Preventive Instruments of Social Governance

Edited by
ALEXANDER BRUNS
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Preface

This volume contains contributions to a symposium that was held as part of a Joint Project initiated by colleagues of the Nagoya Law School and of the Faculty of Law of the Albert-Ludwigs-Universität Freiburg on September 21–22, 2016 in Freiburg on the topic "Social Governance by Law – Preventive Instruments of Social Governance". The Joint Project has been funded in a collaboration of the Freiburg Institute for Advanced Studies (FRIAS) and the Nagoya Institute of Advanced Research (IAR). With the social governance by law and the interplay between substantive legal standards and procedural enforcement the Symposium addressed a topic of both outstanding academic and practical importance. The legal framework is an essential instrument of modern societies under the rule of law to define the standards for the social life of man. The way the governance by law works may vary with the legal system and culture. In the analysis of legal governance instruments the interplay between substantive standards and their procedural enforcement is of central importance. In the pursuit of certain political or social goals a legal system is basically faced with two options: the exertion of influence on the behaviour of its citizens by means of preventive or reactive instruments. The relationship of preventive and reactive regulatory instruments is a key element for the analysis and understanding of a legal system. Practically all modern legal systems implement a combination of prevention and reaction. Prevention aims at anticipatory avoidance of unwelcome results, whereas reaction is designed to compensate and maybe deter.

In this major field the contributions to the symposium aim at comparative and international research with a focus on the Japanese and German legal cultures in their respective international settings, especially in reference to the European Union, the United States of America and Asia.

Freiburg and Nagoya, August 2017 The Editors

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Miyuki Watanabe

I. Introduction

Traditional civil procedure is established as the procedural system in which courts legally resolve certain conflicts between parties *ex post facto*. It does not start until a plaintiff files a lawsuit against a defendant, asserting that his or her right has been infringed.

Injunctive judgments require a defendant (debtor) to refrain from certain described actions and thereby have a function that prevents the subsequent damage caused by the action of the defendant from occurring or spreading. However, based on traditional civil procedure, because of the difficulty of filing a lawsuit, in some cases this preventive function is not performed and the right of person is thereby not sufficiently protected. The principle that litigants must individually come before the court in order to benefit from or be bound by civil litigation is fundamental to Japanese civil procedure. However, it is difficult to suppose that a person files a lawsuit in the case of so-called diffuse and collective interests, because the amount of the damage per person is too small to have reasonable incentives to bring a lawsuit. Besides, in such cases, as the other parties are "Anti Social Forces"[1], a person tends to hesitate to bring a lawsuit as a plaintiff out of fear of becoming a target of revenge.

As is well known, especially in the field of consumer protection, where such problems have recently been intensively discussed, many countries have established new legal rules in this area. In recent decades, Japanese civil procedure has seen the introduction of the special injunctive collective litigations in the form of "group complaints", asserted by certain certified groups in the Consumer Contract Act (CCA) and Act on Prevention of Unjust Acts by Organized Crime Members (APUA). The Anglo-American style of class action is not

[1] "Anti Social Forces" means (1) an organized crime group, a member of an organized crime group, a related company or association of an organized crime group, and any other equivalent person of the above; or (2) a person who herself or through the use of third parties conducts a demand with violence, an unreasonable demand beyond its legal entitlement, use of intimidating words or actions, damages the credit or obstructs the business of the other party by spreading false rumors or by the use of fraud, or any other equivalent actions of the above.

known in Japan. In this report, some procedural problems regarding the group litigation for injunction, especially concerning the execution of injunctive judgment in consumer group litigation under the CCA and handling of personal identifiable information in the group litigation under APUA, are considered.

