A Misinterpretation or a Productive Diversion? The Rise and Fall of the "Relationship of Reciprocal Interchangeability" Concept and the Possibility of Reception of a Legal…

Kadomatsu, Narufumi

(Citation)
Comparative perspectives on administrative procedure:105-127

(Issue Date)
2017

(Resource Type)
book part

(Version)
Version of Record

(URL)
https://hdl.handle.net/20.500.14094/90005956

Narufumi Kadomatsu*

A Misinterpretation or a Productive Diversion? The Rise and Fall of the "Relationship of Reciprocal Interchangeability" Concept and the Possibility of Reception of a Legal Interpretation

I. Introduction[1]

The Japanese legal system is sometimes described as a "laboratory of operative comparative law."[2] When the Government introduces a new legal scheme or makes important amendments to an existing law, an extensive comparative analysis is usually required. For Japan, the transplantation or reception of foreign law is not just a historical incident, but a contemporary phenomenon as well. As a result, for a Japanese legal academic, it is necessary to be well versed in at least one foreign legal system—mainly American or European in order to participate in the drafting of bills and the legislature's deliberations, as well as subsequently the interpretation and application of laws. Theories and concepts that originated outside Japan are often used in Japanese discussions on the interpretation of the law.

* Professor of Administrative Law, Kobe University

1. I–V of this paper is an abridged and updated version of the author's paper "The Rise and Fall of the 'Relationship of Reciprocal Interchangeability' Theory in Japan—Productivity of 'Misinterpretation'" 43 *Kobe University Law Review* 1–15.(http://www.lib.kobe-u.ac.jp/handle_kernel/81004333, http://ssrn.com/ abstract=2435457). VI is based upon the author's paper in Japanese "*Gokanteki Rigai Gainen no Keiju to Henyo*" (Reception and Transformation of the Concept "Reciprocal Interest Relationship"), in: Toshihiro Ochi et al(ed.) "*Gyosei to Kokumin no Kenri*" (2011)("Administration and Rights of the Citizens") pp.150–178.

2. Meryll Dean(ed), *Japanese Legal System, 2nd edition*, Cavendish Publishing, London, 2002, p.2.

This paper focuses on the process for receiving a specific legal concept or theory into Japanese law as an interpretive tool: the legal concept which is referred to as "relationship of reciprocal interchangeability" (hereafter "RRI"). This legal concept has its origins in the German Federal Administrative Court, and was introduced into Japan by an academic who was highly proficient in German law. When the concept was originally accepted in lower court cases, it underwent an important transformation, and produced various significant and partially unexpected impacts before fading from the stage. I trace this transformation process and examine the roles of various actors in the process: academics, attorneys, and the courts who, along with citizens as "users of the law," took part in the process. Finally, using the reception process as an example, I offer insights regarding the legal reception/transplantation discussion, focusing not on legal texts, but on their interpretation from the perspective of recipients.

II. Background: The *Kunitachi* condominium conflict

It started as a typical neighborhood conflict between the developer of a high-rise building and neighborhood residents. 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 strongly opposed the plan, claiming that the building would destroy the beautiful roadside landscape, especially because it would not be in harmony with rows of ginkgo and cherry trees, approximately 20 meters high, on either side of the road. *Toho* School, a private school located nearby, strongly opposed the plan because the multi-story building would block sunlight from reaching its playground that was used for physical education activities. Because the condominium construction plan did not violate existing zoning regulations, or other rules of the City Planning Act and the Building Standard Act, the Tokyo Metropolitan Government issued a construction permit to the developer.

However, *Kunitachi* City was a special town. The city is famous for a long tradition of civic activities in protection of the environment and landscape. Moreover, the condominium conflict was the first important challenge for the newly elected mayor, who had been one of the leaders of an environmental activist group in the city. 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 impose stronger regulations on a small area; in this case, the affected part of University Boulevard.

Because the new district plan regulations could not be enforced retrospectively for existing buildings and buildings that were "under construction" (Building Standard Act, Art.3 para.2), the situation turned into a race. On February 1, 2000, when the new regulations took effect, the developer had begun excavation work on the condominium's foundations, but had not started constructing the building. Was the condominium already "under construction"? If so, the new regulations would not apply to the building. If not, the building could be subject to a suspension or demolition order from the Tokyo Metropolitan Government (Building Standard Act, Art.9).[3] 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 this led to several legal suits. In the first suit (the Civil Injunction Litigation=Suit A), the plaintiffs sued the developer to suspend construction and remove any part of the building above 20 meters in height. In the second suit (the Administrative Litigation=Suit B), plaintiffs sued the Tokyo Metropolitan Government, contending that the building was not under construction as at February 1; therefore, the government should issue a suspension/demolition order for the building based on the new regulations.[4]

The legal issues differed between the two suits. In the Administrative Litigation (Suit B), whether the building was "under construction" on February 1 was undoubtedly the central issue. In the Civil Injunction Litigation (Suit A), the issue was whether construction constitutes a tort in civil law.[5] Therefore, the questions were: (i) whether there was a legally protected interest of neighbors in the landscape; and (ii) whether construction infringed interests beyond a 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 relief, so construction continued during litigation of both suits and construction of the condominium was completed. Ultimately, the residents' group failed in both suits and the condominium stands today.

---

3. For a building owner to get this "under construction" protection, obtaining a construction permit would not suffice. Actual construction activities should have commenced.

4. There was also another type of suit that is not discussed in this article, in which the real estate developer sued *Kunitachi* City and the City's mayor for governmental tort liability.

