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Kadomatsu, Narufumi

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The Rise and Fall of the “Relationship of Reciprocal Interchangeability” Theory in Japan ---Productivity of “Misinterpretation”?

KADOMATSU Narufumi^{1 2}(Faculty of Law, Kobe University)

I Introduction^{3&4}

An important aspect of the provision of legal assistance by Japan to recipient countries is that Japan has been a recipient of legal models itself. For Japan, the transplant or reception of law is not only a historical incident but also a contemporary phenomenon. The extensive study of comparative law is a prerequisite when the Government introduces a new legal regime or makes important amendments to an existing regime. To be well versed in at least one foreign legal system---mainly American or European---is still considered today to be an essential part of a legal academic’s training⁵.

Such professional training is reflected not only in the drafting of bills and the legislature’s deliberation but perhaps more so in the application and interpretation of laws. Theories or concepts which originated outside of Japan are often used in Japanese discussion on the interpretation of the law.

This paper focuses on a reception process of a specific legal concept or theory as a tool of interpretation: the legal concept of “relationship of reciprocal interchangeability”. This legal concept has its origins in the German Federal Administrative Court, and was introduced into Japan by an academic highly proficient in German law. When the concept was originally accepted in lower court cases, it underwent an important transformation and had a significant and partly unexpected impact in various ways, before

1 Professor, Graduate School of Law, Kobe University since 2005. LLM, University of Tokyo, 1988; Research Associate, Institute of Social Science, University of Tokyo 1992-1995; Associate Professor, Kyushu University 1996-2005; Visiting Scholar, University of Hamburg 1998-1999; Guest Professor, Ludwig Maximilian University Munich, 2003-2004.

2 Japanese personal names in this paper are given in Japanese order, namely the surname first, followed by the given name.

3 This paper is based upon the author’s presentation at the 2009 annual meeting of the Law and Society Association (May 28 2009, Denver, Co., U.S.A). The author would like to thank Prof. Kaneko Yuka (Kobe University), who organized the session (Session 1411, “Beyond Legal Pluralism: Lessons for Technical Legal Assistance Programs from the Japanese Experience of Modernization”) and other participants. Special thanks also go to Mr. Stephen Green (Associate Professor, Ritsumeikan University College of Law) for his legal editing. Needless to say, the author is at fault for all the remaining errors.

4 This paper is supported by JSPS KAKENHI (20402012) and Asahi Glass Foundation.

5 There are changes in this trend. The introduction of the new legal training system (Law School), increasing interest in law and economics in some fields of the law, and other factors are impacting on “reproduction system” of legal academics.

it faded from the stage. I will follow this transformation process and examine the roles of various actors in the process: academics, attorneys, the courts and most importantly citizens as the “users of the law”.

II Background: the Kunitachi condominium conflict

It started as a typical neighborhood conflict between the developer of a multi-story building and the neighbourhood residents⁶. In 1999, a real estate developer drew up plans to build a 40 meter-high condominium on Daigaku Dori (“University Boulevard”) in Kunitachi City, in the suburbs of Tokyo. Many neighborhood residents were strongly against the plan and claimed that the building would destroy the beautiful landscape along the road, especially because it would not be in harmony with the row of ginkgo and cherry trees, approximately 20-meters high, on either side of the road.⁷ Toho School, a private primary school, junior and senior high school nearby, was also a strong opponent of the plan because the multi-story building would block sunlight from its play ground which was used for physical education activities. Since the construction plan for the condominium did not violate the existing zoning regulations and other rules of the City Planning Act and the Building Standard Act, the Tokyo Metropolitan Government issued the developer a Construction Permit.