II. Group Litigation (Verbandsklagen)

1. History of Group Litigation

In the system of group litigation, certified interest groups file a lawsuit and litigate against the other party on behalf of the common interests with which they are associated. The origin of group litigation (Verbandsklagen) is said to be the Law Combating Unfair Competition (Gesetz zur Bekämpfung des unlauteren Wettbewerbs) of 1896, which authorized business groups to seek injunctive relief against defendants who falsely advertised. For business associations, whose rights were infringed by false advertisements of other associations, it was difficult to file a lawsuit as plaintiffs for fear of their reputation in the industry or transactions in the future. Thus, law authorized the group the right to litigate. Then, in Germany, regulatory laws protecting competition and consumer interests (e.g. Law against Unfair Competition (Gesetz gegen den Unlauteren Wettbewerb) of 1965, Law Regulating the Use of Standard Contract Terms (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen) of 1976) authorized certain associations focused on these aspects of public interest to seek injunctive relief against defendants violating these statutes. The laws authorize qualified consumer interest groups to request injunctive relief against the use of unfair standard contract terms or advertisements impairing consumer interests. The right to be protected against unfair and false advertisements and standard contract terms is diffused among general consumers, rather than belonging to a specific person (diffuse interest). Such a diffused right hardly belongs to a specific person, and it is therefore difficult to suppose that they, themselves, file a lawsuit. If the unfairness of the standard contract terms is recognized, the person who is not thereby impaired may not file a lawsuit because of the problems with procedural preconditions such as standings or interests in a lawsuit. Therefore, certain consumer groups are authorized to bring a lawsuit as a plaintiff representing the interest of general consumers.

2. Group Litigation in Japan

a) Consumer Group Litigation

Consumer group litigation was introduced by the reforms to the CCA in 2006. The scope of its application has been expanded to the Premiums and Rep-

resentations Act, the Act on Specified Commercial Actions in 2008, and the Food Labeling Act in 2013.

A qualified consumer organization which has the certain necessary qualifications and is certified by the Prime Minister (Sec.2 (4) CCA, Sec.13 CCA) may, for many and unspecified consumers, demand that a business operator stop or prevent unfair use of the contract terms and unfair solicitation, dispose of or remove materials used for such acts, or take other necessary measures to stop or to prevent such acts (Sec.12 CCA). According to present civil procedure, only consumers who have damages caused by the unfair action of the business operator may rescind the contracts retroactively and individually. Nevertheless, the unfair action of the business operator should be stopped in order to prevent the occurrence or spread of damage to other consumers.

At present there are 14 qualified consumer organizations in Japan.[2] About 20 complaints per year are brought to the courts.[3] Each qualified consumer organization has its own right to seek injunctive relief. An injunction demand may not be made where the content of the demand and the other party are the same as those for which a final and binding judgment already exists from a previous lawsuit in connection with an injunction demand to which another qualified consumer organization was party (Sec.12-2 (1) (ii) CCA).[4]

b) Group Litigation against the Use of Office by Organized Crime Group Members

In 2012, the group litigation system for injunction was introduced by the reforms to the Act on Prevention of Unjust Acts by Organized Crime Members (APUA) to prevent the use of an office by an organized crime group (OCG). Certain qualified groups may bring a lawsuit seeking injunctive relief which orders such prevention for the purpose of securing the safe lives of citizens and a peaceful society, which are threatened by the occupation of the office by the OCG (Sec. 32-4(1) APUA). OCG means "a group which has the possibility of encouraging members to use violence by the group or habitually." The number

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[2] Consumers Organization of Japan, Consumers Support Organization of Kansai, Japan Association of Consumer Affairs Specialists, Kyoto Consumers Contract Network, Consumers Net Hiroshima, Hyogo Consumers Net, Group to Prevent Consumer Damages in Saitama, Consumer Support Net Hokkaido, Prevention of Consumer Damages Network Tokai, Oita Consumer Affairs Network, Consumer Support Organization Fukuoka, Consumers Support Net Kumamoto, Consumers Net Okayama, Saga Consumer Forum.

[3] http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/index.html.

[4] It is not an extension of effects of judgments but a politically special provision for preclusion. However, the discussion over an extension of effects of judgments, as an exercise of rights out of court, should be allowed and the decision as to whether the content of the claim is the same as the previous one or not should be flexible.

of the members and associate members of OCGs in Japan amounted to 46,900 at the end of 2015.[5]

It is difficult for ordinary citizens to bring a lawsuit against an OCG as plaintiffs seeking injunctive relief because of fear of reprisal from members of OCGs. Therefore, the National Center for Removal of Criminal Organizations (NCRCO) may bring a lawsuit on behalf of local citizens as their legal representation. There is no precedent in the world for such group litigation. Though, as with consumer group litigation, it was introduced to deal with general and typical situations that an individual, rights-bearing person can hardly litigate by him/herself as a plaintiff.

