of requirements → (4) creation of new principles of law ― and on this basis developed the proposition[47] that "general principles of law" (especially "the *fraude* theory" as a "corrective principle of law") are involved in the development of law and constitute the foundation of legal rules. I would like to conclude by recognizing that such a layered structure of legal order and dynamic comprehension (*incessant dialogue*) of principles and exceptions will lead to a gradual evolution of a legal order[48].

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43 Supreme Court precedent of October 16, 1981, Minshu Vol. 35, No. 7, p.1224; Supreme Court precedent of November 11, 1997, Minshu Vol. 51, No. 10, p.4055.

44 *Cf.* "(Symposium) Present & Tasks of Theory of International Civil Procedure Law," Journal of Civil Procedure No. 45 (1999), p.132 et seq. [Shunichiro NAKANO]; "Progress in Autonomy by Parties Concerned over Disputes in International Transactions" compiled by Akira SAITO [Akira SAITO] (Horitsu-Bunka Sha Co., 2005), p.101 et seq.; etc.

45 *Cf.* Arthur HARTKAMP, "Judicial Discretion Under the New Civil Code of the Netherlands" (translated by Hiroo SONO), Minshoho Zasshi (Journal of Civil/Commercial Codes) Vol. 109, No. 4=5, p.647 et seq. (esp. pp.656-659); Naoya KATAYAMA, "Extinctive Prescription System under New Dutch Civil Code" in "Present State & Revision Proposals on Extinctive Prescription Law" compiled by Naoki KANAYAMA (NBL N. 122, Separate Volume, 2008), p.174 et seq.; etc.

46 DE MOY also analyzes gradual legal evolution in five steps regarding filiation of illegitimate children (*enfants naturels*). *Cf.* DE MOY, *op. cit.* (*20), n^{os} 753-754, pp.347-348.

47 KATAYAMA, *op. cit.* (*21), p.7.

48 For the layered structure of legal rules and its dynamic comprehension, refer to Naoya KATAYAMA,

"Types of Fraudulent Acts & Structure of Rules of Law – 'From Theory of Types to 'Theory of Layered Structure of Rules" in "A Collection of Dissertations in Memory of Dr. Keishiro Uchiike, Establishment & Evolution of Private Rights" (Keio University Press, 2013).

Toward Diachronic Self-Government: Public Records and Popular Sovereignty in Japan

YOKODAIDO, Satoshi *

CONTENTS

Introduction

Mismanagement of public records in Japan has been a significant issue since 2010. Such incidents include the failure to note the minutes of meetings responding to the Great East Japan Earthquake in 2011 and COVID-19 in 2020–2021, the cover-up of daily logs by Japan's Self-Defense Forces in South Sudan (from January 2012 to May 2017), the falsification of documents in the Moritomo Gakuen and Kake Educational Institution scandals (2017–2018), and the destruction of the list of attendees to the "Cherry Blossom Viewing Party" hosted by Prime Minister Shinzō Abe (from 2013–2017). Why are public records important in a liberal democratic country? Japanese constitutional law scholars have rarely pointed out, aside from the disclosure of public information, the importance of public records and their management until a series of scandals.[1] One of the causes of public records mismanagement

* Professor of Constitutional Law, Keio University Law School, Japan: Visiting fellow, Trinity College Dublin Law School, Ireland (2022-2023).

1 Junta Okada, *Nihonkoku Kenpō ni Okeru Kōbunsho Kanri Ron: Digital-Ka Jidai no Kenpō Ron ni*

appears to be a lack of sufficient understanding of the significance of public records management from the perspective of constitutional law.

Therefore, in this paper, I attempt to answer this question.[2] I clarify the importance of public records management and disclosure in a democratic nation with a popular sovereign. In addition, I analyze the concept of popular sovereignty in this context and claim that it requires the recording, management, and disclosure of public records as a constitutional obligation. From this perspective, I point out the problems in the systems and practices of public records management in Japan.

I. Development of Laws

In this section, I provide an overview of the development of laws concerning public records and information in Japan, emphasizing the relationship between freedom of expression and popular sovereignty.

1. The Importance of Freedom of Expression in a Democratic Nation

The Supreme Court of Japan (SCJ) stated the importance of freedom of expression, in terms of popular sovereignty, in the famous Hoppō Journal case,[3] as follows:

> In a democratic nation, where sovereign power resides with the people, the following is the foundation of its existence. That is, the people as constituents of that nation may express any doctrine, advocacy of doctrine, and the like as well as receive such information from each other, and by taking whatever he believes rightful from among them of his own free will, the majority opinion is formed, and government administration is determined through such process. Therefore, the freedom of expression, especially the freedom of expression relating to public matters, must be respected as a particularly important constitutional right in a democratic nation. It is considered that this thought lies at the root of paragraph 1, Article 21 of the Constitution.[4]

Mukete [*Archives and the Japanese Constitution in the Digital Age*], 26(1) Hakuoh Hōgaku 243, 245 (2019). *See also* Junta Okada, *Archives in Parliament: Democratic Role of the Japanese National Diet Library*, in Archives for Maintaining Community and Society in the Digital Age 13 (Keiji Fujiyoshi ed. 2021).

2 This article is based on my article: Satoshi Yokodaido, *"Kiroku ga Tsunagu Bundan: 'Kako, Genzai, Mirai o Tsunagu Kuni no Jyūdai na Sekimu to site no Kiroku"* [*The "Division" Connected by "Records": "Records" as a "Vital National Responsibility that Links the Past, Present, and Future"*], in Kenpō to "Bundan" [Constitution and "Divisions"], 137 (Makoto Arai, Shinsuke Tomotsugu, and Satoshi Yokodaido ed. Kōbundō, 2022). This article was supported by JSPS Kakenhi, Grant-in-Aid for Scientific Research (B), Grant Number 22H00919.

3 Saikō Saibansho [Sup.Ct.] June 11, 1986, 40(4) Saikō Saibansho minji hanreishū [Minshū] 872 (grand bench judgment).

4 Nihonkoku Kenpō [Kenpō] [Constitution], art. 21, para. 1: Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed.

The SCJ indicated that the freedom of expression, provided in Article 21, paragraph 1 of the Japanese Constitution, guarantees the free expression of ideas and the free receipt of such ideas without any interference by public authorities. The latter is the "right to know" or "freedom to know." Constitutional law scholars have argued that the right to know has both negative and positive meanings ── not being prevented from receiving information by public authorities and the right to request the disclosure of information held by the public authorities. The reason is that "the people are sovereign and in order for the people as sovereigns to properly monitor and control the activities of the state, it must be made clear to the people what information the government possesses."[5]

2. The Enactment of the Access to Information Act in 1999

The construction of a legal system to embody the right to request the disclosure of government information has been slow. In the 1980s, local governments in various regions enacted information disclosure ordinances that preceded the national government. In 2001, the "Act on Access to Information Held by Administrative Organs"[6] (hereinafter, "Access to Information Act") finally came into effect[7] (it was enacted in 1999). Article 1 stipulates the purpose of the Act as follows:

> The purpose of this Act is, in accordance with the principle of sovereignty of the people, and by providing for the right to request the disclosure of administrative documents, etc., to endeavor towards greater disclosure of information held by administrative organs thereby ensuring to achieve accountability of the Government to the citizens for its various activities, and to contribute to the promotion of a fair and democratic administration that is subject to the citizens' appropriate understanding and criticism.[8]

In the legislative process, there were discussions about whether to specify the "right to know" in this purpose provision; however, it was not explicitly stated. This is because there are various views on the basis and content of the concept of the "right to know" and the SCJ precedents do not explicitly recognize it in a positive sense, namely, the right to request the disclosure of information held by the administrative organs.[9] Instead of the "right to know,"

5 1 Tyūshaku Nihonkoku Kenpō [1 Commentary on Japanese Constitution], 346 (Yasuo Hasebe ed., 2018) (written by Shōjirō Sakaguchi).

6 Gyōsei Kikan no Hoyū suru Jyōhō no Kōkai ni Kansuru Hōritsu [Gyōsei Kikan Jyōhō Kōkai Hō] [Act on Access to Information Held by Administrative Organs], Law No. 42 of 1999 (hereinafter Access to Information Act).

7 Information held by independent administrative agencies is not covered by the Access to Information Act: This is covered by the Dokuritsu Gyōsei Hōjin Tō no Hoyū suru Jyōhō no Kōkai ni Kansuru Hōritsu [Dokuritsu Gyōsei Hōjin Tō Jyōhō Kōkai Hō] [Act on Access to Information held by independent administrative agencies], Law No. 140 of 2001.

8 Access to Information Act, *supra* note 6, art. 1.

9 Syōkai Jyōhō Kōkai Hō [Detailed Explanation of the Access to Information Act], 13–14 (Sōmu-Shō Gyōsei Kanri kyoku [Administrative Management Bureau of the Ministry of Internal Affairs

the legislature uses "the principle of sovereignty of the people." The importance of this decision is discussed later.