However, Kunitachi City was a special town. The city was developed by Tsutsumi Kojiro, the founder of Seibu Corporation group in the 1920s. The idea of the city was inspired by the “Garden City” concept by Ebenezer Howard. The city is famous for its long tradition of civic activities to protect the environment and landscape. Activists, who were wary of the trend of de-regulation in the 1990s that prevailed in the national government and the conservative city government, succeeded in winning the city’s mayoral election in 1999. The new mayor had been a leader of a citizen’s group, which was engaged in protecting the environment and landscape. The condominium conflict was the first important challenge for the mayor. Neighborhood residents, people related to the Toho School, and citizen activists moved very quickly to push the city government to enact a new district plan and building ordinance, a legal scheme under which the municipal government can enforce stronger regulation over a small area, for

6 For the background and legal issues surrounding neighborhood conflicts in Japan, see: Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, Columbia Law Review, Vol. 84, No. 4 (1984), pp. 923-983 ; Nakagawa Takehisa, *Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization*, 52 Administrative Law Review 157 (2000); Nakagawa, *Administrative Guidance: a Tentative Model of How Japanese Lawyers Understand It*, Kobe University Law Review 32 (1998), pp.1-20

7 *Daigaku Dori* is about 44 meters wide and includes a green area of about 9 meters in width. The green area is arranged as a tree-lined street with 171 cherry trees, 117 ginkgo trees, and other trees.

the part of the University Boulevard which was of concern.

Since the new district plan regulations could not be enforced retrospectively against existing buildings and buildings “under construction”⁸ (Building Standard Act, Art.3 para.2), the situation turned into a first-come-first-served race. On February 1, 2001, when the new regulations came into effect, the digging of the condominium’s foundations had begun, but there was no structure of a building. Was the condominium already “under construction?” If yes, the new regulations would not apply to the building unless it is rebuilt or added to in the future. If not, the building can be subject to suspension or demolition order from the Tokyo Metropolitan Government (Building Standard Act, Art.9). The Tokyo Metropolitan Government took the view that the building was already under construction on February 1. The residents’ group naturally took the contrary position and it led to several legal suits being filed. In the first suit (the Civil Injunction Litigation), the plaintiffs sued the developer for suspension of the construction and removal of any part of the building above 20-meters in height. In the second suit (the Administrative Litigation), the plaintiffs sued the Tokyo Metropolitan Government, contending that the building was not under construction as at February 1, and therefore the government should issue a suspension/demolition order against the building based on the new regulations⁹. (See Chart 1)

The legal issues differed between the two suits. In the Administrative Litigation, whether the building was “under construction” on February 1 was undoubtedly the central issue. In the Civil Injunction Litigation, the issue was whether the construction constitutes tort in civil law¹⁰. Therefore, the questions were: (i) whether there is a legally protected interest of neighbours in the landscape; and (ii) whether the construction infringed the interests beyond the tolerable limit. The “under construction” issue was taken into account as one factor, but did not immediately determine the fate of the civil injunction case.

The residents’ group did not succeed in obtaining interim relief¹¹, so the construction continued during the litigation of both suits and the

8 Obtaining a construction permit would not suffice. Actual construction activities should have commenced.

9 There is also another type of litigation which is not discussed in this article, in which the real estate developer sued for governmental tort liability against Kunitachi City and the City’s mayor.

10 In Japan, the legal ground for an injunction is disputed. The majority found it in “the right for personhood” as an unwritten civil law. However, the Miyaoka decision chose the minor legal construction which finds its basis in tort liability.

11 Filing a civil injunction suit alone cannot stop the defendant (developer) from continuing the construction. The plaintiffs’ petition for provisional disposition (interim relief) was not affirmed (Tokyo District Court, Hachioji Branch, June 6, 2000 & Tokyo High Court, Dec. 22, 2000). Besides, under the Administrative Case Litigation Act before 2004, there was no system of petition for provisional administrative disposition (suspension/demolition order). The only possible interim relief against an administrative disposition was a petition for suspension of its legal effect.

construction of the condominium was completed. Ultimately, the residents' group failed in both suits and the condominium stands today.

III Standing to sue

(a) Japanese case law on standing

As mentioned above, the central issue in the administrative litigation was the “under construction” issue. However, there was an important procedural issue to be resolved before the court could consider the substantive issues: did the plaintiffs have standing to sue^{12&13}.

The Administrative Case Litigation Act (Act No. 139 of 1962) only stipulates that the plaintiff must have a “legal interest” (Art.9) to be admitted to have standing.