5. 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 A-3 decision chose the minor legal construction which finds its basis in tort liability.

		Issues	
		"Under Construction" or not	Injunction/ Suspension order affirmed
Suit A (Civil Injunction Litigation) Neighborhood vs. Developer	A-1 Ruling, Tokyo DC Hachioji Branch, June 6, 200	Y	N
	A-2 Ruling, Tokyo HC Dec. 22, 2000	N	N
	A-3 Decision, Tokyo DC Dec. 18, 2002	Y	Y
	A-4 Decision, Tokyo HC Oct. 27, 2004	Y	N
	A-5 Decision, Sup.Ct. Mar. 30, 2006	Y	N
Suit B (Administrative Litigation) Neighborhood vs. Tokyo Metropolitan Government	B-1 Decision, Tokyo DC Dec. 4, 2001	N	Y
	B-2 Decision, Tokyo HC, June 7, 2002	Y	N
	B-3 Ruling, Tokyo Sup.Ct. June 23, 2005	The lower court's judgment was upheld without the court giving substantial reasons for its decision.	

III. Standing to sue

(a) Japanese case law on standing

As mentioned, 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.[6]

The Administrative Case Litigation Act (Act No. 139 of 1962) stipulates that the plaintiff must have a "legal interest" (Art.9) in order to establish standing.[7] However, judicial precedents provide that standing exists only if:[8] (i) the subjective interests of the plaintiff are damaged by the disposition;[9] (ii) such subjective interests fall under the protected realm of statutory law, which serves as the legal ground for the disposition; and (iii) such subjective interests remain as **specific interests** of the plaintiff and not entirely absorbed by the "public interest." The origin of this doctrine is the German *"Schutznormtheorie,"* but its actual implementation in Japan is, generally speaking, narrower than that in Germany, especially given Japan's strict interpretation of the "specific interest" requirement.

The trend of court decisions recognized "subjective, specific interests" in environmental litigation when there is a specific **point** that is the source of a nuisance. On the other hand, Japanese law rarely considered the benefits that the plaintiff enjoys from **area-level regulations** as "specific interests."[10]

(b) "Relationship of reciprocal interchangeability (RRI)"

Against the backdrop of negative case law regarding the establishment of standing based on the benefits from area-level regulations, *Ryuji Yamamoto*, a brilliant young associate professor at the University of Tokyo, introduced the

6. Another difficult issue in this case was the admissibility of an ex-ante remedy against the administration, which had been extremely rare under the Japanese Administrative Case Litigation Act before its amendment in 2004. See, Kadomatsu, Judicial Governance Through Resolution of Legal Disputes?—A Japanese Perspective, 4-2 *National Taiwan University Law Review* 141–162, 156,158. (http://ssrn.com/abstract=2435456)

7. On the standing issue in Japanese administrative law, see my chapter "Taking the Regulatory Court Seriously" pp 213–230 and references mentioned there.

8. See Mitsuo Kobayakawa, *Kokokusosho 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).

9. In the context of the *Kunitachi* conflict, "non-feasance of the disposition."

10. An example is the Sup. Ct. Decision Dec.17, 1998. In this case, standing to sue against the approval of a *pachinko* parlor (a de facto gambling place) was denied to the residents, who asserted that 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 that the location contravened the distance restriction on locating a *pachinko* parlor near a hospital (Sup.Ct. September 27, 1994).

theory of the relationship of reciprocal interchangeability (hereafter "RRI").[11] He came up with the idea after an extensive study of historical analyses of "legal relationships" in German administrative law. In particular, he drew attention to a passage in a decision of the German Federal Administrative Court handed down on September 16, 1993 (Garage case). In that case, the German Court admitted that a citizen would have standing to challenge the permission given to his neighbor to build a garage. Plaintiff claimed that building permission was given illegally in an area designated as a "residential-only district" (Reines Wohngebiet) in the land-use plan (B-plan).

> *It is part of the task of 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 same time determines the content of 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 public law land use regulation, she can also enforce her neighbor to comply with the regulation. (——) A typical example of this principle being applied is in zoning regulations on activities permitted by a German land-use plan (B-plan). Under 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 restrictions.*[12]

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 for a single building but as a uniform regulation applied throughout the area. In other words, an obligation of a person under zoning is meaningful and legitimated only by the fact that other persons in the area are also subject to the same regulation. A person who assumes an obligation under a zoning regulation also enjoys benefits from the fact that other persons also assume the same obligation; therefore, she may claim those benefits*

11. Yamamoto, *Gyoseijo no Shukanho to Hokankei* ("Subjective Law" and "Legal Relationships" in Administrative Law) (Yuhikaku, 2000). Cf. Matthias Schmidt-Preuß, *Kollidierende Privatinteressen Im Verwaltungsrecht: Das Subjektive Öffentliche Recht Im Multipolaren Verwaltungsrechtsverhältnis*. Berlin: Duncker und Humblot, 1992 (2nd edition 2005)S.34.

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

as her legal interest. She has a right to prevent buildings that violate the zoning regulation and destroy features of the area.[13]

(c) Application to the *Kunitachi* conflict

Attorneys in the *Kunitachi* conflict learned of this theory and decided to use it as a way to establish their clients' standing to sue.[14] Their argument was accepted by the Tokyo District Court.