Based on this purpose, the Act guarantees every person, even non-Japanese nationals, the right to request disclosure of information[10] in "administrative documents,"[11] and adopts a system in which this disclosure is obligatory (in principle) and can be exceptionally undisclosed only when it falls under the grounds for non-disclosure specified in the Act.[12]

3. The Enactment of the Public Records Management Act in 2009

The disclosure of government information is meaningful only when public records are properly made, maintained, and managed. Therefore, it was necessary to establish a legal system for public record management at the time of the enactment of the Access to Information Act. However, this was on hold until the "Public Records and Archives Management Act"[13] (hereinafter, "Public Records Management Act") came into effect in 2011 (it was enacted in 2009), 10 years after the Access to Information Act.[14] Article 1 stipulates the purpose of the Act as follows:

> The purpose of this Act is, to strive towards proper management of administrative documents and appropriate preservation, use, etc. of historical public records and archives, by providing for the basic particulars concerning management of public records and archives, taking into consideration that public records and archives as records of historical facts and various activities of the State and incorporated administrative agencies, etc. should be available for independent use by the citizens, who have popular sovereignty, as an intellectual resource to be shared by the people in supporting the basis of sound democracy, in accordance with the principle of sovereignty of the people, thereby enabling administration to be managed properly and efficiently, and also ensuring accountability of the State and incorporated administrative agencies, etc. to the public for their various activities in both the present and future.[15]

In this purpose provision, it was declared that the Act was enacted "in accordance with the

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and Communications] ed., Zaimu-Shō Insatsu Kyoku, 2001).

10 Access to Information Act, *supra* note 6, art. 2 para. 3.

11 *Id.* art. 2, para. 2: The term "administrative document," as used in this Act, means a document, picture, and electronic or magnetic record (a record made by an electronic method, a magnetic method, or any other method not recognizable to human senses; the same applies hereinafter) that, having been prepared or obtained by an employee of an administrative organ in the course of their duties, is held by the administrative organ concerned for organizational use by its employees.

12 *Id.* art. 5.

13 Kōbunsho Tō no Kanri ni Kansuru Hōritsu [Kōbunsho Kanri Hō] [Public Records and Archives Management Act], Law No. 66 of 2009 (hereinafter, Public Records Management Act).

14 The National Archives of Japan was established in 1971 and the Public Archives Act was enacted in 1987. However, these Acts are not for recording, managing, and preserving public records in general.

15 Public Records Management Act, *supra* note 13, art. 1.

principle of sovereignty of the people" for "ensuring accountability" to the public in both the present and future. Hence, the idea of diachronic self-government is expressed. Based on this purpose, Article 4 of the Act specifies the obligation to make documents, including the decision-making process, providing that "For the purpose of contributing to the achievement of the purpose specified in Article 1, employees of an administrative organ must prepare documents concerning the following and other particulars to enable decision-making processes including their background in the relevant administrative organ and performance of the affairs and business of the relevant administrative organ to be inquired into or observed logically, except when a case pertaining to processing is minor…"[16] The Act stipulates that the head of the relevant administrative organ must, according to the Cabinet Order provisions,[17] classify and arrange documents,[18] appropriately preserve,[19] register the administrative document files,[20] dispose of the documents after the expiration of the retention period,[21] and report the status of management,[22] etc.[23] ── it contributes to the realization of public records management under uniform rules.

II. Record Keeping and Disclosure as Requirements of Popular Sovereignty

The scandals concerning the mismanagement of public records, seen at the beginning of this paper, occurred after the laws were in place. The reason may be that there is insufficient awareness of why public records management is necessary. It is important to note that both Acts use the phrase "the principle of sovereignty of the people" in Article 1, which declares the purpose of the Acts. What is the meaning of inserting the phrase into both Acts? In this section, I answer this question by focusing on the arguments of a particular constitutional law scholar who played a crucial role in inserting the phrase into Article 1 of the Access to Information Act.

1. The Meaning of the "Principle of Sovereignty of the People"

It was Kōji Satō, an influential constitutional scholar and a member of the Administrative Information Disclosure Subcommittee of the Administrative Reform Commission,[24] who put

16 Public Records Management Act, *supra* note 13, art. 4.

17 Kōbunsho Tō no Kanri ni Kansuru Hōritsu Shikō Rei [Order for Enforcement of the Public Records and Archives Management Act], Cabinet Order, No. 245 of 2010.

18 Public Records Management Act, *supra* note 13, art. 5.

19 *Id.* art. 6.

20 *Id.* art. 7.

21 *Id.* art. 8.

22 *Id.* art. 9.

23 *Id.* art. 10. This Article stipulates the obligation of the heads of an administrative organ to establish rules concerning the management of administrative documents to ensure that the documents are managed properly.

24 This commission was established by the Gyōsei Kaikaku Iinkai Setchi Hō [Act for Establishment of the Administrative Reform Commission], Law No. 96 of 1994.

the phrase, "in accordance with the principle of sovereignty of the people," in the Access to Information Act.[25]

The textbook written by Satō explained "sovereignty of the people" as follows[26]: "sovereignty of the people is…not only the will or authority that establishes and supports the Constitution but also includes the normative requirement that, *on the premise of that Constitution*, the system of national government must be organized to take advantage of this will or authority of the people."[27] Satō called this requirement the constitutive principle of popular sovereignty ── "The constitutive principle of popular sovereignty not only calls for the democratization of the system of governance but also requires that there should be a '*forum for open public debate*' among the people that allows them to constantly monitor and question the system of governance and its activities."[28] Furthermore, Satō emphasizes the direct link between "popular sovereignty" and "freedom of expression." According to Satō, "Freedom of expression, which encompasses freedom of assembly and association and the so-called 'right to know,' is essentially the freedom of the individual from the state, but at the same time, it has an aspect *directly related to* popular sovereignty in the sense that it is a means to maintain and develop a forum for open public debate and to realize political management by the people."[29]

Thus, in Satō's understanding, popular sovereignty, as a constitutive principle, requires a "forum for open public debate" and freedom of expression is positioned as essential for the maintenance and development of this forum and participation in national politics. In addition, by understanding that freedom of expression encompasses the "right to know," popular sovereignty becomes directly linked to it and information disclosure.

2. Public Records Management Act and Popular Sovereignty

Article 1 of the Public Records Management Act uses the phrase "in accordance with the principle of sovereignty of the people."[30] Although Satō did not participate in the process of the enactment of the Act, the phrase is clearly intentional in its relevance and consistency with the purpose of the Access to Information Act. In this regard, Satō stated, "Since the Access to Information Act (ordinances) is interpreted as being based on constitutional requirements, *constitutional control is exercised over the reliable creation of documents (information), the establishment of an appropriate management system, and the establishment*

25 Hiroshi Miyake, Shiru Kenri to Jyōhō Kōkai no Kenpō Seisaku Ron: Nihon no Jyōhō Kōkai Hōsei ni Okeru Siru Kenri no Seisei, Tenkai to Kadai [Theory of Constitutional Policy of Right to Know and Access to Information: Generation, Development and Issues of Right to Know in Japan's Legal System of Access to Information], 3 (Nihon-Hyōronsha, 2021).

26 Satō wrote many textbooks. Among them, I quote his latest textbook, which presents Satō's position more clearly than his earlier one. Kōji Satō, Nihonkoku Kenpo Ron [Theory of the Constitution of Japan] (2nd ed. Seibundō, 2020).

27 Satō, *supra* note 26, at 433 (emphasis in original).

28 *Id*. at 434 (emphasis in original).

29 *Id*. at 434 (emphasis in original).

30 *See supra* text accompanying note 15.

and operation of disclosure standards, etc."[31] In other words, Satō believed that the creation of a system of making documents and their maintenance and information access are constitutionally requested.[32]

This understanding seems to be in line with the "Basic Recognition" of the "Final Report" of the Expert Group on the Way of Public Record Management.[33] The "Final Report" states, "The foundation of democracy is for the people to freely access accurate information, make accurate judgments based on that information, and exercise their sovereignty. The 'official documents,' which are accurate records of the nation's activities and historical facts, are the basic infrastructure supporting this foundation and are the valuable common property of the people, indispensable for learning lessons from the past, as well as, for fulfilling accountability to the people in the future."[34]

3. From Administrative Information to Governance Information

The Access to Information Act and the Public Records Management Act relate to administrative organs' information and records. The legislature and judiciary were excluded from their scope. However, there is no reason to exclude them from the requirements of the people's principle of sovereignty. Satō did not limit the scope of his argument to government-held information. Satō understood that the "forum for open public debate," which is required by "the constitutive principle of popular sovereignty," was a forum to "enable constant monitoring and questioning of *the system of governance* and its activities."[35] Based on this understanding, Satō explicitly wrote that "The Diet (especially the significance of Article 57 of the Constitution[36] regarding the openness of both House of the Diet meetings) and the courts (especially the significance of Article 82 of the Constitution[37] regarding the

31 *Id*. at 281 (emphasis in original). In this sense, Article 4 of the Public Records Management Act (*See supra* text accompanying note 16) is a materialization of this constitutional requirement.

