

Not **Incapacitation** But **Inclusion!**
What we can learn from the ISO 22458,
“Consumer **Vulnerability**: Requirements
and Guidelines for the Design and
Delivery of **Inclusive Service**”
for reforming Japanese Consumer Law

Professor, Dr Fumie Suga, M.St(Oxford)
at Hosei University &
University of Oxford (academic visitor)

- An elderly lady, aged 70, retired, living alone
- A former secretary who used to be dressed fashionably at her office
- A shopping lover. Taking a bus to her favorite department store regularly.
- Having a favorite shop and a close shop assistant

- **Increased** number of visits and amount of purchases
- **Repeated** purchases of similar items, and in addition, more private transactions of health supplements with the shop assistant

- Brother **requested** the shop **to stop selling** to her, in vain
- Total cost amounted to 1,100,000 yen (≐70,000 euros) in 4.5 years

A small but big case

- a) Criminal Regulation : punishment
eg Criminal Code, CPUTR2008(UK)
- b) Administrative Regulation : fines, penalties, depriving of business licenses
eg FCA(UK)~New Consumer Duty
CMA(UK)
- c) Civil Regulation=Remedies : discharge from performance& restitution
private enforcement
What the claimant wanted!!
- d) Voluntary Regulation : reputation, trust in society, creating culture
eg IS(ISO), BS(UK), JS(Japan)

Regulating and Governing Market

~by more than sanctioning rogue traders

① She *lacked mental capacity* (every time) when she made contracts with the shop !

*280 items proven to be purchased

② The conduct of the shop assistant was *unconscionable*, because the shop assistant

knew/should have known

about her lack of mental capacity

*over 400 visits proven to be made

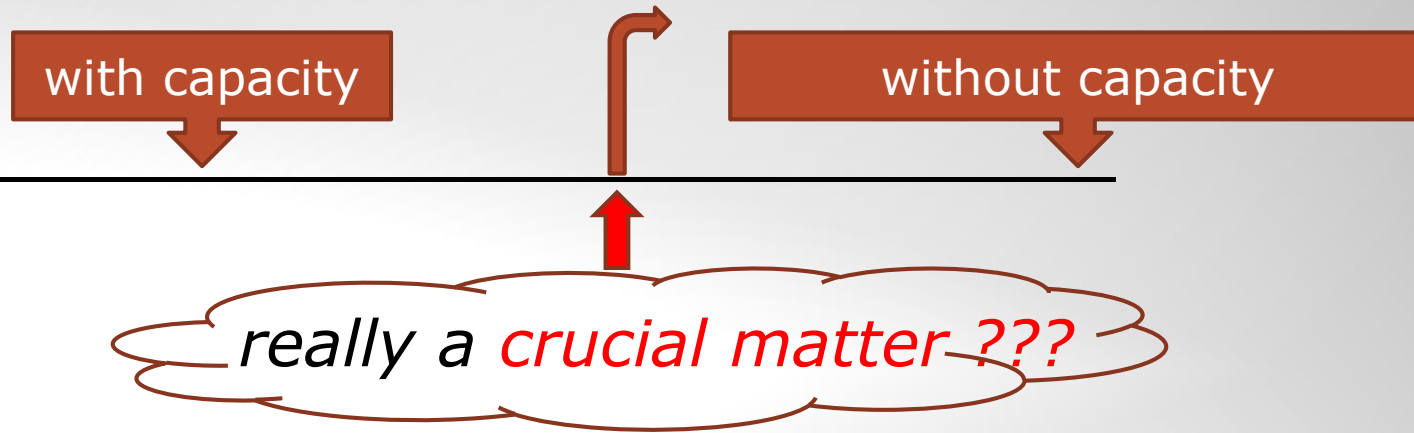
→the shop had *a duty* to stop selling to her !

What her families alleged (on behalf of her)

- Through the repeated contacts (and purchases as a result) over 4.5 years
- **the special relationship** was produced from her emotional dependence on the shop assistance, which was even more strengthened, together with her deteriorated condition of mental health
- and, eventually, such confidence & trust ***was exploited***, as the result, she could not have the **free will** to make decision **to protect her own best interest**

What seems to exist behind the scene

© When it can be medically found that she lacked her mental capacity?