III. Legal Position of Qualified Interest Groups

1. Inherent Right or Legal Representation?

The qualified groups themselves are not the subjects which originally hold the rights. They do not litigate based on their own rights. We explain the legal position (standing: Prozessstandschaft) of the qualified groups as described below.

One concept is that law makes a new material right as a cause of action, and gives this right to the qualified group (inherent right structure). At the same time, the group is authorized to bring a lawsuit. The other concept is legal representation. The qualified group authorized by the entitled party may bring a lawsuit on behalf of the person holding the right (legal representation structure).

2. Legal Position of Qualified Interest Groups in Group Litigations

In Japan, qualified consumer organizations have their own rights to seek injunctive relief. CCA established the injunctive right (Unterlassungsanspruch) of a qualified consumer organization to prevent unfair solicitation or the use of unfair general contract terms (Sec.12 CCA). Qualified consumer organizations have their own material rights, so they can reasonably negotiate with the other person, such as the business operator, out of court. It is difficult to suppose that this right to demand an injunction belongs to an individual person. Potential sufferers are general consumers, not the specified person. Such a diffuse right can hardly specify the original parties, and it is not suitable to the legal representation structure. Therefore, the right to demand an injunction was established, and it adopted the inherent right structure. However, we should pay at-

[5] In 2015, the number of the members of OCGs is 20,100 while the number of associate members is 26,800. Recently, the number of members has been decreasing. For more information, *see*: https://www.npa.go.jp/sosikihanzai/bouryokudan/boutai18/h27_jousei.pdf.

tention to the fact that the qualified groups do not protect their own interests, but the interests of general consumers.

On the other hand, the group litigation system in APUA adopts the legal representation structure. The inherent right structure could be adopted, if the right to seek the removal of danger caused by the existence of the OCG could be said to be the diffuse right. However, the right to seek an injunction is based on personal rights. In conclusion, the inherent right structure was passed-up, and the legal representation structure was adopted, giving consideration to continuity between the conventional individual litigation seeking injunctive relief and the new group litigation system. The structure of legal representation requires the authorization of local residents; this has the advantage of being easy to link the local residents' campaign for the removal of the OCG and the litigation action.[6]

IV. Execution of Injunctive Judgments by Consumer Groups

In spite of obtaining a title of obligation, such as a final and binding judgment, when the other party does not obey the order, a qualified consumer organization may file for civil execution. A qualified consumer organization is to properly exercise its right to demand an injunction in the interest of many and unspecified consumers (Sec.23 (1) CCA).[7] When it is found that the failure to pursue compulsory execution by the organization is materially detrimental to the interests of many and unspecified consumers without justifiable reason, the Prime Minister may rescind the certification of a qualified consumer organization (Sec.34 (1) (v) CCA). Injunctive judgments are executed by the method of indirect compulsory execution. An indirect compulsory execution is to be carried out by the method in which the execution court orders the obligor to pay a certain amount that is found to be reasonable for securing performance of the obligation, according to the period of the delay, or immediately if the obligor fails to perform the obligation within a certain period that is found to be reasonable.

In the case of compulsory execution with the right to demand an injunction by means of indirect compulsory execution, in determining the amount of money that an obligor should pay a creditor, the court of execution is to "specifically consider the disadvantages that many and unspecified consumers may suffer by failure to perform the obligation" (Sec.47 CCA). In contrast to ordinary

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[6] Koichi Miki, "Boutuidantaisosho no Seiritsu no Keii oyobi Naiyo to Kadai ni tuite [Circumstances of Establishment, Contents and Issues of Group Litigation for Removal Organized Crime Group]", *NBL* No. 1023, 2014, p. 19.