32 From this understanding, the professionals who bear the responsibility of public records management become indispensable actors in a constitutional democracy with popular sovereignty. On this point, *see* Junta Okada, *Archivist no Kenpō-Teki Igi* [*Constitutional Meanings of Archivists*] 25(2) Hakuoh Daigaku Ronshū 145, 151–152 (2011).

33 Kōbunsho Kanri no Arikata Tō ni Kansuru Yūshikisha Kaigi [Expert Group on the Way of the Public Records Management], Saishū Hōkoku: Toki o Tsuranuku Kiroku to shite no Kōbunsho Kanri no Arikata: Ima, Kokka Jigyō to Shite Torikumu [Final Report: The Way of Public Records Management as a Record through Time: Now Working on It as a National Project], Nov. 4, 2008, *available at* https://www.cas.go.jp/jp/seisaku/koubun/hokoku.pdf [last visited Jan. 31, 2023].

34 *Id*. at 1. The idea of diachronic self-government is expressed here, too.

35 Satō, *supra* note 26, at 434 (emphasis in original).

36 Nihonkoku Kenpō [Kenpō] [Constitution], art. 57: (1) Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two-thirds or more of those members present passes a resolution therefor. (2) Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy. (3) Upon demand of one-fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes.

37 Nihonkoku Kenpō [Kenpō] [Constitution], art. 82: (1) Trials shall be conducted and judgment declared publicly. (2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall

openness of judicial proceedings) are at the *center* of the 'forum of open public debate' and are expected to provide the people with important information about national politics and play a role in showing them the path to consider."[38] Satō pointed out that these provisions materialized at the constitutional level of the right to request the disclosure of public information, which is a component of the right to know.[39]

Constitutional law scholar, Hideki Shibutani pointed out the existence of the "principle of openness" of the governance process, which is found in the governance provisions of the Constitution of Japan.[40] Shibutani said, "the principle of openness of the governing process is not only an objective legal norm but also a subjective legal norm (right). It can be said that all the information held by the governing bodies essentially belongs to the sovereign people and that the people have a sovereign right to know the contents of such information. This is a common understanding of the current constitutional law scholarship."[41] Shibutani argued, like Satō, that the direct linkage between the right to know and the principle of sovereignty of the people is cited as the basis for the principle of openness of the administrative information and the governing process.

III. Problems with the System and Practice

If the principle of sovereignty of the people requires the principle of openness of the governance process, it is important to look at the records of the entire governing process, including administrative, legislative, and judicial documents and information, from the perspective of popular sovereignty. In this section, I point out the problems with the system and the practice of managing these records in the Diet.[42]

1. Records of Business of Both Houses

The Secretariat of the House of Representatives and the Secretariat of the House of Councilors hold certain documents. Both Secretariats enacted the Rules for Handling Documents.[43]

always be conducted publicly.

38 Satō, *supra* note 26, at 434 (emphasis in original).

39 *Id.* at 281, 309.

40 Hideki Shibutani, Kenpō [Constitutional Law], 521 (3rd ed. Yūhikaku, 2017).

41 *Id.* However, the understanding that "This is a common understanding of current constitutional law scholarship" is questionable. If this understanding is correct, why have constitutional law scholars in Japan not emphasized the importance of archive management? *See* Okada, *supra* note 1, at 245.

42 Although this article does not touch on court records, this does not mean that there is no problem. The most serious problem concerning the court case records is that they are to be discarded after the established retention period. It is reported that several case records concerning important constitutional and administrative law precedents and high-profile crimes are discarded. The SCJ recently ordered high, district, and family courts to keep records, even if they have reached the end of their mandated retention periods, to review whether historically valuable materials have been handled appropriately. *See e.g., Top court orders temporary blanket halt to disposal of case files*, Kyodo News, Nov. 2, 2022, available at https://english.kyodonews.net/news/2022/11/f096c5adacd0-top-court-orders-temporary-blanket-halt-to-disposal-of-case-files.html [last visited Jan. 31, 2023].

43 Syūgiin Jimukyoku no Hoyū Suru Giin Gyōsei Bunsho no Kaiji Tō ni Kansuru Jimu Toriatsukai Kitei [Syūgiin Jimukyoku Bunsho Toriatsukai Kitei] [Rules for the Administration of Disclosure, etc., of House

However, these rules have certain problems. As Ayako Ōkura, the public records management specialist pointed out,[44] the Rules only state that the purpose of document management is proper and efficient execution of administrative work; there is no perspective of accountability to the present and future citizens, as stated in Article 1 of the Public Records Management Act.[45] In addition, the creation of documents is not mandatory and specific examples of documents to be created are not provided. Furthermore, the organization of the documents is not obligatory and does not indicate the criteria for setting retention periods. The preservation of the documents is also not obligatory and is managed in a decentralized manner. Article 13, Paragraph 2, of the Supplementary Provision of the Public Records Management Act, stipulates that "management of the documents of the Diet and the courts is to be subject to review, in consideration of the purpose of this Act, as well as the status, power, etc., of the Diet and the courts." Hence, it is necessary to develop the system because it is a constitutional obligation.

2. Minutes of Meetings in the Diet

Article 57, paragraph 2, of the Constitution[46] requires the preparation, preservation, publication, and distribution of "record of proceedings" or "minutes of meetings" of both Houses of the Diet at the constitutional level to make it possible to confirm the proceedings and deliberations of the Diet to make them widely known to the people.[47] Although this Article directly covers only plenary sessions, it is often said that the provision applies *mutatis mutandis* to committees due to its purpose.[48] Hence, the provisions of the Rules of the House of Representatives and the House of Councilors, which provide for the preparation of the minutes of the committee meetings,[49] can be regarded as embodying the requirements of the Constitution. Currently, the minutes of the plenary sessions and the committee meetings of each House of the Diet can be viewed in text or image format through the National Diet Library's Diet Meeting Minutes Search System,[50] starting from the first Diet session (May

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of Representatives Administrative Documents Held by the Secretariat of the House of Representatives] (Agency Instruction No. 1 of 2008), and Syūgiin Jimukyoku no Hoyū Suru Jimukyoku Bunsho no Kaiji Tō ni Kansuru Jimu Toriatsukai Kitei [Sangiin Jimukyoku Bunsho Toriatsukai Kitei [Rules for the Disclosure, etc., of Secretariat Documents Held by the Secretariat of the House of Councilors] (decision by the Secretary-General in 2011).

44 Ayako Ōkura, *Sangiin Jimukyoku Oyobi Syūgiin Jimukyoku ni Okeru Genyō Bunsho no Kanri* [*Management of Working Documents in the Secretariat of the House of Councillors and the Secretariat of the House of Representatives*], 75 Records Management 23, 44 (2018).

45 *See supra* text accompanying note 15.

46 *See supra* note 36.

47 3 Tyūshaku Nihonkoku Kenpō [3 Commentary on Japanese Constitution], 761 (Yasuo Hasebe ed. 2020) (written by Masakazu Doi) (hereinafter, Commentary).

48 *Id*. at 745.

49 Syūgiin Kisoku [Rules of the House of Representatives], art. 61-63 and Sangiin Kisoku [Rules of the House of Councilors], art. 56–59.

50 https://kokkai.ndl.go.jp/#/ [last visited Jan. 31, 2023]. Stenographic records of meetings at plenary sessions and committees at the Imperial Diet under the Constitution of The Empire of Japan are also available from the first session of the Imperial Diet (Nov. 29, 1890), via the Imperial Diet Meeting Minutes Search System, provided by the National Diet Library. https://teikokugikai-i.ndl.go.jp/#/ [last visited Jan. 31,

20, 1947). Although the actual degree of publication is evaluated to be very high compared to other countries,[51] certain issues need to be considered from the perspective of popular sovereignty.

3. Problems of Practice

Secret Meetings There is no provision for the disclosure of the records of "secret meetings."[52] While some records of secret meetings, under the former Constitution (1889-1947), were made public, there are no examples of the same under the current Constitution.[53] Generally, the need for secrecy diminishes with time. If no positive rationale can be offered for not disclosing them, then they should be disclosed to fulfill accountability and self-governance.

Revocation of Remarks Regarding the revocation of the remarks by the Speaker of the House of Representatives, the President of the House of Councilors, and the Chairperson of committees in both Houses, the Speaker and the President of the Houses can order the revocation of the speech of a member, which may undermine the authority of the legislator's speech, be offensive to a member's dignity, or contradicts facts.[54] In a committee, the Chairperson can order the revocation of a member's speech.[55] The revocation is done in a manner that it is impossible to identify the deleted statements.[56] The purpose is explained as "reproducing such statements in the minutes would once again violate laws and regulations, etc."[57] However, the details of the statements are an important factor for evaluating a member's qualifications as a politician for the general public. If the easy cancellation of the statements is rampant, it may hinder the evaluation of a member's competencies.