The leading case explains the requirements for such a “legal interest” as follows:¹⁴

“The person who has an interest protected by law” in initiating an action for the revocation of the decision is the person who has had their right or interest protected by law infringed, or whose right or interest protected by law is most likely to be infringed by the decision. In cases where the administrative law which provides for such decisions does not merely absorb the specific interest of an unspecified number of people into the general public interest, but can be understood to protect the specific interest of individuals who belong to this scope of people, such an interest should be regarded as an interest protected by law in this context, and those who have had such an interest infringed, or whose interests are most likely to be infringed by the decision, shall be regarded to have standing to sue for its revocation. Whether or not the given administrative law intends to protect the specific interest of the unspecified number of people as well as the specific interest of individuals who belong to this group shall be determined by taking into consideration the intention and purpose of the given administrative law, the content and nature of the interest which the given administrative

12 Cf. Kadomatsu Narufumi, Judicial Governance Through Resolution of Legal Disputes?—A Japanese Perspective, National Taiwan University Law Review Vol.4 No.2(2009) pp.141-162(150-151)(<http://www.law.ntu.edu.tw/ntulawreview/4/02/toc.htm>)

13 This administrative litigation was also unique in a different aspect. The Japanese administrative litigation system has long centered upon revocation litigation, which is an ex-post and negative remedy against an administrative disposition already rendered. In this litigation, on the contrary, the plaintiffs were seeking positive action from the Tokyo Metropolitan Government to issue a suspension/demolition order. This is considered to be ex-ante litigation for a future administrative disposition. Under the Administrative Case Litigation Act of 1962, this kind of litigation was theoretically thought to be possible under certain conditions, but actual decisions had been extremely rare. In 2004, the amendment of the act expressly admitted such litigation. See, Kadomatsu, *supra* note 12, pp.156,158)

14 Sup. Ct September 22, 1992 (Monju atomic power plant case)

law intends to protect via such a decision.

In sum¹⁵, judicial precedents require that: (i) the subjective interests of the plaintiff should be damaged by the disposition;¹⁶ (ii) such subjective interests should fall under the protected realm of the statutory law, which serves as the legal ground of the disposition; and (iii) such subjective interests should be protected as the specific interests of the plaintiff and not entirely absorbed into the “public interest”. The origin of this doctrine is the German “Schutznormtheorie”, but its actual implementation in Japan is very narrow, especially with the strict interpretation of the “specific interest” requirement.

The trend of court decisions was that they granted such “subjective, specific interests” in environmental litigation in which there is a specific point as the source of nuisance¹⁷. On the other hand, they rarely considered the benefits that the plaintiff enjoys from area-level regulations as “specific interests”.¹⁸

(b) “Relationship of reciprocal interchangeability (RRI)”

Against the backdrop of the negative position of the case law against standing based on area-level regulation, Yamamoto Ryuji, a brilliant young associate professor at the University of Tokyo, introduced the theory of relationship of reciprocal interchangeability (hereafter “RRI”).¹⁹ He got the idea from extensive study on historical analysis of “legal relationship” in German administrative law. He drew attention to a passage in a decision of the German Federal Administrative Court, handed down on September 16, 1993. In this case, the German Court admitted standing to sue by a citizen against permission to build a garage granted to his neighbour. The plaintiff claimed that the building permission was illegally given in an area designated as “residential-only area” (Reines Wohngebiet) in the land use plan (B-plan).

“It belongs to the task of the city planning law to provide individual lots with possibilities of land use that are compatible with each other. In this way, the law adjusts possible land-use conflicts and at the

15 See Kobayakawa Mitsuo, *Kokokusoshō To Horitsujo No Rieki-Oboegaki* [Memorandum on legal interests in complaint litigations]. In: Seisaku Jitsugen To Gyoseiho [Achieving policy aims and administrative law] (Yuhikaku, 1998) (pp. 43-55).