(Tokyo District Court, December 4, 2001 (B-1 Decision))[15]

Lot owners of the area concerned 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 users of the space that constitutes Kunitachi University Boulevard. ***They are put into a certain reciprocal interest relationship, in which one can enjoy the interest of the beauty of the landscape in return for observing the height regulation and enduring property restrictions.*** *In addition, the landscape can be destroyed easily simply when one user does not observe the restrictions. If this happens, other users will lose their incentive to contribute to landscape protection, which leads to the further destruction of 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 construe the building ordinance and Building Standard Law 68-2 so that they protect the interests of lot owners to enjoy the particular landscape (Kunitachi University Boulevard) in the height-restricted district as their individual interests.*

The B-1 Decision not only recognized that the neighborhood residents had standing, but also affirmed their claim that the building was still not "under construction" on February 1, and declared that non-feasance of a removal order by the Tokyo Metropolitan Government was illegal.

The RRI theory was used in academic discussions and the B-1 Decision to break the impasse, which Japanese standing discussion faced in the treatment of area-level regulations. Through this theory, the interests derived from the regulations could be admitted as "specific interests of the plaintiffs," as case law requires for the basis of standing. It should be noted that the na-

---

13. Yamamoto (n.11), pp.306–307.

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

15. 1791 *Hanrei Jiho* 3.

ture of RRI in the German Federal Administrative Court, *Yamamoto*'s monograph, and the B-1 Decision are grounded in zoning regulations based on statutory laws.

IV. Diversion of the RRI theory to civil litigation—A-3 Decision

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 on the beautiful landscape of University Boulevard which, they asserted, had been preserved through the long-term efforts of the residents.[16, 17]

> The attorneys also put forward the idea of RRI in Civil Injunction Litigation. The Tokyo District Court rendered a landmark decision on December 18, 2002, ordering that the part of the condominium over 20 meters high should be removed (A-3 Decision). The judgment drew increased media attention to the dispute and the issue of the landscape was driven into the national public attention.

Interestingly, the A-3 Decision admits that the building was already "under construction" on February 1; therefore, the new regulation could not be applied retrospectively to the condominium. However, the court stated that legality according to the Building Standard Law does not automatically lead to legality under private law. If the building causes damage to the neighborhood and infringes the rights of residents beyond tolerable limits, it may be illegal from a private law perspective.[18]

The decision once again accepts the theory of RRI (although it does not use the term), but this time in a private-law context.

---

16. At a public meeting between the developer and the residents, the leader of a citizens' group opposed to the condominium openly criticized the developer saying: "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?" (Ichiko Ishihara, *Keikan ni Kakeru* (Devoting my life to protecting the landscape), Shinhyoron, 2007) p103–104.

17. There were different concerns among the main opposition groups against the condominium, but after the B-1 decision, the landscape issue took over the central role. For details, see *Kiyoshi Hasegawa, Toshi Komyuniti to Ho* (Urban Community and the Law) University of Tokyo Press, 2005), p.282, Kadomatsu (n.1), pp.7–9.

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

(Tokyo District Court, December 18, 2002 (A-3 Decision))[19]

> *There are cases in which property right holders establish certain standards on height, color, or design for buildings within an area and thus a certain landscape evolves in the area. When not only the residents but also society at large considers it to be a good landscape, it gives* ***added value to the lot.*** *(———) It is the property right holders who enjoy the added value of the landscape that themselves have brought forth through their continuous efforts. It required their mutual understanding, solidarity, and self-sacrifice. To maintain such added value, the above standards must be observed by all property right holders. It takes only one property right holder to immediately destroy the uniformity of the landscape with 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 the burden of voluntarily restraining the free exercise of their rights, and on the other hand must be able to enforce a similar burden against other right holders.***
>
> *Such origin and peculiarity of the urban landscape, derived from the* ***self-restraint of local property holders,*** *does not immediately lead to a recognition of the abstract "right to environment" or "right to landscape." Upon considering it, however, property right holders may have* ***"an interest in the landscape," derived from the property rights.***

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

Knowingly or unknowingly (probably the former), the A-3 Decision used the RRI theory in a very 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 A-3 Decision uses it in the private civil law context.[20] For the latter, RRI is the source of the law itself. Even though the building did not violate the Building Standard Law, it violated unwritten customary law.

---

19. 1829 *Hanrei Jiho* 36.

20. Strictly speaking, there is also a difference of context between the German court and the B-1 Decision. While the Garage Decision is about the regulation on the inteded use, the issue in the B-1 Decision was a building height regulation. It is not certain whether the German court would grant RRI in height regulations.

Because of its use in a civil law conflict, RRI theory had a greater social impact. In many conflict cases in which landscape issues are in question, it is not often that the plaintiffs can successfully allege that the administrative authorities violated building law regulations, because the Japanese city planning system relies heavily on "objective" and numerical regulations, and gives little discretion to building authorities.[21] The *Kunitachi* case, in which there were ample grounds for the plaintiffs to challenge the interpretation of "under construction," probably belongs to the rare minority. With the diversion, the RRI theory achieved the possibility of being applied to cases where no violation of building regulations is conceivable.[22]

V. Fading away of the RRI theory

(a) Supreme Court's "simple and casual" recognition of "the interest in the landscape"

Like an old soldier, a legal theory may never die but it does fade away. That was also the fate of the RRI theory. One of the reasons it faded away is that, in the end, plaintiffs lost the battle. After their victories in the Tokyo District Court, they lost all of the higher court decisions. The decision of the Supreme Court in suit A (March 30, 2006) upheld the High Court's decision. The plaintiffs finally lost the case.