Request for Correction of Statements A member who has made a statement or speech may not change the point of their statements. However, they may request a correction of the wording by 5:00 p.m. on the day following the distribution of the minutes.[58] In the usual process, a request would be made and approved *after* the minutes were issued. Therefore, the corrected remarks would not be deleted from the minutes; instead, the minutes would be corrected in a manner that the edited text would be published in the most recent minutes of the meeting. Hence, "since the fact of the correction is revealed only after the minutes of a later meeting, the reader is likely to overlook it."[59] However, it has value since we can dis-

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2023].

51 Commentary, *supra* note 47, at 768.

52 *See supra* note 36.

53 *See* Shigeo Konno, *Kokkai ni Okeru Himitsu Kaigi Roku no Toriatsukai ni Tuite* [*On the Handling of Minutes of Secret Meetings in the Diet*], 15 Research Bureau Ronkyū 66 (2018).

54 Kokkai Hō [Diet Act], Law No. 79 of 1947, art. 116.

55 Syūgiin Kisoku [Rules of the House of Representatives], art. 71, and Sangiin Kisoku [Rules of the House of Councilors], art. 51.

56 Makoto Shirai, Kokkai Hō [Diet Act], 89-91 (Shinzansha, 2013).

57 Akio Morimoto, Kokkai Hō Gaisetsu [Outline of Diet Act], 282 (Kōbundō, 2021).

58 Syūgiin Kisoku [Rules of the House of Representatives], art. 203, and Sangiin Kisoku [Rules of the House of Councilors], art. 158.

59 Morimoto, *supra* note 57, at 279.

tinguish the statements that have been corrected.

Visualized Materials Diet members extensively use flips and panels at the meetings, especially televised meetings. This is problematic because, in principle, such materials are not recorded in the minutes. The minutes are recorded as "according to this;" however often the reference to "this" is not clear. As Satō emphasized, if the Diet is at the center of the "forum of open public debate" and is "expected to provide the people with important information about national politics and to play a role in showing them the path they should consider,"[60] the inability to adequately reconstruct the meeting from the minutes must be improved.

Reference Materials Regarding the materials used in the Diet meetings submitted by the administrative organs, the remarks by Reiko Ōyama, a political scientist and a Diet expert, are worth mentioning. She pointed out that "when a bill is examined by the committee, the administrative ministries and agencies submit a large number of reference materials. Some of these contain valuable information that should be shared with the public, such as statistical data that are not generally available. However, these materials are, with few exceptions, closed to the public."[61] Hence, if the Constitution and the principle of popular sovereignty require the principle of openness, the materials submitted to the Diet must be open to the public.

Conclusion

If the concept of popular sovereignty requires the creation of a system of making documents and their maintenance and access to information as a constitutional obligation, it means that Japan, a sovereign nation, was built on an unstable foundation before the enactment of the Access to Information Act and the Public Records Management Act. However, as we have seen, even after these enactments, there have been several problems concerning the systems and practices of public records management. To tackle such issues, we must be aware of the importance of public records in a constitutional democracy. The argument here focuses mainly on the Japanese situation. However, the main point of this argument is valid for other countries with popular sovereignty. In this sense, comparative studies offer several suggestions. This could be the next theme of interest for constitutional law academics in Japan who have not emphasized the importance of public records management from the perspective of constitutional law.

60 Satō, *supra* note 26, at 434.

61 Reiko Ōyama, *Kokkai to Accountability: Kokumin Daihyō Kikan no Nijyū no Sekimu* [*The Diet and Accountability: Dual Responsibilities of National Representation Body*], 20(4) Komazawa Hōgaku 1, 21 (2021).

Abandonment of Crime: Act of Abandonment and Voluntary Action*

WADA, Toshinori**

Judgment of 5th Criminal Division of Tokyo High Court, on July 14, 1976 (the "Judgment")
Case number: 1976 (*U*) 651; Case of attempted murder, assisted murder attempt, violation of the Act for Controlling the Possession of Firearms or Swords and Other Such Weapons and Explosives (the "Case")
Hanrei Jiho (834) p.106

CONTENTS

I. Facts

Defendant X had left his wife P under care of his best friend Q at Q's house. When X dropped by Q's house on around 10 AM of September 29, 1975, X was informed of the fact that Defendant Y took P who had returned home to see A back to Q's house. And then, X brought A to Q's house and demanded A to explain his relationship with P on the second floor of the house, but A never admitted his fault. Seeing this, X decided to murder A in retaliation and had Y who was on the first floor of the house bring a Japanese sword with approximately 52-cm blade. Y understood X's intent, and therefore, X and Y were conspired with each other to murder A. On around 11 AM of the same day, Y brandished the Japanese sword and slashed A on his right shoulder once, and when Y tried to attack A by the second brandish to finish A's life, X said "That's enough. Y, let's go." and stopped Y from pursuing the attack, which Y followed and gave up his next attack. Subsequently, X instructed his best friend Q and others to take A to the hospital, and consequently, A was able to receive a medical treatment and ended up with only a cut wound to his shoulder which required ap-

* This article was originally published in Japanese, "Chushihan" [Abandonment of Crime] in Matsubara, Y. ed. *Keihou no hanrei: Souron* [Criminal Case Studies: General Theory] (2011) Seibundo, pp.207-223.
** Professor of Criminal Law, The University of Tokyo Graduate Schools for Law and Politics

proximately two-week treatment.

The original judgment (Judgement of Urawa District Court, on March 1, 1976; no publication) (the "Original Judgement") admitted that it is presumable that Defendants abandoned their act of crime as their voluntary action because Defendants stopped their attack despite the fact that there was no deterrent against further attack to murder A. The Original Judgment, however, denied Defendants' defense of abandonment of crime because A could have died from excessive bleeding from the approximately 22-cm cut wound on his right shoulder if he had left unattended and therefore this case is a completed attempt, and further because the Defendants only asked Q and others to rescue the victim and provided no first-aid treatment by themselves, and thus the court recognized no sincere effort to prevent the consequence.

Defendants filed the appeal against the Original Judgment, arguing that the Original Judgment that denied defense of the abandonment of crime regarding the attempted murder was based on a false interpretation of the law in that the defense of abandonment of crime should be granted because Defendant X asked his best friend Q and others to take A to the hospital immediately after Defendants abandoned their murderous intention against A and gave up the further attack on A and, following the request, Q and others put the will of X into action and took A to the hospital, and thus their act should be equated with the act of X.

II. Court Ruling

Reversing the Original Judgment and Decision by the Appellate Court

The court, granting Defendants the defense of abandonment of crime on the following grounds, reversed the Original Judgement, and sentenced Defendant X to seven-year imprisonment and Defendant Y to four-year imprisonment.

"In order for the defense of abandoned attempt to be effective, it requires the attempter who undertook the commission of the crime to prevent the consequence of his/her criminal act by his/her own voluntary act and effectively prevent the completion of the crime. At the same time, however, the defense of abandoned attempt is the very act of abandonment by the offender and, in the phase of uncompleted attempt, the voluntary abandonment of commission and further pursuit of the crime before the completion of the commission is adequate to constitute abandoned attempt; in the case of completed attempt, however, since the act of commission by the offender has already been completed, in order to be granted the defense of abandonment attempt, it is required to prevent the crime from being completed by voluntary action, and therefore a sincere effort to prevent the consequence from happening is required.

Applying these to this case, and considering the result of the fact-finding by this court together with the evidence as provided in the Original Judgement, the following facts are found: Defendants conspired to murder A motivated by the reason as provided in the Original Judgement, and Defendant Y, following the order of Defendant X, brandished the Japa-

nese sword with approximately 52-cm blade as provided in the Original Judgement and slashed A who was sitting on his heels in front of Defendants on his shoulder once, and A fell forward; and at the moment Defendant Y tried to finish A's life by the second attack with the sword, Defendant X said 'That's enough. Y, let's go.' and stopped Y from pursuing the attack, which Y followed and gave up his second attack. Further, based on the above evidence, it is impossible to determine that the act of commission of murder of A had already been completed only with the first attack Y delivered as provided in the Original Judgement, as Defendants did not consider the first attack Defendant Y delivered to A to be critical to A's life, and that was the very reason Y tried to pursuit the subsequent attack, and the wound on A was an approximately 22-cm cut wound on his right shoulder which did not penetrate to the bone (medical certificate of A prepared by Doctor R) (In addition, there is no good evidence to verify that A was in danger of death by excessive bleeding due to the attack Y delivered as held by the Original Judgement). Therefore, this case is precisely the case that falls under the case of uncompleted attempt as described above, and Defendants voluntarily abandoned the subsequent attack despite the fact, as held in the Original Judgement, that Defendants could have pursued the subsequent attack without any difficulty. In addition, as Defendant X told the judicial police and prosecutor, as the reason he stopped Defendant Y from pursuing the second attack with the sword, 'I could not bear to finish A's life and see A being murdered. I stopped Y from ending A's life because I thought to myself, "We cannot murder A. There would be no other choice but to have A take care of my four children and my wife who has mental problem when I do jail time. We cannot murder A."' The abandonment of the assault based on such reason is undeniably voluntary abandonment as provided in the relevant law. Defendant Y also stopped pursuing the subsequent attack just as instructed by Defendant X. (As provided in the Original Judgement, Defendant X instructed Q as provided in the Original Judgement to take A to the hospital and A was taken to S National Hospital and received a medical treatment immediately after the instruction.).