16 In the context of Kunitachi conflict, “non-feasance of the disposition”

17 e.g. Monju APP case (Sup. Ct. September 22, 1992), Niigata airport noise case (Sup. Ct. Feb. 17, 1989)

18 An example is the Sup. Ct. Decision Dec. 17, 1998. In this case, the residents’ standing to sue against the approval of a pachinko parlor (a de facto gambling place regulated under the Act on Control and Improvement of Amusement Business) was denied to residents who asserted the parlor was illegally located in a residential area. On the other hand, standing was affirmed in the case of a nearby hospital, which claimed the location contravened the distance restriction on locating a pachinko parlor near a hospital (Sup. Ct. September 27, 1994).

19 Yamamoto, *Gyoseijo no Shukanho to Hokankei* (“Subjective Law” and “Legal Relationships” in Administrative Law) (Yuhikaku, 2000)

same time determines the content of the land property. Neighborhood protection of the planning law is therefore based on the idea of the relationship of reciprocal interchangeability. So far as a property owner is subject to the public law land use regulation, she can also enforce that her neighbor complies with the regulation.(----) The typical example in which this principle is applied is the zoning regulations on permitted activities by German land use plan (B-plan). By the regulations the concerned lot owners are combined into a community of common destiny. Restrictions on the usability of her land-use possibility is compensated by the fact that other property holders are also subject to the same restriction”²⁰

Yamamoto highlights the essence of the RRI theory as follows:

“A zoning type regulation on the use (my emphasis) of buildings may have meaning and therefore be legitimated not as a regulation against a single building but as a uniform regulation throughout the area. In other words, an obligation of a person from the zoning is meaningful and legitimated only by the fact that other persons in the area are also subject to the same regulation. The person who assumes an obligation under a zoning regulation, also enjoys benefits from the fact that other persons also assume the same obligation, and therefore may claim those benefits as her legal interest. She has a right to prevent buildings that violate the zoning regulation and destroy features of the area.”²¹

(c) Application to the Kunitachi conflict- Ichimura decision

Attorneys for the neighborhood residents in the Kunitachi conflict learned of this theory and used the idea as a basis for arguing their clients had standing to sue²². Their argument was accepted by the Tokyo District Court, Judge Ichimura Yosuke presiding.

(Tokyo District Court, December 4, 2001)

When buildings constitute an important element of a particular landscape within a certain space, the users of the space (e.g. building owners or residents) will stand in a different position from that of passersby, who are nothing but beneficiaries of the beauty of the landscape. Building owners or residents can enjoy the landscape only when they themselves strive to maintain the beauty. In addition, the landscape can easily be destroyed if any of the users does not observe the rules necessary for its maintenance. One can enjoy the interest

²⁰ German Federal Administrative Court, September 16, 1993 (BVerwGE 94,151)

²¹ Yamamoto, *supra* note 19, pp.306-307

²² The author was personally involved in this, introducing the idea to an acquaintance who was an attorney in the Kunitachi case.

in the landscape continuously only when all users of the space form a relationship in which they mutually maintain and respect the landscape. Landscape can be maintained only when all the users of the space observe its rules. It is highly dependent on a consciousness of community of the users of the space.

Lot owners of the concerned area in this case are subject to the height restriction of either 10 or 20 meters according to the district plan and the building ordinance. They are the users of the space that constitute the Kunitachi University Boulevard. They are put into a certain reciprocal interest relationship, in which one can enjoy the interest of beauty of the landscape in return for observing the height regulation and enduring the property restriction. In addition, the landscape can easily be destroyed simply when one user does not observe the restriction. If this happens, other users will lose their incentive to contribute to the landscape protection, which leads to further destruction of the beauty. Such being the case, adequate protection of the “interest in the landscape” is essential in order to maintain the landscape as part of the public good. Therefore, we should so construe the building ordinance and Building Standard Law 68-2 that they protect the interest of lot owners to enjoy the particular landscape (Kunitachi University Boulevard) in the height restriction district as their individual interests.

The Ichimura Decision not only admitted the standing of the neighborhood residents, but also affirmed their substantial claim that the building was still not “under construction” on February 1, and declared that non-feasance of a rectification order (suspension, demolition etc.) by the Tokyo Metropolitan Government was illegal.