× Whether the shop assistant took advantage of her vulnerability was not questioned enough.

∴ there was **no evidence** proven that the shop assistant **knew** or **could have known** that her client **lacked capacity** at that time
≡ NO EXPLOITATION ???

What was focused in the judgement

The shop assistance

- a) did not recognise
- b) could not recognise
- c) should have recognised
- d) had to recognise

that her (long-standing) personal client

- e) is
- f) would be
- g) might be
- h) must be

in an incapacitated
in a *confused*

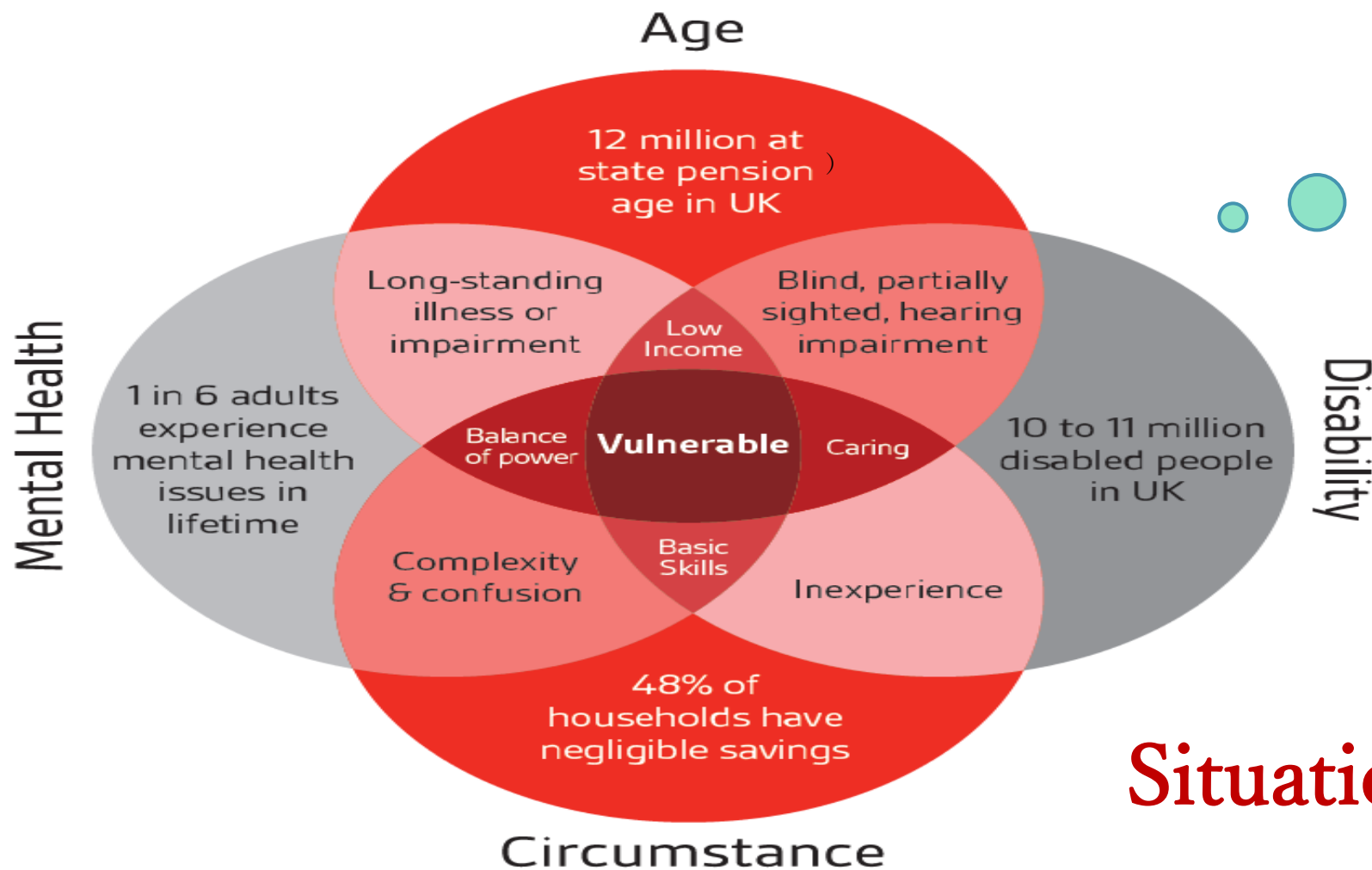
situation

=situational vulnerability

Beyond (reversing) the burden of Proof

The Vulnerability Landscape

Survey data: BS 18477: 2010

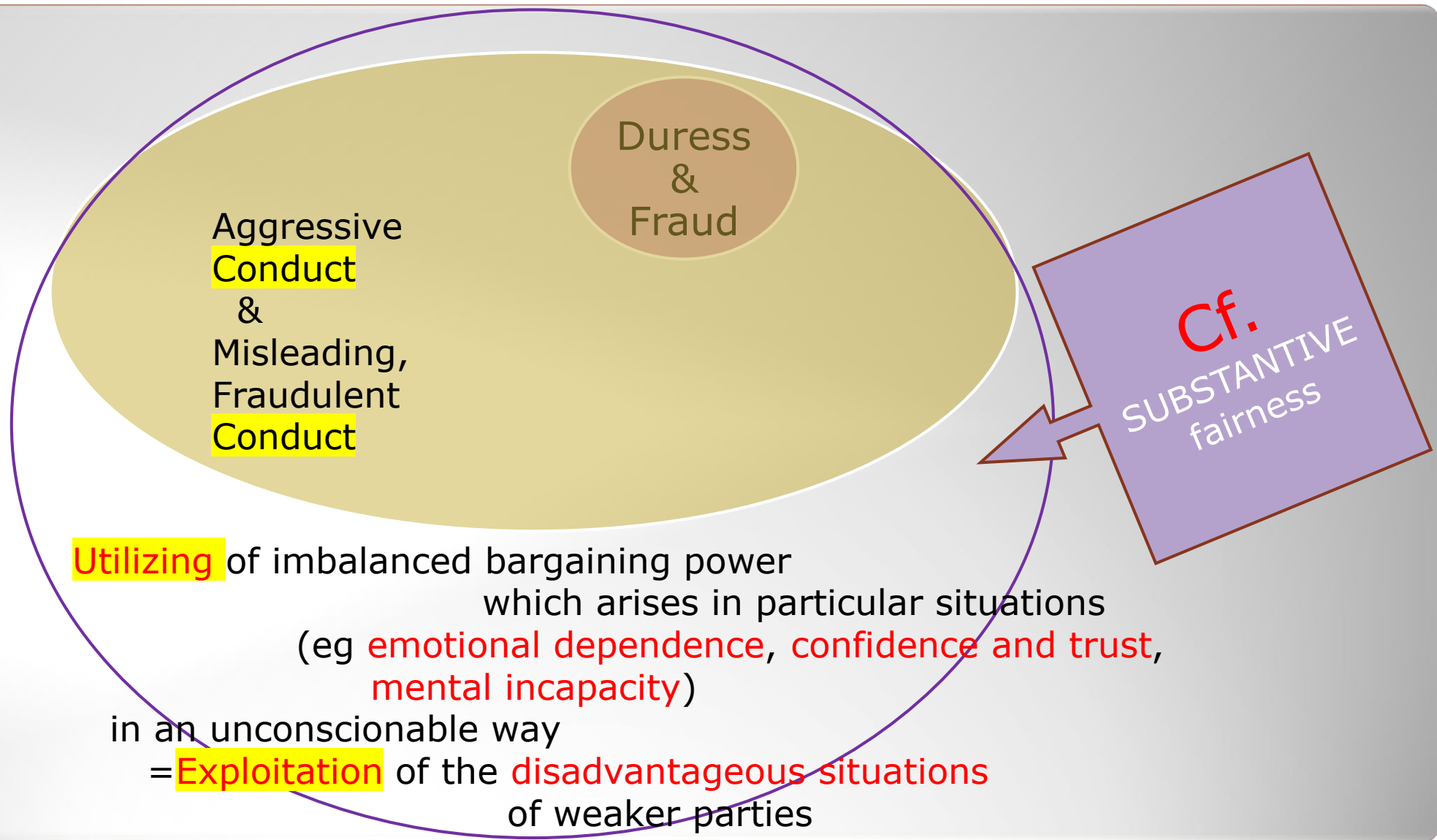


In what sort of situations people can become “vulnerable” in making transactions?