Considering the above, the Original Judgement that determined that Defendants' act of attempted murder which, in its nature, should have fallen under the abandoned attempt as stipulated in proviso of Article 43 of the Criminal Code (the "**Article** 43") was interrupted attempt should be criticized as being illegal for its error of recognizing the relevant facts or misinterpretation of the law. Therefore, it is clear that such error or misinterpretation affects the judgment as the punishment shall be reduced or the offender shall be exculpated in the case of abandoned attempt."

III. Notes/Commentary

1. Precondition for Abandonment

(1) The Structure of Act of Abandonment

The abandonment of crime stipulated in the proviso of Article 43 shall be constituted by "voluntary abandonment of the crime." "Abandonment" means an act of giving up and

what is given up is a "crime." The body text of Article 43 stipulates the case of a person who "commences commission of a crime without completing it," and a crime starts from its "commencement of commission" and ends at its "completion." Therefore, the literal interpretation of "abandonment of the crime" is, in order to constitute the abandonment of crime, (i) at a moment in time, commencement of commission of the crime is considered to have already been undertaken; (ii) under the assumption that there remains the possibility that the crime is completed; and (iii) the possibility of the crime being completed has to be eliminated.

(2) Abandonment after Preparation

In association with the (i) above, an issue called abandonment after preparation is under discussion. The question is whether it is possible to reduce the punishment by analogical application of the proviso of Article 43 in cases where the plan of crime is abandoned after preparation of a crime is constituted and before commission of the crime is commenced. It has been debated when the crime subject to the abandonment is considered to commence. The commonly accepted theory postulates a crime which starts from preparation, passes through attempt and ends at its completion and considers it possible to abandon the crime even when it is after preparation and before attempt. The court precedent[1], however, denied the applicability of the proviso of Article 43 based on the understanding that a crime that commences as at its attempt and ends as at its completion and a preparation of a crime are two separate crimes, and abandonment after the preparation does not constitute abandonment in connection with either of the two crimes because, at the point in time, preparation of the crime has already been finished/completed, and another crime that commences as at its attempt and ends as at its completion is yet to be commenced.

(3) Abandonment after Completion Turns out Impossible

The first case in which abandonment is denied in association with the (ii) above is abandonment because of objective failure of attempt. A shooting attempted by a shooter whose bullets all missed the target is definitely an attempted crime, and there remains no chance that the crime is completed; there is no arguing for abandonment.

Also, in the cases where a crime is once completed, abandonment shall be denied. In the case of offence of endangerment (*kikenhan*) or offence which can only be committed over a period of time (*keizokuhan*), although infringement of interest protected by law may actually occur or increase after the crime has reached its completion formally, prevention of such infringement does not lead to reduction of punishment based on abandonment[2]. This shall also be the case if a graver consequence is prevented after the principal crime has been committed in the case of offense of negligence (*kashitsuhan*) or aggravated consequential offense (*kekkateki-kajuhan*). If an analogical application of the stipulated reduction or exculpation

1 Judgment of Supreme Court on May 17, 1949 (Preparation of Robbery) Supreme Court Reports (criminal cases) [*Shukei*] Vol.10 p.177 ; Judgment of Grand Bench of the Supreme Court on January 20, 1954 (Preparation of Robbery) Supreme Court Reports (criminal cases) [*Keishu*] Vol. 8, Part 1, p.41

2 Reduction or exculpation of punishment must be stipulated by law as in Article 228-2 of the Penal Code (Reduction of Punishment in the Case of Release of Kidnapped Person).

of punishment based on abandonment is denied in these cases, it would be reasonable to understand abandonment after preparation in the same manner[3].

2. Act of Abandonment in the case of Abandonment by Inaction

(1) Mechanism of Abandonment by Inaction

In cases where the prerequisites of abandonment of crime ((i) and (ii) in 1. above) are satisfied, required act of abandonment ((iii) in 1. above) depends on the degree of possibility of completion of the crime or state of the risk related to such completion.

There are two types of risks in possibility/risk of completion of a crime. The first is "physical risk" that may cause completion as a consequence of a chain of events starting from the act of the doer but without further action of the doer, and the second is "risk based on possibility of continuance of the criminal conduct" that may cause completion by the continuance of the criminal conduct by the doer. The following seems to be a commonly accepted framework for determining the requirement for act of abandonment to be affirmed: (a) when only physical risk is involved, "act of abandonment by preventive action" which prevents completion of the crime by cutting off the chain of cause and effect in a proactive manner shall be required; (b) when only risk based on possibility of continuance of the criminal conduct is involved, "act of abandonment by inaction" which causes the discontinuation of the crime shall be required[4]; and (c) when two types of risks are both involved, discontinuation of the crime *and* cutting off the chain of cause and effect shall be required.

Based on such framework, discontinuation of the crime alone shall be inadequate for act of abandonment to be affirmed in cases where physical risk is involved.

(2) Criteria for Judgment in Court Precedents

The first court precedent that expressly referred to the manner of act of abandonment[5] made mention of "possibility to cause death" if the victim is left unattended, and other court precedents thereafter seem to almost follow the framework as mentioned above. Reviewing

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3 Formally, reduction or exculpation of punishment based on abandonment is applicable only to the case of attempted crime. Once reduction or exculpation of punishment based on abandonment is analogically applied to abandonment after preparation in consideration of the substance of the crime, such application provides a rationale to applying such reduction or exculpation of punishment to cases after completion of offence of endangerment or offence which can only be committed over a period of time. Thus, in order to deny reduction or exculpation of punishment based on abandonment in a case of abandonment after completion of the crime, it is necessary to understand that the purpose of such reduction or exculpation of punishment is to prevent crimes from being completed, and therefore such purpose would not be applicable to crimes after its completion. Further, on the other hand, if we understand that the purpose of punishment for attempted crime after preparation and before attempt is to prevent completion of the crime, reduction or exculpation of punishment based on abandonment would no longer be necessary, which brings our thoughts back to the idea that reduction or exculpation of punishment based on abandonment is applicable only to the cases of attempted crime. And only after this contemplation, applicability of reduction or exculpation of punishment based on abandonment to offense of negligence or aggravated consequential offense can be explained.

4 In this case, objective act of abandonment by inaction is not necessarily deemed "adequate" to constitute act of abandonment. As it requires "voluntary intent of abandonment" in general, abandonment of continuance of the crime based on offender's misrecognition of physical risk or impossibility of completion shall be inadequate for act of abandonment to be affirmed.

5 Judgment of Tokyo District Court on April 28, 1965, Lower Court Reports (criminal cases) [*Kakeishu*] Vol. 7, No. 4, p.766

the relevant court precedents of high courts, while act of abandonment by inaction was judged adequate in the case of inflicting only an approximately 22-cm cut wound to the right shoulder which did not penetrate to the bone by the Japanese sword[6] and in the case of inflicting cut wound to the left forearm which required approximately two-week treatment by chef's knife (*gyu-tou*)[7], act of abandonment by preventive action was judged necessary in the case where the offender choked the victim on her neck with his weight and with all his strength and kept choking for approximately 30 seconds after the victim had passed out, and the victim had subsequently lost her consciousness for 30 minutes to one hour, as it involved "actual risk of death of the victim"[8]. Further, act of abandonment by preventive action was judged necessary in the case where "there was no super-urgent risk of death, but there was a potential risk of death if the victim was left unattended"[9]. In these cases, it can be summarized that act of abandonment by preventive action was required and abandonment by inaction was ruled out in the cases where a risk may cause the result only by the physical progress of cause-and-effect link and the risk does not have to be urgent but the risk actually exists.

(3) Other Related Considerations

The following points should, however, be noted as well.

First, this issue used to be discussed as a question of end point of commission of the crime, and in the discussion, act of abandonment by inaction was deemed adequate in the case of uncompleted attempt at a point in time when commission of a crime is yet to be completed, and act of abandonment by preventive action was deemed necessary in the case of completed attempt at a point in time when commission of a crime has already been completed. The underlying idea was that an abandoned attempt is a cessation of the act of commission which is the principal part of the crime. Such idea that determines the requisites for abandonment based on the characteristics of commission of a crime itself should be considered invalid today; however, such idea have left a mark in the writings of some of the court rulings today[10]. We need to focus on the substantive judgement of the underlying physical risk at the time of abandonment in such rulings.