The RRI theory was utilized in academic discussion and the Ichimura decision to break the impasse, which Japanese standing discussion faced in the treatment of area-level regulations. By this theory, the interests derived from the regulations had a chance to be admitted as the “specific interests of the plaintiffs”, as the case-law requires for the basis of standing.

It should be noted that the nature of RRI in the German Federal Administrative Court, Yamamoto’s monograph and the Ichimura judgment are grounded in the zoning regulations being based on statutory laws.

IV Application to civil litigation: fruitful misinterpretation?

(a) Different and changing concerns of citizen groups

The idea of RRI was also quite appealing to the plaintiffs. Throughout

the conflict, they insisted that the real estate developer was nothing but a free rider to the beautiful landscape of the University Boulevard, which, they asserted, had been preserved by the long term efforts of the residents²³.

An observation by legal sociologist Hasegawa Kiyoshi²⁴ shows that there were different concerns among three main groups which joined in opposition against the condominium. The first group (*Kangaeru-kai*) was a coalition of several citizens groups engaged in various environment movements in Kunitachi-City. This group placed importance on the landscape and living environment of University Boulevard. Most of the members of the second group (*2H no kai*) owned single-family houses along University Boulevard, and valued the landscape issue but were more interested in the loss of sunlight to their property, or the construction noise issue.

The position of the third actor, Toho School is especially interesting in this respect. The school had a very important role in the opposition movement. It assisted the movement by providing places for meetings, and more importantly, it utilized personal networks of the PTA and alumni to get the help of experts such as city planners and attorneys, who helped the movement probably with only nominal reward. During the opposition movement, the central concern of the people related to the school seems to have shifted from the issue of sunlight to the landscape issue. Onishi Shinya, a school official and key person in this movement, was deeply impressed by the history and tradition of civic movements in Kunitachi City. In 1972-1973, when the Kunitachi City office proposed zoning regulations which mitigates height restriction along University Boulevard, there was a citizens' movement among the residents against the plan. This resulted in the Tokyo Metropolitan Government designating the area as a first-class residential area, which meant the area was subject to even stricter regulation than before²⁵ (the site of the condominium was not in this area). Onishi felt "he found a treasure" when he read of this history. He thought it reflects the consciousness of Kunitachi citizens, who voluntarily endure restrictions on their property to preserve the landscape²⁷. Onishi, a lay person in the law, prepared a document to be submitted to the Tokyo District Court, and stressed that there is a "legal conviction in Kunitachi that serves as a basis of customary law".²⁸

23 In a public meeting between the developer and the residents on November 20, 1999, Ishihara Ichiko, the leader of a citizen group against the condominium, openly criticized the developer saying: "Let me give one statement to the people of the Meiwa Estate. We have not preserved the environment of Kunitachi to let you milk us. By what power are you authorized to intrude into our sanctuary with your shoes on?" (Ishihara, *Keikan ni Kakeru* (Devoting my life to protecting the landscape), Shinhyoron, 2007) p103-104. The metaphor of "milking" is even chosen as a title of the collection of materials compiled by the citizens group (*Umaishiru to Shimin Jichi* (The milking and civic autonomy), Tokyo Kaijo Atochi kara Daigaku Dori no Kankyo wo Kangaeru Kai, 2003)

24 Toshi Komyuniti to Ho (Urban Community and the Law) University of Tokyo Press, 2005), p.282

25 Ibid, p..312

26 This history is explained in Sup. Ct. Decision March 30, 2006. <http://www.courts.go.jp/english/judgments/text/2006.03.30-2005.-Ju.-No..364.html>

27 Interview by the author on Dec.6, 2008.

28 Ishihara, supra note 23, p. 121.

Compared with the plaintiffs, the attorneys might have been less attracted to the RRI theory. At the first stage of the litigation, they were rather reluctant to focus on the landscape issue²⁹, since they thought there would be less chance of winning on that issue. It probably seemed a safer strategy for them to focus on the sunlight or noise issues, which were already acknowledged by courts to be legally protected interests.

(b) Civil litigation - Miyaoka decision

The attorneys, however, were naturally happy with their triumph in the Ichimura decision and also put forward the idea of RRI in the Civil Injunction Litigation.