However, the loss of the case was not the only reason that the theory faded. The theory lost its raison d'etre because the Supreme Court "simply and casually"[23] **recognized** the possibility of an "interest in the landscape" without the need for any complicated reasoning such as RRI.

(Supreme Court, March 30, 2006(A-5 Decision))[24]

---

21. Kadomatsu, Recent Development of Decentralization, Deregulation and Citizens' Participation in Japanese City Planning Law, 40 *Kobe University Law Review* 1–14,3.

22. Three months after the A-3 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). At this point, some observers expected similar decisions would follow.

23. Tadashi Ohtsuka, *Kunitachi Keikansosho Saikosaihanketsu no Igi to Kadai* (Significance and Task of the Supreme Court Judgment over *Kunitachi* Landscape Litigation), 1323 *Juristo*.70–81,76.

24. 60–3 *Minshu* 948. (English Translation http://www.courts.go.jp/app/hanrei_en/detail?id=832). See Alexander Peukert, Schutz wertvoller Stadtlandschaften durch das Zivilrecht?-Bemerkungen zum Schutz individueller und kollektiver Rechtsgüter, 48 *Kobe*

(I)t 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."

(——)

The infringement of the interest in landscape is, because of its nature, unlikely to harm the daily lives or health of the people who have the interest. On the other hand, protection of the interest in landscape involves restriction of property rights for land and buildings in relevant areas, which might provoke a conflict of opinions between inhabitants in surrounding areas or between such inhabitants and property right holders in terms of the scope and contents of the interest. For this reason, it is contemplated that protection of the interest in landscape and restriction of property rights will be achieved primarily by enforcing administrative laws or regional ordinances that are established by democratic procedures. Therefore, it is appropriate to construe that in order for an act to be regarded as illegally infringing the interest in landscape, at least, the manner and/or extent of the act must fail to meet the standards generally accepted in society, such as violating criminal laws or administrative laws or constituting a breach of public policy or abuse of right.

The "interest in landscape" analysis of the Supreme Court relates to "inhabiting" as opposed to land property in B-1 Decision or A-3 Decision. As the last paragraph of the extract shows, the Supreme Court affirms tort liability based on "the interest in the landscape" only in rare situations, because the court emphasizes the primacy of legislative and administrative regulation. Having been detached from the RRI theory, and property law, "the interest in landscape"

University Law Review 45–70 analyzes this decision from the perspective of German civil law and environmental law.

has a larger range but a much weaker impact. This was the result of the "simple and casual" recognition.

Notwithstanding, the fact that the A-5 Decision of the Supreme Court recognized the "interest in landscape" as a legally protected interest was important, because the landscape protection issue had been generally considered only at the level of objective law and it had been thought that it does not constitute a subjective legal interest.[25]

(b) "Reverse import" to standing in administrative litigation

As shown above, the "interest in landscape" was first admitted in the standing argument decision in administrative litigation (B-1 Decision) with the help of RRI, and was later "imported" into a civil litigation case (A-3 Decision). The sophisticated RRI theory was necessary to recognize the existence of a "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 standing issue in administrative litigation occurred. In a case where the historical landscape of a beautiful harbor 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; Hiroshima District Court Decision October 1, 2009 (Tomonoura)[26]), quoting the A-5 Decision without regard to the RRI theory.

There was even a somewhat ironic situation in the debate in this case. Namely, the attorneys for the **defendant** (Hiroshima Prefecture) quoted the three requirements for the "interest in landscape" in the A-3 Decision to negate the plaintiffs' standing. In response, the plaintiffs in Tomonoura quoted the A-5 Decision, which turned down the claim of the *Kunitachi* plaintiffs, in order to support their standing arguments. The RRI theory faded away from the stage, at least temporarily.

VI. Reflections

(a) Reception-Diversion—Fading Away

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

25. Ohtsuka (n.23), p.75.
26. 2045 *Hanrei Jiho* 98; 2060 *Hanrei Jiho* 3.

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 young academic who was highly proficient in German law. This was motivated by the pure academic interest of a researcher who wanted to reconstruct the administrative law doctrine through legal relationships and subjective law, and was not done with the intention of directly applying them to a specific case and situation.

Reception 2: Yamamoto → Administrative Litigation (B-1 Decision)

Through the assertions of the plaintiffs' attorney who cited the above monograph, the RRI theory was adopted by the B-1 Decision. The theory caught the judge's attention probably because (i) the theory offered an effective tool to break through the traditional standing doctrine as applied to area-level regulations, and (ii) the court found no obstacle to accepting it because it was based on German "*Schutznormtheorie,*" which forms the foundation of the Japanese standing doctrine.

Diversion: B-1 decision → Civil Litigation (A-3 Decision)

Victory in the B-1 Decision may have been unexpected. However, the RRI theory used in the decision captured the attention not only of attorneys but also of plaintiff residents. The concepts of "reciprocity" and "community" were more attractive than the doctrine itself to residents who had a conscious pride in the notion that "we have protected the town." Against such a backdrop, the A-3 Decision diverted the theory to a context that was separate from the foundation of statutory laws. This diversion had a greater social impact because of this diversion.

Fading Away: Supreme Court — Self-sustainability of "Interest in Landscape"

With the "simple and casual" recognition of "the interest in landscape" by the Supreme Court (A-5 Decision), 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, at least temporarily. Ironically, a "reverse importing" of the "interest in landscape" into the standing argument occurred, which was the original context of the RRI theory.