Second, in the cases where act of abandonment by preventive action is required in the face of physical risk, such risk seems to have been supposed to be judged in an objective manner. In some court precedents, however, while they adopt the commonly accepted requisites for abandonment, the existence of risk as the benchmark was determined based on

6 Judgment of this case by Tokyo High Court on July 14, 1976

7 Judgment of Tokyo High Court on July 16, 1987, *Hanrei Jihou* (1247) p.140 For the avoidance of doubt, this is merely a reference to the case, and the case does not provide any such reasoning in an express manner.

8 Judgment of Fukuoka High Court on September 7, 1999, *Hanrei Jihou* (1691) p.156

9 Judgment of Osaka District Court on November 27, 2002, *Hanrei Times* (1113) p.281

10 The above-cited judgement of Tokyo High Court on July 16, 1987, for instance, held "at the point where the defendant assaulted [the victim] with the chef's knife (*gyu-tou*) but failed to murder the victim, the act of commission of murder was yet to be completed, and therefore, this case falls within the case of what is called "uncompleted attempt."

the standard of general persons as at certain point in time[11]. In a high court ruling, the defendant injured the victim by stabbing the victim's right chest with a small craft knife and inflicted only a stab wound of approximately 2-cm long and 1.5-cm deep which did not penetrate to the lung and required approximately one-week treatment, and the court determined this act as completed attempt and required act of abandonment by preventive action[12]. The court precedents may seem to be unsure about following the criteria of generally accepted theory, and some academic theory poses a question of the validity of the theory by pointing out such attitude of the courts[13]. It is intuitively agreeable that, in some cases, the reduction or exculpation of punishment based on abandonment should be denied if an offender leaves the victim with a serious injury at the scene of the incident even though the injury is not critical.

However, if no proactive action to prevent completion of the crime is taken in such cases, intent of abandonment or voluntary action may be doubtful in many cases, and in such cases, act to prevent completion of the crime by preventive action may count as indirect evidence to recognize intent of abandonment and voluntary action. If this is the case, even in the cases where the reduction or exculpation of punishment should be denied as there is no act to prevent completion of the crime by preventive action, denying intent of abandonment or voluntary action should be enough to reject the reduction or exculpation of punishment based on abandonment, and an understanding that it is insufficient objectively as an act of abandonment should be unnecessary.

3. Act of Abandonment in Abandonment by Preventive Action

(1) Mechanism of Abandonment by Preventive Action

If act of abandonment by preventive action is necessary in the cases where there is a physical threat, what relationship is required between the action to prevent completion and extinction of possibility of completion? Applying the correlation between action and consequence in criminal theory, we can think of three questions: (1) the question of factual causality whether or not defense of abandonment of crime should be granted in the cases where the possibility of completion extinguished without any action to prevent the completion; (2) the question of legal causality whether or not defense of abandonment of crime should be granted in the cases where the process of cause and effect between action to prevent the completion and extinction of the possibility of completion is unreasonable; and (3) the question of how much an offender must contribute to extinguish the possibility of completion in the cases where a third person helped to extinguish the possibility of completion.

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11 Judgment of Tokyo District Court on January 22, 2002, *Hanrei Jihou* (1821) p.155; and the article by the Author "Hanhi" [Criticism] *Keijiho Journal* [*Criminal Law Journal*] Vol.4 (2006) p.79

12 Judgment of Nagoya High Court on July 17, 1990, *Hanrei Times* (739) p.243. For the avoidance of doubt, the case granted defense of abandonment of crime as the defendant was determined to have abandoned the crime by preventive action, and the court also expressly considered the fact that "considering the damage of the wound, there was no chance of death if the wound was treated by a doctor."

13 Shiomi, Jun "Chushihan no kouzou" [Mechanism of Act of Abandonment] in festschrift in honor of Kenichi Nakayama on his 70th birthday Vol.3, p.258 and after.

The questions (1) and (2) above are question of whether defense of abandonment of crime is applicable only to completion of abandonment or also applicable to uncompleted attempt of abandonment. As the provision refers to an offender who voluntarily *abandoned* the crime and not an offender who *tried* to abandon the crime, it would be natural to limit the application of defense of abandonment of crime to those who completed abandonment of the crime; however, academic theory generally accepts applicability of defense of abandonment of crime to uncompleted attempt of abandonment[14]. The question (3) requires further discussions.

(2) Original Court Precedent

An important case of abandonment by the aid of third person is the case of 1937 in which an arson offender ran away screaming at the neighboring relative, "Do what you have to do as I set the fire!" and the relative rushed over to the scene and put out the fire and the arson ended up without completion[15]. This court precedent is meaningful in two respects: on one hand, it put a break on a series of precedents that had set too much limitation on application of defense of abandonment of crime, and on the other hand, it limited the scope of application of defense of abandonment of crime to the cases of abandonment by the aid of third person. In the sentence, it clearly rejected the precedents that could be interpreted as if the arson offender needed to put out the fire alone by saying "it is obvious that the offender does not have to act alone to prevent the consequence."[16] Also, granting the defense of abandonment in the cases where "the offender does not act alone" lead to affirming the defense of abandonment of crime in the cases where the offender was indirectly involved in the act that directly caused the prevention of the consequence. This is meaningful in rejecting the precedents that had dismissed the abandoned attempt in the case where the fire was substantially extinguished by the act of a third person[17]. At the same time, however, the ruling held that the indirect preventive action must be considered substantial as if the offender directly prevented the consequence by saying "at least the effort must be as intense as to be considered as if the offender himself prevented the consequence," and running away screaming "Do what you have to do as I set the fire!" did not fall under such substantial preventive action.

(3) Going Back and Forth in Academic Discourse

As for the standard that the case of 1937 established, the concept of "sincerity" was

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14 The arguments of page 375 by Hayashi "*Keihou souron*" and pages 225 and 228 by Yamaguchi "*Mondai tankyu*" [Research on Issues] require causality between the extinguishment of possibility of completion and the preventive action and it sounds as if the application is limited to completed act of abandonment; however, in judging the risk in advance, incomplete attempt of act of abandonment is also affirmed after all in relation to objective risk. See also "Chushihan niokeru 'yameta' no imi" [The Meaning of 'Abandonment' in Abandonment Defense] by Saku Machino in *Law School* Vol. 7 (1979), p.105.

15 Judgment of Old Supreme Court on June 25, 1937; Old Supreme Court Report (criminal cases) [*Keishu*]Vol. 16 p.998

16 Judgment of Old Supreme Court on October 25, 1927; *Houritsu Shinbun* (2762) p.11

17 Judgment of Old Supreme Court on September 17, 1929; Old Supreme Court Report (criminal cases) [*Keishu*] Vol. 8, p.446

used by the academic position which stresses the subject of the actor,[18] and the "effort which is as intense as to be considered as if the offender himself prevented the consequence" was interpreted as "sincere effort to prevent the consequence." In such context, "sincere effort" was deemed to be a factor to reduce liability and subjective illegality by considering sincere effort that eliminates liability as an embodiment of normative consciousness,[19] or sincerity was required as an effort by the actor genuinely seeking to prevent the consequence.[20] These theories had a substantial impact: "sincere effort" is required in general to affirm the defense of abandonment by preventive action with a third parson's aid in these days.

This is true in court judgments as well, and the courts significantly reduced the application of defense of abandonment for a period of time.[21] It was criticized because concealment of the trace of a crime which has nothing to do with prevention of completion of a crime was considered as a factor to deny defense of abandonment.

In recent years, along with the tide of objective constitution of criminal theory, more and more theories deny the concept of "sincerity" and argue that "active effort" or "appropriate effort" is enough for defense of abandonment to be applicable.[22] It is reasonable to eliminate moral factors which have nothing to do with the prevention of completion of a crime, but the question is how to measure the activeness and appropriateness, and how to evaluate these factors in the context of defense of abandonment. Some argue that "effort" is unnecessary in the first place[23].

(4) Criteria to Judge Joint Action in Abandonment

The case of 1937 which did not use the "sincerity" concept should be interpreted as follows: if you consider the act of abandonment with an aid of a third person who became aware of the offender's intention to prevent the consequence as "accomplice" of abandonment, such third person does not have to be a "sole agent (*tandoku-seihan*)" or coagent (*jikko-kyodo-seihan*) in the act of abandonment, but solicitation (*kyosa*) or aid (*hojo*) of abandonment is not enough; such third person must at least be "co-principal by reason of conspiracy (*kyobo-kyodo-seihan*)." To summarize, only an act of abandonment by "co-action" with a third person constitutes "abandonment" to which defense of abandonment may be granted.