The Tokyo District Court, with presiding judge Miyaoka Akira, rendered a landmark decision on December 18, 2002 ordering the part of the condominium over 20 meters-high should be removed. The judgment drew increased media attention to the dispute and the issue of landscape was driven into national public attention.

Interestingly, the Miyaoka decision admits that the building was already “under construction” on February 1, therefore, the new regulation cannot apply retrospectively to the condominium. However, the court stated, the legality according to the Building Standard Law does not automatically lead to the legality under private law. If the building causes damage to the neighborhood and infringes the rights of residents beyond tolerable limits, it can be illegal from a private law perspective.³⁰

The decision once again accepts the theory of RRI, but this time in a private-law context.

(Tokyo District Court, December 18, 2002)

There are cases in which the property right holders establish certain standards on height, color or design for the buildings within the area and thus a certain landscape of the area evolves. When not only the residents but also the society at large considers it as good landscape, it forms added value to the lot.

Such added value of urban landscape is by its nature different from enjoyment of the natural landscape of mountains or coast, or from enjoyment of historical buildings which are preserved at the cost of their owners. It is the property right holders who enjoy the added value of the landscape themselves that have brought forth the value by their continuous effort. It required their mutual understanding, solidarity

²⁹ Ibid, p.121 .

³⁰ This part of the decision, which distinguishes different aspects of legality or accepts dualism of the public law order and the private law order, is not necessarily unique but is rather a common understanding among Japanese courts.

and self-sacrifice. In order to maintain such added value, the above standards must be observed by all the property right holders. Only one property right holder can immediately destroy the uniformity of the landscape by a building that violates the standard and deprive other property right holders of the above added value. The property right holders in the area therefore must have a burden to voluntarily restrain the free exercise of their rights, and on the other hand must be able to enforce a similar burden against the other right holders.

Such origin and peculiarity of urban landscape, derived from self-restraint of local property holders, does not immediately lead to recognition of the abstract “right to environment” or “right to landscape”. Upon considering it, however, property right holders do have “the interest in the landscape”, derived from the property right. They namely have the obligation to preserve the good landscape themselves and at the same time may mutually demand other right holders to do so when the following conditions are met: (i) a particular artificial landscape in a particular area is maintained as a result of the continuous self restraint of property right holders; (ii) there is social consensus about the benefit of the landscape; and (iii) added value emerges as a result. In this case, this right to interest deserves legal protection and the violation of the interest will result in tort liability.

The court granted a removal order as a result of such tort liability, which emerges when three requirements ((i) continuous self-restraint of right holders; (ii) good landscape; and (iii) added value) are met. Although the decision itself does not use the term, one may understand that it recognized the existence of customary law in such cases.

(c) Impact of “misinterpretation”?

Knowingly or unknowingly (probably the former), the Miyaoka decision used the RRI theory in a totally different context from the German original. While the German Federal Administrative Court applied the theory in a case in which an administrative interpretation of statutory planning law was in question, the Miyaoka decision uses it in the private civil law context³¹. For the latter, the RRI is the source of the law itself. Even though the building does not violate the Building Standard Law, it violates the unwritten customary law³².

31 Strictly speaking, there is also a difference of context between the German court and the Ichimura decision. While the German decision is about land use purpose regulation, the issue in the Ichimura decision was building height regulation. It is not certain whether the German court would grant the existence of RRI in height regulations.

32 It is somewhat difficult to assume how Yamamoto would evaluate this “misinterpretation”. His introduction of the RRI theory clearly has legislative rules in mind. He places importance on the role of legislators for the coordination of interests, for which interpretation of constitutional rights by the court would have limits (Yamamoto, *supra* note 19, p. 340). On the other hand, interest coordination by the legislators is always rather comprehensive and long term. Yamamoto does not deny that private civil law, which can react flexibly to individual situations, plays an important role in sensitive micro-level coordination of interests.