[7] Tsuneo Matsumoto & Toshio Uehara, *Q&A Shohisha Dantai Sosho [Q&A Consumer group litigation]*, Sansei-do, 2007, p. 96 (Uehara).

cases, in the case of indirect compulsory execution of the injunctive relief by consumer groups, the group's own damages (creditor) suffered by the unfair action of the other party with regard to the demand of injunction are not supposed.[8] Because the interests protected by injunctive relief belong to many and unspecified consumers, by estimating the proper amount of coercive monetary payment of the indirect compulsory execution, instead of the damages of the creditor, the disadvantages that many and unspecified consumers may suffer by failure to perform the obligation should be given special consideration.[9]

In Japan, the coercive monetary payment by indirect compulsory execution belongs to a creditor, and it is assigned to compensation for damages from defaulting on an obligation (Sec. 172(4) Japanese Civil Execution Act). Is that consistent with the estimate in group litigation where the damages are understood as "the disadvantages that many and unspecified consumers may suffer"? The coercive monetary payment by indirect compulsory execution belongs to the qualified consumer group (creditor in the group litigation). However, the coercive monetary payment might be applied to the damages of individual consumers based on the unfair actions of the obligor, if the measure of damages is the damages of many and unspecified consumers. The group's own damages would be only procedural costs. Although the group is to reserve a fund for the amount received as the payment order to cover the costs required for the service related to injunction demands (Sec. 28 (5) CCA), it seems that the ordered payment is applied to the interests of general consumers.[10] If so, however, the scope of the consumers would shift from those who actually suffered damages by the other party to all potential consumers. Moreover, the amount of the coercive monetary payment could increase in the case of potentially large damages.[11] Would this cause the rigorous execution and the amount of coercive monetary payment to the group to increase exponentially? Or in group litigation, would it be understood as the special punitive damages which, functionally, mean sanctions? In group litigation, execution creditors are not those who suffered damages caused by the unfair action of the other party; therefore, the traditional way of thinking that places the damages of the creditor as the element is not suitable.

Generally speaking, the coercive monetary payment may belong to a creditor, the national treasury or public institution, or both.[12] If the coercive monetary

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[8] Only indirect damages such as procedural cost for litigation or execution are supposed.

[9] *See, e.g.,* Matsumoto & Uehara, *supra note 7* p. 92, Nichibenren Shohisha-Mondai Taisaku-Iinkai, *Commentary on Consumer Contract Act 2ed*. Shoji Homu 2010 p. 483 f.

[10] If a qualified consumer organization terminates services related to injunction demands or stops services due to the expiration or rescission of the certification, and a surplus remains, such a surplus shall belong to another qualified consumer organization or to the national treasury (Sec. 28(6) CCA).

[11] Teiichirou Nakano, *Minji Sikko Ho [Law of Civil Execution] 6ed*., Seirinshoin, 2010, p. 821.

[12] Shinobu Ohama, *Furansu no Asutoranto [Astreinte in France],* Sinzansha, 2004 p. 501 f.

payment is understood as a procedural sanction against the debtor, it seems that, theoretically, it belongs to the national treasury, not the creditor. Though, from the point of view of effectiveness, we should consider the incentive of a creditor who files an execution. Assignment to a creditor could explain as a consideration that the creditor cooperates with the state to realize private rights (so-called private agent of execution by the state). Moreover if the payment might apply to the damages of the creditor, the enormous surplus for the creditor could be avoidable (the amount of the coercive payment is limited to the amount of damages), and the creditor could obtain the execution titles for damages with simple procedures.[13] However, it runs the risk of too much profit for creditors or the abuse of rights of creditors. On the other hand, if the payment were to belong to the national treasury[14], there is a risk that there may be no incentives for creditors to file a petition for indirect compulsory execution, though there is little risk of too much profit.[15] Therefore, the resolution can be that the coercive payment be assigned to both the creditors and the national treasury or public institutions to secure the incentives to use indirect compulsory execution for creditors while avoiding excessive profit.[16]

Also in consumer group litigation, the coercive payment to the groups as execution creditors could be justified in that they contribute to the realization of private rights, which is originally the role of the state. However, it should be considered in the future that the coercive monetary payment belongs to the national treasury or other institutions, such as the consumer rights protection fund[17] or the creditors, while the state splits the money of coercive monetary payment. The reasons for that are listed as follows. First, the plaintiff consumer groups have the duty to exercise the right to demand an injunction representing public interests. Second, as the groups do not have their own damages caused by the unfair actions of the debtors, the coercive monetary payment has little nature as monetary damages, such that it is difficult to compensate damages in the same manner as ordinary cases. Third, it is necessary to consider avoiding rigorous execution against debtors, yielding a surplus for the consumer groups.