To organize court precedents in this respect, a court denied the act of abandonment in the case of aid to rescue the victim of murder attempt in accordance with the victim's in-

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18 Makino, Eiichi, "Chushikoui no shinshisei" [Sincerity in Act of Abandonment] in "Keihou kenkyu" [Criminal Law Sutdies] Vol. 7 (1939), p.449 – and "Chushihan to chushi no shishisei" [Abandonment Defense and Sincerity in Act of Abandonment] in "Keihou kenkyu" [Criminal Law Studies] Vol. 8 (1939), p.295

19 Kagawa, Tatsuo, "*Chushimisui no houtekiseikaku*" [*Legal Nature of Attempt by Abandonment*] (1963), p.116

20 Nishihara, Haruo, "*Keihou souron*" [*General Theory of Criminal Law*] (1977) p.293

21 The best example is the judgment of Osaka High Court on October 17, 1969, *Hanrei Times* (244) p.290, which denied sincere effort and defense of abandonment based on concealment of the trace of a crime.

22 Naito, Ge, Vol. II, p.1331 and Sone, p.255

23 Yamaguchi, p.285; incorporating this factor into factors such as causality between act of abandonment and consequence of abandonment and requirement for intent of abandonment.

struction[24]. In contrast, another court ruling affirmed the act of abandonment in the case where the offender only called the ambulance on the ground that it was the best choice of action the offender could take[25]. Even though the offender called the ambulance, if the offender failed to provide useful information to prevent the completion of the crime, such failure would be used to deny act of abandonment[26].

Accordingly, it seems that these court cases can be organized that collaboration in the act of abandonment is affirmed in the cases where the offender made objectively substantial contribution to prevent the completion of the crime and had a strong mental tie with the person who assisted the preventive action. It can be understood that the intentional omission of feasible action which would help prevent the completion of the crime is not an act of abandonment because it lacks intent to cooperate (not moral sincerity) and it merely solicits or aids other person to prevent completion of the crime. The offender of the case of 1937 may be considered to have substantially contributed to extinguishing the fire by providing a crucial cue, but at the same time the offender lacked the intent to cooperate abandonment in that the offender left the scene without helping the firefighting when it was possible.

It seems that the "sincere effort" should be understood as an issue of cooperativeness of abandonment as explained above which does not involve any normative factor unrelated to prevention of completion of the crime.

4. Voluntary Action of Abandonment

(1) Perspective of Analysis

An act of abandonment must be done "by actor's own will." Concerning this requirement, three criteria for judgment have been presented as academic theory today: (a) subjective theory which judges the possibility of continuing the commission of the crime based on the actor's subjective view at the point of the act of abandonment[27], (b) limited subjective theory which limits the motive and purpose of abandonment in terms of norm[28], (c) objective theory which judges possibility of continuing the commission of the crime based on whether the circumstances which the actor recognized may empirically hinder the continuance of the commission of the crime.

In addition, separate from the above-mentioned organization, concerning how we should treat the concept of voluntary action, there are two different perspectives: one is to treat as an issue of reduction of liability and culpability; and the other is to treat as an issue of free will.

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24 Judgment of Osaka District Court on June 21, 1984, *Hanrei Times* (537) p.256

25 Judgment of Tokyo District Court on March 28, 1996, *Hanrei Jihou* (1596) p.125

26 The above-mentioned judgment of Osaka High Court on October 17, 1969 cited the failure to tell the type of weapon and detail of the injury to the doctor as a factor to deny act of abandonment.

27 The judgment is made based on what is called Frank's Rule.

28 Basically, the motive and purpose of abandonment are limited to what is called resipiscence in a broad sense of the term (including convincement, shame, terror, sympathy, pity and other similar emotions), and limited subjective theory may include the irrational decision theory (Yamanaka, p.772) which evaluates the irrationality of the offender.

If the concept of voluntary action is treated as an issue of free will, the above three theories affirm the concept of voluntary action only when the relevant act of abandonment is deemed to be based on free will and they are different only in their criteria on evaluating free will. From that viewpoint, subjective theory does not deny free will unless the act of abandonment is made by an absolute coercion or in similar situation, and objective theory denies free will in relation to and depending on an external factor if any such factor exists as deterrence, and limited subjective theory affirms free will only when the act of abandonment is made based on resipiscence in a broad sense of the term.

On the other hand, if the concept of voluntary action is treated as an issue of reduction of liability and culpability, subjective theory affirms reduction of liability if the offender is aware of reduction or extinction of risk, and limited subjective theory does not affirm sufficient reduction of liability and culpability unless resipiscence in a broad sense of the term is observed in the offender as a renunciation of his/her own criminal act, and objective theory affirms reduction of liability and culpability when an offender abandons commission of the crime despite he/she could continue the commission of the crime.

(2) Court Precedents

In Old Supreme Court precedents, the court, at first, held that voluntary action was denied only if the defendant had been forced to abandon the commission of the crime due to an external factor.[29] Voluntary action was denied even if such external force was insignificant, and voluntary action was affirmed only if the defendant had abandoned the commission of the crime motivated solely by internal cause without any interference of external factor.[30] However, as people can hardly make a decision entirely without being influenced by an external factor, such criteria would deny voluntary action virtually in any case. Then, in some court precedents, one denied voluntary action because the motive/cause was generally an obstacle to commission of the crime,[31] and another can be understood to have affirmed voluntary action based only on the fact that the motive of abandonment had normative value.[32]

The Supreme Court seems to have followed the Old Supreme Court in essence; as it adopted the criteria of generality of an obstacle to commission of the crime,[33] and also it denied voluntary action based on the fact that the motive of abandonment had no normative value.

Many lower courts have judged on voluntary action based on the severity of obstacle

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29 Judgment of Old Supreme Court on November 8, 1913 Old Supreme Court Records (criminal cases) [*Keiroku*] Vol. 19, p.1212

30 Judgment of Old Supreme Court on November 3, 1936, Supreme Court Reports (criminal cases) [*Keishu*] Vol. 16, p.272

31 Judgment of Old Supreme Court on September 21, 1937, Supreme Court Reports (criminal cases) [*Keishu*] Vol. 16, p.1303

32 Judgment of Old Supreme Court on July 4, 1927, Old Supreme Court Reports (2) (criminal cases) p.17

33 Judgment of Supreme Court on July 9, 1949, Supreme Court Reports (criminal cases) [*Keishu*] vol. 3, part 7, p.1173; Judgment of Supreme Court on September 10, 1957, Supreme Court Reports (criminal cases) [*Keishu*] vol. 11, part 9, p.2202

together with normative value of the motive of abandonment. Unlike the Supreme Court precedents, few cases denied the voluntary action in lower courts,[34] and many judgements affirmed voluntary action based on the significance of obstacle together with normative value of the motive of abandonment[35]. They affirmed voluntary action even if the normative value of motive of abandonment is small in the cases where the commission of the crime is abandoned even if obstacle to continue such commission is small,[36] and they also affirmed voluntary action in an opposite case, i.e., where the normative value of motive of abandonment was high, while the obstacle to continue such commission is significant.[37] Further, many judgements have affirmed voluntary action based only on the normative value of the abandonment,[38] and the case that can be understood as rejection of voluntary action based only on the lack of normative value of the motive of abandonment is extremely exceptional[39]. In addition, many judgments have denied voluntary action based only on the significance of obstacle to continue the commission of crime,[40] and these judgments can be understood as they presume the denial of normative value of the motive of abandonment, and thus the judgments that affirmed voluntary action based only on the lack of obstacle to continue the commission of crime[41] are worth noting[42].

(3) Systematic Understanding

The overview of the above-mentioned court precedents provides us with the understanding that the courts (1) considered two factors that reduce liability, namely, whether or not the circumstances recognized by the actor pose, in general, an impediment in committing the crime and whether or not there is a normative value in the motive of abandonment, and (2) affirmed the voluntary action when the sum of these two factors amounts to a certain

34 Judgment of Saga District Court on June 27, 1960, Lower Courts Reports (criminal cases) [*Kakeishu*] vol. 2, part 5 and 6, p.938

35 Judgment of Tokyo High Court on July 14, 1976, Hanrei Jihou (834), p.106; Judgment of Yokohama District Court's Kawasaki Branch on September 19, 1987, Monthly Report on Criminal Cases [*Keigetsu*], vol. 9, part 9 and 10, p.739; Judgment of Miyazaki District Court's Miyakonojo Branch on January 25, 1984, *Hanrei Times* (525) p.302

36 Judgment of Fukuoka High Court on March 6, 1986, High Courts Report [*Koukeishu*] vol. 39, part 1, p.1; Judgment of Osaka District Court on June 18, 1997, *Hanrei Jihou* (1610) p.155

37 Judgment of Tokyo High Court on July 16, 1987 *Hanrei Jihou* (1247) p.140; Judgment of Tokyo District Court on March 28, 1996, *Hanrei Jihou* (1596) p.125, which affirmed voluntary action in the case where the two factors are treated equally.