Situational Vulnerability

Guidance issued on 25th May 2016 ~ ~ ~ The vulnerability criteria in Article 5(3) of the UCPD2005

- CONSUMER VULNERABILITY is multi-dimensional, and
- MOST consumers can become vulnerable, depending on their circumstances and situation.



Procedural fairness issues

= to restrain **abuse of power** arising from the other's **vulnerability**

- Knew or could reasonably be expected to have known [the party was]
- dependent, or had a relationship of trust,
- economic distress or had urgent needs,
- improvident, ignorant, inexperienced, lacking in bargaining skill
- *Given the circumstances and purpose of the contract, exploited the situation by taking an excessive benefit or grossly unfair advantage*

DCFR, II -7 Article 207
Unfair Exploitation



- Knew or ought to have known [the party was]
- dependent on or had a relationship of trust
- in economic distress or had urgent needs,
- improvident, ignorant, inexperienced or lacking in bargaining skill
- *Given the circumstances and purpose of the contract, took advantage of the situation in a way which was grossly unfair or took an excessive benefit*

PECL, Article 4:109,
Excessive Benefit or Unfair Advantage



- Knew, could be expected to have known
- [the party was]
- dependent on, or had a relationship of trust
 - in economic distress or had urgent needs
 - improvident, ignorant, inexperienced
- Exploited the situation
- by taking an excessive benefit or unfair advantage *in the light of the circumstances and purpose of the contract*

Common European Sales Law
Article 51 Unfair exploitation



Civil Code, Article 90 (since 1896)

“Contracts which are against public order or good morals shall be void”

Consumer contract Act, Article 4(4) (amended in 2016)

; the right of cancellation due to excess

- When the trader recognise the excess in amount, times, duration of goods and services for the consumer, and then they invite the consumer to the contract,
- The consumer shall be able to cancel the contracts, if they conclude the contract because of the invitation.



Japanese law

21 Unconscionable conduct in connection with goods or services

(1) A person must not engage in conduct that is, in all the circumstances, unconscionable.

22 Matters the court may have regard to for the purposes of section 21

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used

- Terms
- Assessing the process; as a system of conduct or pattern of behaviour
- Also at the time of Negotiation, Entering into Performance, Revision, Termination

Australian Consumer Act (ACL)

Lord Nicholls in *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021

“Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired.

So undue influence can be presumed even if no obvious misconduct is involved, because it is wrongful to abuse your position and benefit from it.”

Relationship + suspicious transaction that ‘calls for an explanation’, unless the presumption is rebutted.

English law of equity “undue influence”

claimant

to prove

unordinary contract



to prove

situational vulnerability

Presumption of unconscionable conduct

"calls for an explanation"

"not to be reasonably accounted for"

can be rebutted

defendant

The presumption can be rebutted by defendant's proof that the transaction or gift:

"... was the *spontaneous act* of the donor acting under circumstances which enabled him to exercise an *independent will* and which justifies the court in holding that the gift was the result of the *free exercise of the donor's will*." Cotton LJ in *Allcard v Skinner* (1866)

LR 1 HL 200

It must be proved that the claimant was released from influences caused from their imbalance of power by, such as, having had an independent advisor.