(b) Micro-fit and macro-fit

Hideki Kanda and Curtis J. Milhaupt[27] argue that what is crucial for a successful "transplant"[28] of imported legal rules is that the rules and the environment of the host fit Japanese law from both micro and macro perspectives. **Micro-fit** means "how well the imported rule complements the preexisting legal infrastructure in the host country," and **macro-fit** means "how well the imported rule complements the preexisting institutions of the political economy in the host country." It occupies a central position in analyses as to whether there are "available substitutes" "either within the legal system (in the form of other laws and legal procedures) or outside the legal system (in the form of norms, informal state interventions, or market constraints)."[29]

From the above perspective, *Kanda and Milhaupt* analyzed the phenomenon that the duty of loyalty of directors under the Company Act suddenly started to be used after the decision of the Tokyo High Court Decision October 26, 1989 as the turning point. The concept was transplanted by GHQ from US law in 1950 and lay dormant for almost 40 years. In 1950, the **micro-fit** between the Commercial Code, Article 254-3 and the legal foundation structure was low. In order for the duty of loyalty, having the nature of "standards" (as opposed to "rules") to be used, legal infrastructure were required that include (i) "a viable derivative suit procedure" and (ii) "judges and attorneys familiar with the use of broad legal standards as opposed to narrowly tailored rules." Such conditions were not satisfied at the time. During the high economic growth period, there was little need for a legal response to neglecting the duty of loyalty; in addition, because other provisions of the Commercial Code and non-legal code of conduct of companies functioned as **"substitutes."** It was understood that it lowered the **micro and macro-fit.** Kanda and Milhaupt analyze that such factors brought about an increase in the use of the duty of loyalty as (i) the legal community gained experience with the use of a "standard,"

---

27. Kanda/ Milhaupt, "Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law," 51 *Am. J. Comp. L.* 887.

28. The concept of "legal transplants" has a variety of meanings depending on the author. For example, Watson does not clearly distinguish the concept from such concepts as "reception," "transfer," or "diffusion" of law (Alan Watson, *"Legal Transplants—An Approach to Comparative Law,"* The University Georgia Press, 2nd Ed. 1993, p21. Cf. Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions," Reimann/Zimmermann (ed.) *"The Oxford Handbook of Comparative Law,"* Oxford University Press, 2008, 441–475 (443)). But Kanda/Milhaupt seem to use the concept of "transplants," focusing on the different nature of rules received in the legal system of the host nation.

29. Kanda/Milhaupt (n.27), p891.

as well as (ii) the reform of the derivative suit mechanism (increase in micro-fit), (iii) prolonged recession, and weakening of extralegal structure for Japanese corporate governance (increase in macro-fit).[30]

With some reservations,[31] this analysis can be applied to a review of reception, diversion, and fading away of the RRI theory For **micro-fit**, if we wanted to accept standing based on the interest in area-level regulations, the conventional arguments in Japan did not have an effectively usable concept. Similar things can be said if we wish to formulate "interest in the landscape" into a legally protected interest in civil tort law. To be sure, there was a theory of "right to landscape," derived from the "right to environment" theory, which could be a solution to both issues. However, the "right to landscape" theory was too far-fetched from the contemporary Japanese administrative litigation doctrine, which is based on *"Schutznormtheorie."* The distance to the accepted theory of "legally protected interest" was also large. In this respect, the RRI theory drew attention because it can reasonably be connected to conventional doctrines.

For **macro-fit**, first, the fact that judicial system reform was then in progress is relevant. In the opinion of the Judicial System Reform Council, as of June 12, 2001,[32] the item "Reinforcement of the Checking Function of the Justice System vis-a-vis the Administration" was incorporated and standing was one of the issues to be considered. The B-1 Decision, which was rendered six months after the above opinion, became a topic at the Administrative Litigation Review Conference, which proposed an amendment of the Administrative Case Litigation Act, subsequently introduced in 2004. Second, the rise of political and social interest in landscape issues is relevant. The trend of policies from "Policy Outline for Making Beautiful Nation" of the Ministry of Land, Infrastructure, Transport and Tourism in July 2003 to enactment of the Landscape Act in 2004 raised social interest in this issue, while obtaining feedback from the B-1 Decision and the A-3 Decision.

As a result of the A-5 Decision, which created the concept of "interest in the landscape" to be protected under tort law, a **"substitute"** to the RRI appeared and the micro-fit of the concept decreased.

---

30. Kanda/Milhaupt (n.27) pp 897–899.

31. There are the following substantial differences: (1) The duty of loyalty provision is a statutory provision, but the relationships of RRI theory is a theoretical concept, (2) the duty of loyalty provision is derived from Anglo-Saxon law, which differs from the previous corporate law system, but the relationships of RRI theory is derived from the German *"Schutznormtheorie,"* which is regarded to be the ground of standing theory in Japan.

32. http://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html

(c) On "Diversion"

I refer above to the use of RRI theory by the A-3 Decision as a "diversion." In my previous paper, I even describe it as a "misinterpretation."[33] Are these labels appropriate? To evaluate this, we must once again reflect on what precisely happened in the "reception of law" process from the Garage Decision of the German Federal Administrative Court to the B-1 Decision and the A-3 Decision. In other words, what would be the correct reading of RRI theory, if such a thing as a "correct" reading of a legal theory exists?

The Garage Decision stated the following **legal conclusion**:[34] **"in revocation litigation, a neighbor can claim a breach of the purpose of use of a building provided for in the use district *(Baugebiet)* under the Building Use Order *(Baunutzungsverordnung)*; therefore, standing should be affirmed"** (=proposition 1). The existence of RRI was stated as the **reasoning** for the conclusion. The concept of RRI can be summarized as **"if the form of use of a building is designated in building planning law, the relationships of reciprocal interchangeability exist among persons who are subject to public law regulations as a legal common destiny"** (=**proposition 2**).