38 Judgment of Fukuoka District Court's Iizuka Branch on February 17, 1959, Lower Courts Reports (criminal cases) [*Kakeishu*] vol. 1, part 2, p.399

39 Judgment of Fukuoka High Court on May 29, 1954, High Courts Criminal Cases Special Report [*Hantoku*] vol. 26, p.93; Judgment of Osaka High Court on June 10, 1958, [*Saitoku*] vol. 5, part 7, p.270; Judgment of Nagoya High Court on July 17 1990, *Hanrei Times* (739) p.245

40 Judgment of Tokyo High Court on June 20, 1956, [*Saitoku*] vol. 3, part 13, p.646; Judgment of Tokyo High Court on August 5, 1964, Tokyo High Court Timely Reports [*Toukoukeijihou*] vol. 15, part 7 and 8, p.173

41 Judgment of Urawa District Court on February 27, 1992, *Hanrei Times* (795) p.263; For the avoidance of doubt, the court pointed out that the defendant also had compassion for the victim or repenting/resipiscence as secondary motive of abandonment.

42 Judgment of Sapporo High Court on May 10, 2001, *Hanrei Times* (1089) p.298; in this case, it took time to decide on the abandonment, and the court valued the free will of the defendant at the point of act of abandonment as well as the difficulty of pursuit of the crime in general and resipiscence in the broad sense of the term.

threshold to determine whether it deserves the reduction or exculpation of punishment, and (3) one of the two factors alone can reach such threshold. This way of determining the voluntary action which may be understood as applying objective theory and limited subjective theory at the same time may be criticized for lacking coherence, but such criticism is based on the understanding of the precedents in the framework of existing academic theories, and it is possible to understand the criteria in an holistic manner from the viewpoint of the reduction of liability and culpability. Further, as its nature, the drawback in objective theory may be overcome because it considers the motive, and at the same time, the drawback in limited subjective theory may be overcome because it does not limit the motive, and the resulting conclusions may seem reasonable.

If, however, we understand that the courts have merely changed its judgment criteria, while maintaining the stance that voluntary action is an issue of free will rather than changing the criteria to determine voluntary action from the issue of free will to the issue of reduction of liability and culpability when the earlier judgments of the Old Supreme Court which determined the voluntary action by whether or not the abandonment was made by any outside force in the given situations, or the existence of free will began considering the significance of obstacle and resipiscence in a broad sense, the judgments of Supreme Court and other lower courts' judgments based thereon have still determined the existence of free will. In that case, the court precedents may be evaluated as they have sought to judge more precisely the significance of the influence of outside force to the prevention of completion of the crime in the given situations. In other words, it is understood that in this framework, the courts (1) categorized the motives of abandonment based on their nature into the parts that are deemed to be attributable to outside force in the situation and the parts that are deemed to have arisen from the actor's consciousness free from the circumstances, and (2) concerning the former parts, evaluated the influence of the outside force based on the significance of obstacle posed by such outside force, and (3) determined the proportion of the parts of the motive that are deemed to be attributable to outside force to the entire factor of the motive of abandonment and the degree of influence of the outside force and affirmed the voluntary action when the it is determined that the degree of such outside force is smaller than a certain threshold.

5. Judgment of the Case

Based on the above discussions, the judgment of applicability of defense of abandonment in the Case may be understood as follows.

First, regarding the manner of the act of abandonment, the court held that act of abandonment by preventive action was unnecessary by pointing out that there was no risk of death of A by excessive bleeding due to the attack by Y because the approximately 22-cm-long cut wound on A's right shoulder did not penetrate to the bone at the point when the pursuit of the crime was abandoned. It may be understood that, in this Case specifically, whether there was a physical risk independent from the conduct of the actor decided wheth-

er or not act of abandonment by preventive action was required. Also, concerning the possibility of continuing the crime, the court pointed out "Any further attack could have been done without difficulty if the Defendants so wanted" and affirmed the possibility of continuing the crime. Therefore, act of abandonment by inaction is affirmed. Furthermore, the court pointed out that the Defendants did not believe the first attack on A was critical enough to kill A, which the intent of abandonment was based on (If the Defendants abandoned further attack because they thought A was successfully killed by the first attack, the intent of abandonment should have been denied.).

As a general theory, this Judgement held "in the phase of uncompleted attempt, the voluntary abandonment of commission and further pursuit of the crime before the completion of the commission of the crime is adequate to constitute abandoned attempt; in the case of completed attempt, however, as the act of commission has already been completed by the offender, in order for defense of abandonment to be affirmed, it is required to prevent the crime from being completed by voluntary action, and therefore a sincere effort to prevent the consequence from happening is required" and, on the first glance, it seems to have adopted the framework under which the court determines whether or not the commission of the crime is completed and then determines whether or not abandonment by inaction is sufficient. However, the specific judgment is made based not on matters related to the nature of the commission of the crime at its undertaking but on the actual risk at the point of the act of abandonment as described above.

The Original Judgment required the Defendants' abandonment by preventive action as the victim deemed to be in danger of his death by excessive bleeding and denied the Defendants' sincere effort to prevent the consequence as they only asked Q and others to save the victim. This problem would be avoided if the risk of death is denied as in this Judgment, but act of abandonment may be denied if the life of victim is at risk and no feasible first-aid treatment is provided. On the contrary, the case where abandonment in a cooperative manner is affirmed even if no feasible first-aid treatment is provided seems to be limited to the cases where the risk of death does not exist in the first place as such inaction may be considered to be objective/subjective contribution to the prevention of completion. It seems to be the reason why the Judgment held that abandonment by inaction was enough as it responded to the grounds of appeal that the denial of sincere effort in the Original Judgment had misinterpreted the law.

With respect to voluntary action, Defendant X abandoned the pursuit of his crime because (1) he could not bear to see the victim being murdered and (2) he thought that he could not get A murdered because there would have been no one else but A to take care of his children and his wife who should be left alone while he is in jail, which the court judged to be the Defendant's own will. The reason (1) is resipiscence in a broad sense of the term. Regarding the reason (2), if the purpose of abandonment was to use the victim to pursuit the Defendant's own benefit, the abandonment would not have reduced his liability and culpability, but for the Defendant who tried to murder the victim because his wife was seeing the

victim behind his back, the fact that there would be no one else but the victim to take care of his children and his wife cannot obviously be an obstacle to pursuit the commission of the crime, and in that respect, such reason may constitute the base of voluntary action.

The court pointed out that the Defendant X instructed Q and others to take A to the hospital, and A was immediately taken to S National Hospital and received a medical treatment, which increased the credibility of the statement related to the motive of abandonment by X.

Finally, the abandonment by the Defendants X and Y were jointly subjected to the judgment in this Judgment. Under an analytical view, the primary actor of the murder was the Defendant Y, and the Defendant X ordered Y to eliminate the physical risk that was detached from X, which may be considered to be abandonment by preventive action, but the abandonment by X and Y were considered to be abandonment by inaction.

Also, with respect to voluntary action, the judgment could have been made on an individual basis, and in that case, the voluntary action of Y could have been denied if the court had determined that Y abandoned the pursuit because he was ordered by X as such abandonment might have been considered to be abandonment by outside force that poses an obstacle to pursuit the crime, but this Judgment held that defense of abandonment could be applied to Y when voluntary action is affirmed with regard to X as Y abandoned the pursuit of the crime only following the order of X.

Such judgment concerning voluntary action is reasonable in the case of abandonment of cooperation by accomplice, and this Judgment seems to suggest that voluntary action is not a factor in reducing liability that should be judged on an individual basis.

Reference

Review of the Case

(1) Ohya, Minoru, “Hanhi” [Case criticism], Journal of commentary on important court judgments in 1997 (extra edition of *Jurist* vol. 666)

(2) Nara, Toshio, “Hanhi” [Case criticism] Hyakusen [the Best 100] vol.1 the second issue (additional volume of *Jurist* vol.57)

Abandonment in General

(3) Kanazawa, Mari, “Chushihan” [Abandonment of crime] in “Keihou no souten”

(4) Nozawa, Mitsuru, “Nihon no chushihanron no mondaiten to arubeki gironkeishiki nitsuite” [Issues and the Right Form of Argument regarding the Theories of Abandonment in Japan], *Kanagawa Law Review* vol. 38, part 2-3

(5) Yamanaka, Keiichi, “*Chushimisui no kenkyu*” [Study of Abandoned Attempt]

(6) Wada, Toshinori, “Misuihan” *Houritsu Jihou*, vol. 81, part 6 (2009)

Act of Abandonment

(7) Saitoh, Shinji, “Hanhi” [Case criticism] Hyakusen [the Best 100] vol.1 the sixth issue

(8) Wada, Toshinori, “Hanhi” [Case criticism] Hyakusen [the Best 100] vol.1 the fifth issue

(9) Shiomi, Jun, “Chushihan no kouzou” [Mechanism of Act of Abandonment] in festschrift in

honor of Kenichi Nakayama on his 70th birthday

Voluntary Action

(10) Okumura, Masao, “Hanhi” [Case criticism] Hyakusen [the Best 100] vol.1 the sixth issue

(11) Kanazawa, Mari, “Hanhi” [Case criticism] Hyakusen [the Best 100] vol.1 the fifth issue

(12) Siomi, Jun, “Chushi no nin’isei” [Voluntary Action in Abandonment], *Hanrei Times* (702)