The less and less shop assistants recognise or try to recognise



The more and more

that their clients are would be might be must be

in an incapacitated in a confused situation
=situational vulnerability

the less and less



the more and more

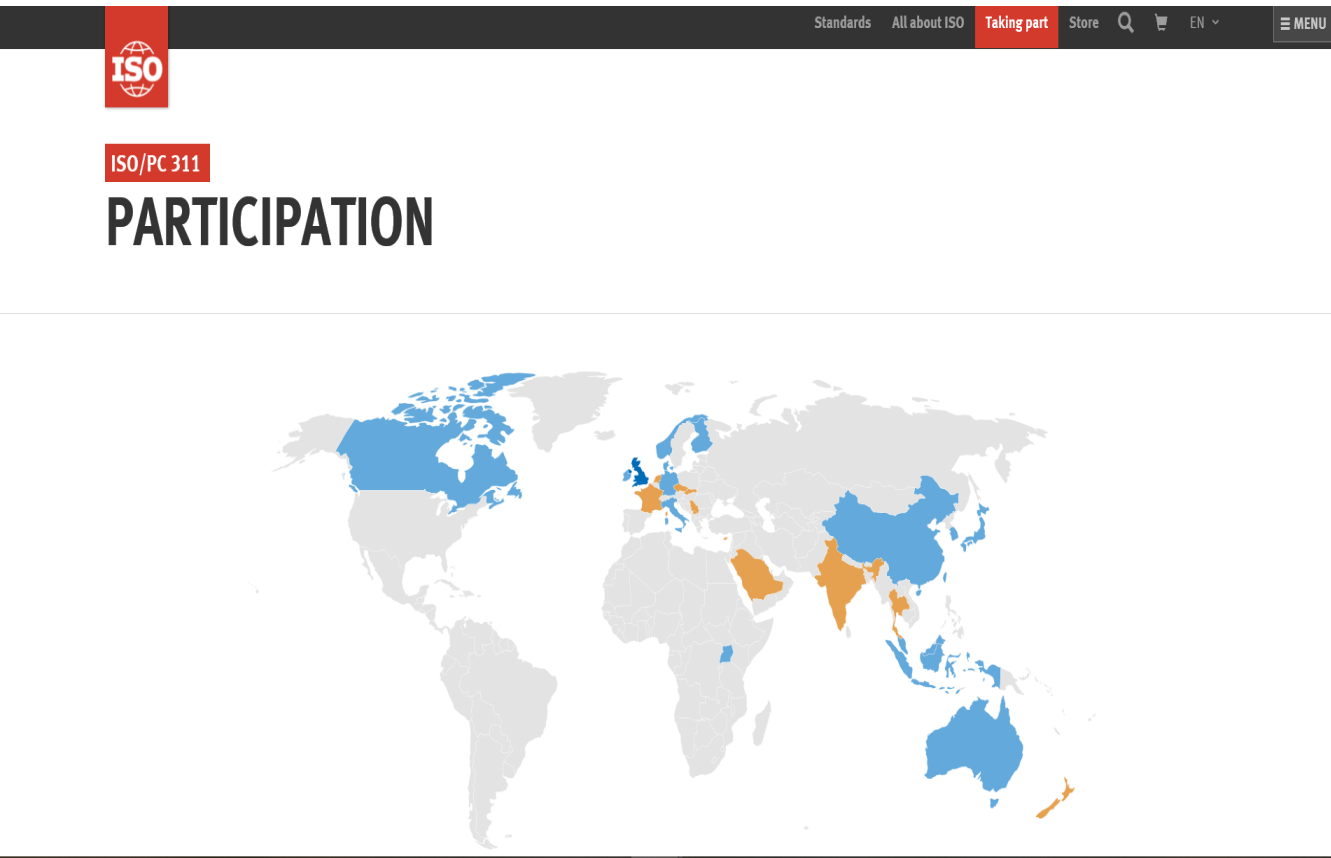
they can be successful in rebutting the presumption of exploitation

~Knowing too little is not a good strategy for traders!!