Proposition 1 is a proposition about interpretation and application of a specific statute. As a **legal conclusion**, the proposition can function as a meaningful proposition only when one presumes the German building law system and the German administrative litigation system. The proposition is totally dependent upon the existence of specific legal schemes. Before arguing about the reasonability of the content of the proposition, **it is *logically* impossible to literally introduce it as a proposition in Japanese law.** However, because there are some similarities between German and Japanese law (e.g. German land use plan (B-plan) and Japanese district plan; German *"Schutznormtheorie"* and Japanese "disposition requirements theory") so-called *mutatis mutandis* reception may be possible.

When can such a *mutatis mutandis* reception be justified? The assertion that "such a **legal conclusion** is adopted in Germany" cannot serve as a justification

33. Kadomatsu (n.1).

34. What I mean by "legal conclusion" here is the "abstract conclusive proposition" (Tsugio Nakano ed., *Hanrei to Sono Yomikata* (Case Laws and How to Read them) (3rd Revised Ed.) (Yuhikaku, 2009) p47 (Nakano)). According to Nakano, op. cit., this "abstract conclusive proposition" can itself function as reasoning for a conclusion in a specific case, but "there are more general legal propositions having a broader content." "Reasoning" in this paper mainly refers to the latter. It contains all the assertions presented as the "ground" for the above conclusions, not only propositions on "definitions" or on "legal requirements or effects."

for adopting it, for instance, in France.[35] Even considering the similarities in German and Japanese law, the assertion looks far from convincing. On the other hand, a consequentialistic reasoning that focuses on the actual effects of a legal conclusion in other legal systems may be possible. For example, one can construct an empirical argument that the expansion of standing has not led to an abuse of litigation or it is functioning well to control building administration.

But, most studies of foreign law by Japanese academics are not of that type. Most studies focus on the **reasoning** behind why a certain legal conclusion is reached under a foreign legal system. They also discuss the possibility of receiving of such reasoning into Japanese law, although legal systems and social situations differ. To make such a discussion possible, abstraction and universalization of the reasoning proposition are necessary. It is also essential to carefully review legal and social **functions** of such a proposition and the **prerequisites for functioning** in the foreign country and in Japan.

In the Garage Decision, the RRI concept as **reasoning** (**proposition 2**) had the effect of subjectification (*Subjektivierung*) of the objective legal norm.[36] Namely, the subjects of the norm can make a claim for the benefit to themselves based on the existence of the objective norm in a land-use district based on the Building Use Order. There are two **prerequisites that underlie the functioning** of this proposition: (a) the norm exists under the building planning law, (b) the content of the norm has a nature that uniformly designates use of buildings in the district.

In the B-1 Decision, the RRI concept had the function of "subjectification of the objective legal norm." The Decision explains that objective regulations regarding the height of buildings provided for in the district plan and building ordinance would lead to a "specific interest" that constitutes the basis for standing.

Now let us examine how these prerequisites apply to the Garage Decision. Considering the similarity between the land-use plan (B-plan) in German Law and the district plan in Japanese law, it is not unreasonable to apply the **prerequisite (a)** *mutatis mutandis*. For **prerequisite (b)**, the B-1 Decision focused

35. Watson asserts that the "transplanting of legal rules is socially easy" and "legal rules move easily and are accepted into the system without too great difficulty" (Watson (n.28), p95–96), while on the other hand argues that "reliance on foreign law, borrowing foreign law, has nothing to do with interpretation" (Watson (n.28), p112). Watson seems to keep in mind the authoritarian "transplant" of "legal conclusion" separated from "reasoning "(Cf. Pierre Legrand, What "Legal Transplants?" in Nelken/Feest (ed.) *Adapting Legal Cultures*, Oxford and Portland, Oregon, 2001, pp55–70 (57–61).

36. Koch/Hendler, *Baurecht, Raumordnung-und Landesplanungsrecht*, 5. Aufl., 2009. §27 Rn.10-19. But, this word is not used directly for relationships of reciprocal interchangeability.

on the nature of the landscape instead of the uniformity of purpose of use in the Garage Decision. By indicating "the interest in the landscape continuously only when all users of the space form a relationship in which they mutually maintain and respect the landscape," "combined into a community of common destiny" referred to in the Garage Decision was brought out.

The case of A-3 decision may be more problematic. The Decision states: "it is the property right holders who enjoy the added value of the landscape and the value they have brought forth from their continuous efforts. It required their mutual understanding, solidarity, and self-sacrifice," which is the particularity of the "added value of urban landscape." Based on this premise, the Decision states, "The property right holders in the area, therefore, must have the burden of voluntarily restraining the free exercise of their rights, and on the other hand must be able to enforce a similar burden on the other right holders."

How we understand the functioning of the RRI theory in the A-3 Decision depends on how we view the decision. For example, *Katsumi Yoshida* states that "the true issue" in the Decision is "what legal remedies should be granted to inhabitants if an act of building was committed in breach of local land-use rules, which have been voluntarily formulated by the inhabitants." *Yoshida* states that in such an event, the legal status for achieving "public order" should be recognized in a private person.[37] If we read the decision in such a way, we can understand that the concept of RRI fulfills the same **function** as the Garage Decision, which "subjectifies on the presumption of the existence of the objective legal norm (regional rule)."