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[13] *See*, Ohama, *supra note 12*, p. 489 f, Makoto Ito etc., "Zadankai, Kansetsu Kyousei no Genzai to Shourai [Group Discussion: Presence and Future of Indirect Compulsory Execution]" *Hanrei Times* No. 1168, p. 38 (Kazuhiko Yamamoto) etc.

[14] Akira Ishikawa, Hanhi, *Hanrei Hyoron* No. 354, p. 53 asserts that the ordered payment should belong to the national treasury. In Germany the coercive monetary payment belongs to the national treasury and the individual coercive monetary payment cannot be an amount in excess of 25,000 Euros (Sec. 888(1) German civil procedure).

[15] According to Sec. 888 of German civil procedure, as a way of indirect compulsory execution, in addition to the coercive monetary payment (Zwangsgeld), coercive punitive detention (Erzwingung) is allowed. Detention is said to be effective (*See*, Ohama, *supra note 12*, p. 502); however in Japan the introduction of such a personal execution should be carefully considered.

[16] *See,* Ohama, *supra note 11*, p. 503 f.

[17] *See,* http://www.csr-forum.gr.jp/crpf.

Even the CCA accords that if a qualified consumer organization terminates services related to injunction demands or stops services due to the expiration or rescission of the certification, and a surplus remains, such a surplus shall belong to another qualified consumer organization or to the national treasury (Sec. 28(6) CCA). It allows the coercive monetary payment to indirectly belong to the national treasury.

V. Problems of Group Litigation in APUA

1. Lawsuit Seeking Injunctive Relief to Prevent the Use of an Office by the OCG

The right to seek injunctive relief to prevent the use of an office by an OCG is the right to demand an injunction based on individual personal rights. There are no express provisions on the matter. The leading case is the provisional decision of 1987 at the Hamamatsu Branch of the Shizuoka District Court. Subsequently, many similar judgments can be seen. In 1993, the Osaka High Court accepted the claim[18] in the case at the time of the litigation that the personal rights of the local residents would be infringed even though the office had not yet been used as the OCG office. According to the judgment, if the building in question were used as the OCG office, the plaintiffs may suffer a great damage or hardship, and they would be forced to live incessantly in fear, owing to uneasiness about the risk of shooting incidents. As the plaintiffs naturally have their own personal rights as humans, in such a situation, based on the right to prevent obstructions as a component of personal rights, they may seek an injunction to prevent the building from being used as an office of the OCG. Also, the Supreme Court, as the final appellate court, approved the decision.

2. Can Personal Rights be Given to the Other?

The right to demand an injunction based on the individual personal rights of local residents is to be given to the qualified consumer groups where the intentional legal representation structure is adopted. The question is whether the personal right, as an exclusive right, may be given to a third person or not. The exercise of personal and exclusive rights should be put in the hands of rights-holders. In case that the personal decisions of rights-holders would be respected, the procedural representation of personal rights seems to be approved.[19] Section

[18] Osaka High court, Judgment, March 25 1993 *Hanrei Jiho*, No. 1469, p. 87.

[19] *See,* Supreme court, Judgment, Oct.6, 1983 *Minshu* 37-8, p. 1041, e.g. Tokyo High court, Judgment, Jun. 4 2002, *Hanrei Jiho* No. 1794, p. 48 (Claim of compensation for mental damages) , Osaka District court, Judgment, March 31 1979, *Hanrei Jiho* No. 937, p. 58 (Right to demand an injunction based on the right to sunlight). Makoto Ito, "Funso Kanri-ken Sairon