Beyond correcting the contradiction

~to create virtuous cycle in society

PC311(vulnerable consumers) in 2017 →ISO22458 (Consumer Vulnerability: Requirements and Guidelines for the Design and Delivery of Inclusive Service) in April 2022

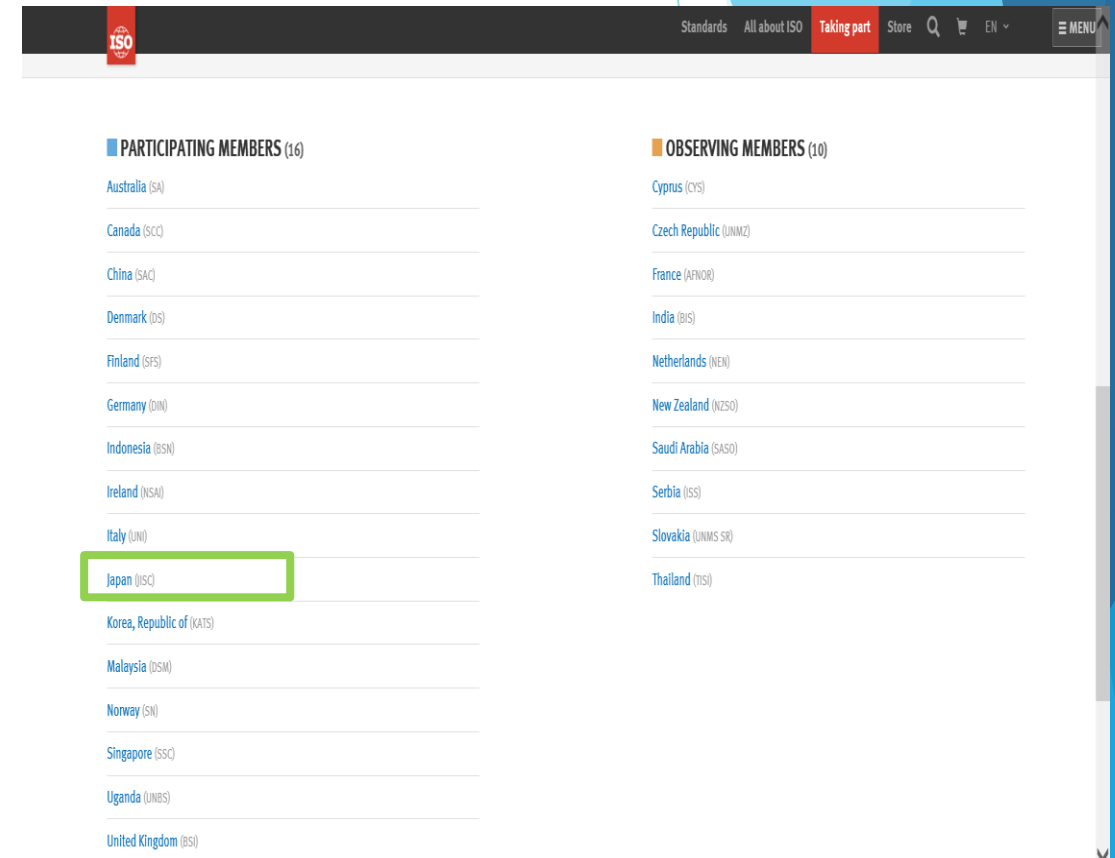
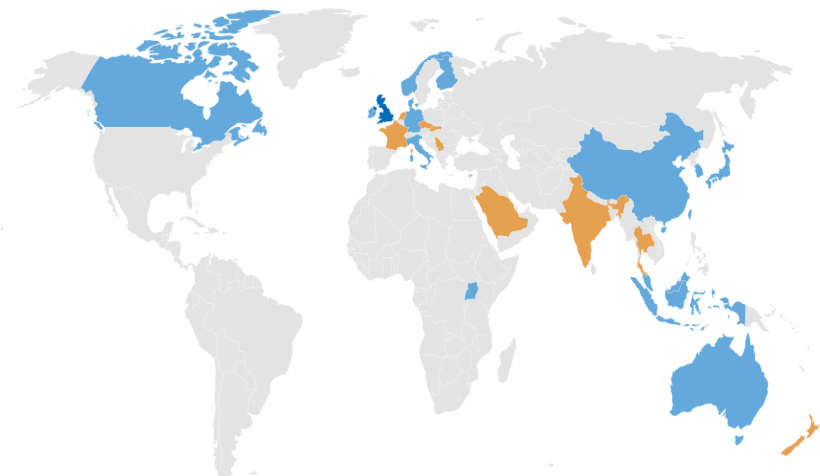