What about the **prerequisites for functioning** ((a) the norm under the building planning law, (b) the content of the norm has a nature that uniformly designates use of buildings in the district)?

First, for **prerequisite (b)**, the A-3 Decision focuses on the nature of the "landscape" as does the B-1 Decision. In addition to emphasizing the necessity of compliance, it focuses on the landscape and uniformity by stating that the urban landscape was formulated as the "result of an accumulation of efforts for mutual compliance by setting certain standards for the height, color, and design, etc. of buildings built in the district."

However, **prerequisite (a)** is problematic. The "objective legal norm" presumed by the A-3 Decision is a private law norm, but is not stated as a norm

37. Katsumi Yoshida, "'Keikan Rieki' no Hoteki Hogo (Legal Protection of 'Interest in Landscape)'" 1120 *Hanrei Times*, 67–73,71. Because Yoshida is critical about deriving the "interest in landscape" from land ownership as in the A-3 Decision, he uses the term "inhabitant" here instead.

under the City Planning Act and Building Standards Act or under traditional administrative law principles. Therefore, the question of whether the "application *mutatis mutandis*" can be allowed depends upon "how crucial [it is to] the reasoning of the Garage Decision that it is a norm under the building planning law or administrative law norm."

The monograph by *Yamamoto* cited above tried to place the RRI theory of the Garage Decision in the context of his ambition to reconstruct the entire administrative law doctrine. He analyzes German discussions on the relations between administrative law regulations and civil regulations,[38] basically standing upon an "internal perspective" in comparative law (the same perspective as researchers within the foreign legal system).[39] In my view, his analysis is truly outstanding.

However, an "internal perspective" may not be essential. For example, *Yasutaka Abe* argues that RRI can only be understood as a "formation of rights and obligations under the administrative law system".[40] His argument is based on his own understanding of the role between administrative law and private law in Japan.

Although I feel sympathy for *Yamamoto*'s idea of reconstructing the entire administrative law system using German discussions as "stimulus," I believe *Abe*'s "external perspective" is also permissible. Suppose a Japanese lawyer develops knowledge regarding a foreign legal concept, comprehends the legal "questions" surrounding the concept in the foreign legal system, and is contemplating whether to transplant the concept into Japanese law. In my view, **provided that she already has an average understanding regarding the functioning of the concept and its prerequisites**, she has a choice. She can either choose to deepen her understanding of the "internal perspective" in the foreign legal system, or switch the perspective to one of an "external" one as a researcher of Japanese law. In other words, she is allowed to evaluate the foreign legal concept from her own interest and perspectives as it pertains to legal questions in Japan.

---

38. Yamamoto (n.11), 322–325.

39. Atsushi Omura/Hiroto Dogauchi/Hiroki Morita/Keizo Yamamoto, "*Mimpo Kenkyu Hando Bukku* (Civil Law Study Handbook)" (Yuhikaku, 2000), p178. The book contrasts the "internal perspective" as opposed to an "external perspective" (=stick to the perspective of a researcher of Japanese law), as two possible strategies for a comparative study of law by Japanese researchers.

40. Yasutaka Abe, "Keikanken wa Shihoteki (Shihoteki) (note: the author intentionally uses homonyms here) ni Keisei Sareruka Jo (Is the Landscape Right formed under Civil Law (or by the Judiciary) (1))" 81–2 *Jichi Kenkyu* p18.

(d) Internal Perspective: Right to Claim for Maintaining the District Character *(Gebietserhaltungsanspruch)*?

Let us take a look more closely at the context of RRI theory and its development in Germany even though such analysis upon an "internal perspective" is not essential for comparative law and is simply a matter of choice.

As is well known, German building law is based on the dichotomy of *Innenbereich* (inner area)—the area where building is principally permitted—and *Außenbereich* (outer area)—where it is principally not permitted. The former includes built-up areas and areas where a detailed B-plan is established. In built-up areas, the B-plan is not always prepared.

Generally, the permissibility of a building plan in built-up areas is determined by "the type and scale of use of a building, coverage type and plot area to be built on, how the building proposal blends with characteristic features of its immediate environment and that the provision of local public infrastructure has been secured" (Federal Building Code, Section 34 paragraph 1). As such, conformity with the actual conditions of the existing built-up area is required. Where "the characteristic features of the immediate environment correspond to one of the specific land-use areas," the permissibility of the development project is determined solely by reference to type and to whether it would in general be permissible under the ordinance that applies within the specific land-use area; (Federal Building Code, Section 34, paragraph 2).

Now, in the Garage Decision, the Federal Administrative Court required mutual compliance with the norm not only in land-use districts where B-plan was established, but also in built-up areas, which had been factually formed but had certain characteristics comparable to that of the land-use district. This is referred to in the literature as the "right to claim for maintaining a district's character" (*Gebietserhaltungsanspruch*[41]). The **Federal Administrative Court accepted "subjectification of the objective norm," even when an administrative organ did not designate the district in the form of an administrative plan.**

Of course, this would not directly result in the conclusion that application of the RRI theory in the A-3 Decision was not a "misinterpretation" of German law.

---

41. Monographs dealing with this concept are Simon Marschke, *Der Gebietserhaltungsanspruch*, Kovac 2009. Mandy Taubert, *Der Drittschutz im Baurecht im Lichte der Europäisierung des Verwaltungsrechts*, Peter Lang 2011 etc. Such expressions as "Anspruch auf Wahrung des Gebietscharacters," "Gebietsgewährleistungsanspruch," "Gebietbewahrungsanspruch" are also used. Another decision of the German Federal Administrative Court (August 23, 1996,BVerwGE 101,365) is also important.