Ironically, possibly because of the court’s misinterpretation, the RRI theory had a greater social impact than it otherwise would have had. In many conflict cases in which landscape issues were in question, it is not often that the plaintiffs can successfully allege that the administrative authorities violated building law regulations, since the Japanese city planning system relies heavily on “objective” and numerical regulations and gives little discretion to building authorities³³. The Kunitachi case, in which there was ample grounds for the plaintiffs to challenge the interpretation of “under construction”, probably belonged to the rare minority. With the “misinterpretation”, the RRI theory attained the possibility to be applied to cases where no violation of building regulations is conceivable.

Three months after the Miyaoka Decision, the Nagoya District Court admitted “the interest in the landscape” in a civil injunction case and ordered an interim suspension of the construction of a condominium in a historically preserved district (Nagoya District Court Ruling March 31, 2003). Some expected similar decisions would follow.

V Fading away of the concept

(a) “Casual recognition” by the Supreme Court

Like an old soldier, a theory may never die but it does fade away. It was also the fate of the theory of RRI. One of the reasons it faded away is that in the end the plaintiffs lost the battle. After their victories in the Tokyo District Court, they lost in all higher court decisions. The decision of the Supreme Court in the civil litigation (March 30, 2006) maintained the High Court’s decision and meant that the plaintiffs finally lost.

However, to finally lose the case was not the only reason for the theory to fade. The theory lost its reason to exist because the Supreme Court simply and casually³⁴ recognized the possibility of “the interest in the landscape” without the need for any complicated reasoning. They did not need any sophisticated theory such as the RRI.

(Supreme Court, March 30, 2006)³⁵

3. Urban landscapes are valuable from an objective perspective if they are good landscapes that create historical or cultural environments and affluent living environments for inhabitants. [the decision mentions (i) the landscape ordinances of Kunitachi City, Tokyo Metropolitan

33 Kadomatsu, Recent Development of Decentralization, Deregulation and Citizens’ Participation in Japanese City Planning Law, Kobe University Law Review No.40 (2006), pp.1-14(3)

34 Ohtsuka Tadashi, *Kunitachi Keikansosho Saikosaihankeitsu no Igi to Kadai* (Significance and Task of the Supreme Court Judgment over Kunitachi Landscape Litigation), Jurist 1323 (2006), pp.70-81(76)

35 Provisional translation provided by the Supreme Court of Japan. (<http://www.courts.go.jp/english/judgments/text/2006.03.30-2005.-Ju-.No..364.html>)

Government and other local governments (ii) the Landscape Law, which was promulgated in 2004]

Consequently, it should be construed that people who live in areas near a good landscape and enjoy the benefit of the landscape on a daily basis should be deemed to be closely related to the infringement of the objective value of the good landscape, and that, therefore, their interest in enjoying the benefit of the good landscape (hereinafter referred to as the “interest in landscape”) deserves legal protection.

However, it is true that the contents of the interest in landscape may vary depending on the nature and type of individual landscapes, and are also likely to change along with changes in society. At present, the interest in landscape cannot be deemed to be clearly substantial as a private right, nor can it be deemed to have been established as a “right to landscape” beyond the level of an “interest.”

As the last paragraph of the extract of the decision shows, the Supreme Court will affirm tort liability based on “the interest in the landscape” only in rare situations, which was the reason why the plaintiffs finally lost the case. However, the fact that Supreme Court recognized the “interest in the landscape” as a legally protected interest is important, if we consider that the interest was often considered to be on the objective law level and does not constitute a subjective legal interest.³⁶

(b) “Reverse import” to standing

As is shown above, the “interest in landscape” was first admitted in the standing argument decision in an administrative litigation case (Ichimura decision) with the help of RRI and later “imported” in a civil litigation case (Miyaoaka decision). The sophisticated RRI theory was necessary to admit the existence of “specific interest” in the case of area-level regulation.

However, once the Supreme Court admitted the existence of “the interest in the landscape” as a legally protected interest in civil litigation, a “reverse import” to the argument on standing in administrative litigation took place. In a case where the historical landscape of a beautiful harbour was in question, the Hiroshima District Court granted standing to the residents living in a “historical landscape zone”. (Hiroshima District Court Ruling February 29, 2008 (Tomonoura)³⁷). It remains to be seen how far this trend continues.