ISO

Standards All about ISO Taking part Store Q EN MENU

ISO/PC 311

PARTICIPATION



Standards All about ISO Taking part Store Q EN MENU

■ PARTICIPATING MEMBERS (16)

- Australia (SA)
- Canada (SCC)
- China (SAC)
- Denmark (DS)
- Finland (SFS)
- Germany (DIN)
- Indonesia (BSN)
- Ireland (NSAI)
- Italy (UNI)
- Japan (JSC)
- Korea, Republic of (KATS)
- Malaysia (BSM)
- Norway (SN)
- Singapore (SSC)
- Uganda (UNBS)
- United Kingdom (BSI)

■ OBSERVING MEMBERS (10)

- Cyprus (CYS)
- Czech Republic (UNMZ)
- France (AFNOR)
- India (BIS)
- Netherlands (NEN)
- New Zealand (NZSO)
- Saudi Arabia (SASO)
- Serbia (ISS)
- Slovakia (UNMS SR)
- Thailand (TIS)

for making “societal” duty of care !!!

The core principles of the standard

- (1) **Accountability** (embed a culture of accountability by taking responsibility for organizational actions and resulting consumer outcomes)
- (2) **Empathy** (treat consumers in vulnerable situations with kindness and without judgement or assumption)
- (3) **Empowerment** (provide consumers with the tools they need to make informed decisions about service; provide staff with the tools they need to support consumers in decision making and to facilitate quick and effective resolution of problems)
- (4) **Fairness** (treat all consumers fairly, and do not discriminate against or seek to mislead or exploit any particular group(s) of consumers)
- (5) **Flexibility** (adopt a flexible approach to service provision, which can be adapted to suit the specific needs and abilities of an individual in a vulnerable situation)
- (6) **Inclusivity** (design and deliver services so that they are accessible to, and usable by, a diverse range of individuals, including those who are vulnerable)
- (7) **Innovation** (be creative in using new technology and processes to identify and support consumers in vulnerable situations; recognize and adapt emerging marketplace issues and new concepts in consumer protection, while ensuring that use of new technology and processes does not risk unintended exclusion of some consumers)
- (8) **Privacy** (treat personal information respectfully and confidentially)
- (9) **Transparency** (be clear and open about the intent to provide an inclusive service, the nature of support available for consumers in vulnerable situations, details of policies, terms and conditions and potential risks).

Consumer Information

~all relevant information, which is appropriate to the individual consumer's circumstances, should be provided, clearly, accurately and timely

Key information (eg terms, conditions, prices, interest rates, additional fees, charges, payment deadlines, cancelation rights)

- should be **clearly highlighted**,
- should be provided **before** making decisions, signing up for services or completing purchases
- should be provided by **simple** languages and **short** sentences
- should be provided simply, **visually** and for **easy comparison**, when the information is detailed and complex
- should be provided **in alternative formats** (eg braille, large print, audio, different languages), if necessary
- should be provided **in printed text format** rather than verbally, if necessary

Traders should

- take reasonable steps to ensure that consumers have **received and understood** the information provided

Selling practices & Contract terms

*~Ensuring of
fair treatment and
positive outcomes*

- Traders must develop a detailed policy for good practices when they sell their products and services to consumers in vulnerable situations.
 - a) Making **regular review** of sales **system** (eg commission), sales **processes** (eg selling inside a consumer's home) and **behaviours** of sales advisors in order to **minimize the risk of exploitation**
 - b) Performing **assessments** to ensure that services and products are **appropriate** to the **circumstances** of the consumer and **suitable** for their **needs**
 - c) Taking all reasonable steps to **ensure** consumers in vulnerable situation **informed decision-making**, by supporting them to understand and **remember the key information, to evaluate consequences, to communicate their decisions, and to take responsibilities for contracts**
 - d) Conducting **regular audits** of sales **practices** to ensure compliance with the code of conduct
- Terms and conditions of any service contract shall not unfairly disadvantage consumers in vulnerable situations (eg bundled packages, minimum purchase quantities, long duration, lock-in periods, too rigid procedures to take account of consumer's personal circumstances, disturbing access to more cost-effective products)

Identifying consumer vulnerability

● "Vulnerability is **not always obvious**. Many people do not think of themselves as vulnerable. They might be unwilling to share personal information or might not think it is relevant".