Apart from the aforementioned point that it is meaningless to directly import the "answer" in German law, we can point out the following problems: (1) Where the "right to claim for maintaining the area's character" in a built-up area is an issue, this issue arises in the context of administrative litigation rather than civil litigation; (2) such an interpretation of the Federal Administrative Court was made on the presumption of the existence of the Federal Building Code, Article 34, paragraph 2 and, in that sense, it was dependent on a specific legal system under planning law; (3) because the right to claim for maintaining an area's character presumes similarities in characteristics of land-use districts under the Building Use Order, uniformity of purpose of use is an issue. Height restrictions as in the case of the A-3 Decision are not in question; and, (4) the provision of the Federal Building Code, Article 34, paragraph 2 presumes the basic notion of German Building law, which does not necessarily presuppose freedom of construction, whether the concept serves as a reference to Japanese law, in which the general legislative practice is prepossessed by the "principle of minimum intervention."[42]

But, it does serve as a useful reference for us that in Germany **"subjectification of the objective norm" does not necessarily presume that administrative agencies actually carried out an adjustment or distribution of interests.** In addition, point (4) in the previous paragraph leads us to reexamine the rationale for our own legal system; "should we really continue in this way?" Here, we can find the significance of "legal irritants" such as "outside noise" in the "interplay of discourses."[43]

(e) External Perspective: Should we call RRI back to the front of the stage?

We have observed that RRI has faded from the stage for the time being, as the Supreme Court "simply and casually" recognized "interest in landscape" as a legally protected interest in civil tort law and "interest in landscape" was reversely imported into standing theory. Is there a need to call RRI back to the stage?

As stated above, RRI is a concept that recognizes interests derived from area-level regulations as "specific interests" in the context of standing.

First, it is conceivable to use this concept in relation to area-level regulations, where "interest in landscape" is not necessarily an issue. However, be-

42. See Kadomatsu (n.21), p.1. Although it is not a clear constitutional principle, it still dominates legislative and administrative practice.

43. Gunter Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences," 61 The *Modern Law Review* 11–32,12.

cause the B-1 Decision admitted "combination into a community of a common destiny" by focusing on the "nature of landscape" in RRI theory, it must be questioned whether a similar communitarian nature can be recognized in the nature of a specific area-level regulation.

Second, it is important that the B-1 Decision recognized that **all** landowners in a height restriction district have standing. The strongest point of the RRI concept is that it provides the logic for recognizing the standing of all beneficiaries of area-level regulations regardless of substantiality of damages to the respective individuals.

In the case of the "right to claim for maintaining the regional character" under German law, the significance of the concept lies in the fact that the neighbors can claim compliance with area-level regulations, regardless of whether they actually suffer from "sensible and provable damages" *(spürbare und nachweisliche Beeinträchtigung)* if the right is recognized.[44]

In contrast, some recent judicial decisions in Japan tend to consider the degree of specific damages caused to the affected individuals as a condition for standing. For example, the Yokohama District Court on February 16, 2005 (Hanrei Jichi No. 266, p.96), addressed a set of facts that was similar to the Garage Decision, concerning the legality of the grant of permission for a garage in a residential area (category 1 low-rise exclusive residential district). The decision indicated the possibility of recognizing standing based on an interest in protecting the "living environment" guaranteed by an area-level regulation, for which the "specific interest" character had usually been denied. However, the decision required the existence of "specific damages" for each plaintiff. It recognized standing only for those "whose interests concerning the right to personhood might be infringed directly."

After the Administrative Case Litigation Law amendment in 2004, an expansive trend in standing to sue was observed.[45] However, the Supreme Court Decision on October 15, 2009(Off-track Betting Facility Case)[46] curbed this trend. The decision focused on the deterioration of the living environment caused by an off-track betting facility of bicycle races, and stated that the "interest in relation to such a living environment should basically be regarded as a public interest; therefore, we should inevitably say that it is difficult to construe

44. Thomas Schröer, Öffentliches Baurecht-Grenzen des Gebietserhaltungsanspruchs, NJW 2009, 484.

45. See Kadomatsu(n.7), pp 109. The leading case is the Supreme Court Grand Bench Decision on December 7, 2005(Odakyu Elevated Track Case, 59-10 *Minshu*, 2645).

46. 63–8 *Minshu*, 1711.

that the Act is further intended to necessarily protect the specific interests of inhabitants living in the surrounding area, ... despite the absence of any clear provision in the laws and regulations that imply protection of such interest."

Based on this presumption, while the Court generally denies individual protection under the standards for location provided for in the Bicycle Racing Act, Article 15, paragraph 1, it found that persons operating medical facilities in the area had standing to sue, depending on factual circumstances. The critical question is whether the plaintiff's medical facility is expected to receive specific and concrete damages from the operation of the betting facility.

If one does not feel sympathy for such an approach by the courts, one that focuses on the degree of individual and specific damages, and if one would like to look carefully at the nature of mutual relationships established by administrative law from a legal point of view, there should be some value in paying attention to the German concept of RRI from the "external perspective" of a Japanese researcher.[47] I believe that the possibility of the RRI concept coming back to the stage is not excluded.

47. However, the specific situation in the Supreme Court off-track betting facility would belong rather to a "reverse relationship" (*Kehrseitigkeit*) (Yamamoto (n.11) p.263) and not RRI.