³⁶ Ohtsuka, *supra* note 37, p.75

³⁷ On October 1, 2009, the Hiroshima High Court confirmed the standing of the residents again and rendered a landmark decision that issued an injunction to suspend a land reclamation license for the bridge project (see <http://search.japantimes.co.jp/cgi-bin/nn20091002a1.html>). There was a somewhat ironical situation in the standing debate in this case. Namely, the attorneys for the defendant in this case (Hiroshima Prefecture) quoted the 3 requirements for the “interest in landscape” in the Miyaoaka decision to negate the plaintiffs’ standing. In response, the plaintiffs quoted the Supreme Court judgment which upheld the overturning of the Miyaoaka decision to support their arguments for affirming standing.

VI Conclusions

The reception and transformation process of the RRI theory can be summarized as follows.

Reception 1: German Federal Administrative Court→An Academic (Yamamoto)

The RRI theory, a product of the German Federal Administrative Court, was imported to Japan by a Japanese legal scholar. In doing that, he was surely critical of the theoretical position of the Japanese Supreme Court on standing, but he was not necessarily thinking about its application to a specific situation. Rather, he was interested in re-organizing the whole system of administrative law doctrine. That is, his interest was purely academic.

Reception 2: Yamamoto→Administrative Litigation (Ichimura Decision)

The judges of a specific administrative litigation case learnt of the RRI theory from Yamamoto's monograph and the efforts of the plaintiffs' attorneys. The theory caught the judges' attention probably because it offered a legitimate way to overcome existing case law on standing, because it comes from the German “Schutznorm” theory, which is the origin of Japanese law on standing.

Transformation: Ichimura decision→Civil Litigation (Miyaoaka Decision)

Victory in the Ichimura decision was probably unexpected. However, the RRI theory attracted the attorneys and the plaintiff residents. For the residents, the idea of reciprocity behind the theory was naturally more important than the original context. It appealed to their pride and dignity as it recognised that they had made efforts to preserve the landscape and environment of Kunitachi City.

Against this backdrop, the Miyaoaka decision applied the theory in a totally different context: where there is no statutory regulation. This can be regarded as a misinterpretation of the theory, but the RRI theory had a greater social impact precisely because of this misinterpretation.

Fading Away: Supreme Court→Self-sustainability of “Interest in Landscape”

With the recognition of “the interest in the landscape” by the Supreme Court in the civil litigation, the interest became self-sustainable and there was no longer a need for the sophisticated RRI theory. The theory quietly

left the stage and faded away. Ironically, the “reverse import” of the “interest in the landscape” into the standing argument occurred, which was the original context of the RRI theory.

I have shown one example how a legal theory on interpreting positive law can be imported into a recipient country. It was an active reception from a legal academic in a recipient country and later applied by the legal professionals (attorneys, judges) there, because it could make an effective counter to the traditional doctrine. It was imported because it fitted well within the context of the legal discussion of the recipient country. However, since the theory also appealed to the layperson, it was transformed to be applied to a broader social context. Therefore, we talk about the productiveness of “misinterpretation”.

<Chart 1>

		Issues	
		“Under Construction” or not	Injunction/ Suspension order affirmed
First Suit(Civil Injunction Litigation) Neighborhood vs. Developer	Ruling, Tokyo DC Hachioji Branch, June 6,2000	Y	N
	Ruling, Tokyo HC, Dec 22, 2000	N	N
	Decision, Tokyo DC, Dec,18, 2002 (Miyaoka Decision)	Y	Y
	Decision, Tokyo HC, Oct.27, 2004	Y	N
	Decision, Sup.Ct., Mar.30, 2006	Y	N
Second Suit(Administrative Litigation) Neighborhood vs. Tokyo Metropolitan Government	Decision, Tokyo DC, Dec.4, 2001 (Ichimura Decision)	N	Y
	Decision, Tokyo HC, June 7, 2002	Y	N
	Ruling, Sup.Ct., June 23, 2005	The lower court’s judgment was upheld without the court giving substantial reasons for its decision	

<Photo>



The Condominium

(photographed by the author)