● **Frontline staffs shall be trained** to look out **signs of vulnerability** and **identify** consumers who might potentially experience difficulties in memorizing, understanding, communicating, payment and deciding their own best interests.

【risk factors】

— **personal characteristics** eg age, gender, culture, geographical location, personality

— **health and abilities** eg physical, sensory, cognitive impairment, mental health, developmental condition, addiction

— **access and skills** eg language, literacy, numeracy, digital access or technical skills

— **life events** eg income shock, financial problems, homelessness, abused, caring responsibilities, fraud, bereavement, relationship breakdown, change of living situation, parenting

— **external conditions** eg economy, public health and environment, market conditions, **organizational behaviour** (**customer services, complaints management, design, advertising, miss-selling, data protection**)

【recognizing signs of vulnerability】

— not responding to emails, phone calls, letters

— not showing up

— apparently confused, having troubles in understanding or remembering

— apparently distressed, influenced by a third-party

【encouraging individuals to disclose information about the challenges they are facing】 19

Responding to consumer vulnerability

● The organization shall provide **frontline staff** with guidance regarding the range of **response options** that are available to consumers in vulnerable situations, in the aim of

- **minimizing** or **preventing harm**, now and in future
- **improving** the quality of their **experience** and the final **outcome**
【response options】
- support for **access** to more suitable products, services, tariffs
- support of **memorizing** and recalling information
eg repeat and help to retain information, in writing, assisting person
- support for **understanding** information
eg in an alternative format, repeat, simplify, summarize information
- support for **communication**
eg assigning one member of staff, offering access to specialist support, allowing extra time for processing transactions
- support for making **payment**
eg break, reduce, waive, cancelation
- support for **tackling** with **personal** circumstances
eg referring to support or advice from specialist

● The organization should take information provided by a consumer about their vulnerabilities **on face value** without requiring evidence.

The ISO 22458 is expected to play a role of **leveling the playing field** where people with vulnerabilities can collect, understand and compare the information they received, and **can have a fair negotiation** for making contracts with traders.

(= **pursue their best interests**)

The ISO 22458 is expected to **change the attitude of traders**, based **on the strict principle of "inclusivity"**.

The ISO 22458 is expected to **break the circuit where vulnerability causes harm**, and to provide **practical suggestions to traders** on what they should **proactively** do for this **outcome**.

The possible impact of the ISO 24588 on society

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eg Criminal Code, CPUTR2008(UK),
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↑
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Regulating and Governing Market

~by more than sanctioning rogue traders

We all consumers entail the possibilities of having vulnerabilities or falling into vulnerable situations during our lifetime. However, even if we are potentially “vulnerable consumers,” the manifestation of such vulnerabilities can be suppressed depending on how traders conduct solicitation, how customer service are provided, and how products and services are designed in the first place.

ISO22458 shows us **how “consumer vulnerability” can be overcome** by good practices of organisations which integrate the “outcome-focused” and “proactive” approach in their internal mechanism.

In conclusion, we see that ISO 224258, as **a driver that can restrain “consumer vulnerability,”** has the potential to support, supplement, and prepare the ground for future amendments to the current consumer law (if necessary).

We hope that in Japan and also in other countries, various stakeholders (e.g., business associations, consumer groups, support groups for people with disabilities, and advocacy groups) will work together to verify that ISO is useful and feasible as practical guidance, **and market can become more inclusive and more efficiently suppress exploitation.**

Conclusion

~ beyond legislations in Japan and other countries

武蔵野大学シリーズ5

法と支援型社会

他者指向的な自由主義へ

武蔵野大学 専任講師
菅 富美枝 著
Suga Fumie



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～「自己決定支援」を追求する自由～

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新 消費者法研究

脆弱な消費者を包摂する法制度と執行体制

菅 富美枝 [著]



成文堂



We don't need "incapacitation" but "**inclusion**"

Thank you for your attention!!
f_suga@hosei.ac.jp