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Taking "Regulatory Courts" Seriously— A Perspective from Japanese City Planning Law

1. Conceptual Issues

1.1 Regulation: A relative/reciprocal concept

Inspired by one of the topics at the Administrative Law Discussion Forum 2014 (The Emergence of Regulatory Courts), this paper examines the role of courts in "regulation" within the context of Japanese administrative law, especially in the areas of land-use law and city planning.

I start with some conceptual issues concerning key words related to the topic. First, the term "regulate" can either mean: (i) the act of controlling in general or (ii) an intervention upon one's liberty or rights. The standard Japanese equivalent of "regulation," "*Kisei*," strongly implies the latter, especially in the context of economic deregulation (*Kisei Kanwa*). When the term is used in the latter sense, it necessarily implies a pre-existing range of liberties or rights, on which the government later (in a logical or chronological sense) intervenes and places restrictions. Our legal thinking is determined by this "liberty/intervention (or restriction)" framework. However, in certain situations, such frameworks should be questioned.

On this point, the most illustrative example is the Supreme Court decision of Apr. 22, 1987[1] (Forest Land Division Case). In this decision, the Forestry Law Art. 186, held that the denial of a minority's shareholder's right to demand partition of a jointly-owned forest from a minority shareholder was unconstitutional. While the Civil Law Art. 256 grants each joint owner the right to demand partition of jointly owned land, the Forest Law prohibits the parti-

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1. 41-3 *Minshu* 408. See Beer/Itoh, The Constitutional Case Law of Japan, 1970 Through 1990 (Univ. of Washington Press, 1996), p.327.

tion in order to prevent the segmentation of forest land. The Supreme Court saw this regulation as a "restriction" on the right to property, which is guaranteed by Art. 29 of the Constitution[2] and declared it to be unconstitutional because the regulation was regarded as an unreasonable way to achieve the legislative purpose of the law: stabilization of forestry management.

However, is the regulation imposed by the Forestry Law really a "restriction" on private property? The concept of "property right" is not specifically defined in the Constitution itself. It does not *expressis verbis* include the right to demand the partition of joint ownership in the concept of "property." As a result, one might legitimately ask why the Forestry Law, which denies such a right in the case of a request from a minority shareholder of a jointly-owned forest, should be regarded as a "restriction on property right"?

This point is even more doubtful if we consider the fact that the Forestry law Art. 186 already existed when the plaintiff in this case acquired the relevant forest land. Plaintiff acquired property that was already accompanied by a legal restriction on partition.

Therefore, if we affirm the understanding that the Forestry Law Art. 186 is a "restriction" on private property, we must consider that the above Civil Law Art. 256 **logically precedes** the Forestry Law. The Supreme Court Decision, which mentions "single ownership" as "the basic form of ownership in modern civil society," seems to have taken such a line of argument.

Let me cite another example. In the 1960s, the new concept of the "right to sunshine" emerged in Japan. With the emergence of high-rise buildings, neighborhood residents sometimes suffered from deprivation of sunlight, which could cause health problems, given the humid atmosphere in Japan, especially given that air-conditioning facilities were not widespread. The courts concluded that this deprivation could constitute a tort, and in some cases held that they could order suspension of construction when neighbors suffered "beyond a tolerable limit" (*Junin Gendo*). In 1976, the Building Standard Law reacted to this social problem by regulating building heights in relation to sunshine. However, even after the enactment of that law, there may still be a possibility that construction violates "the right to sunshine," resulting in tort or suspension, even if a building plan observes the regulations imposed by the Building Standard Law.

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2. The Constitution of Japan, Article 29:
(1) The right to own or to hold property is inviolable.
(2) Property rights shall be defined by law, in conformity with public welfare.
(3) Private property may be taken for public use upon just compensation therefor.

Should we understand this "right to sunshine" as a "regulation" or an "intervention" upon the exercise of private property by high-rise building owners? Or, is it just a "coordination" of conflicting rights or interests between the building owner and neighbors? May we understand that the courts are engaging in resource allocation activities in the form of "defining" rights when they grant the "right to sunshine"?[3]

Likewise, how we legally classify competing interests among stakeholders in a particular piece of land, or in other words, from whose viewpoint we understand the situation, often forms the premise of a discussion, which inevitably determines our legal thinking.

1.2 Expanding functions of the judiciary?

The topic "Emergence of Regulatory Courts" implies that the traditional role of courts is expanding. In saying so, one must have a point of reference for comparison, either chronological (*"compared to before 2000, present courts are ..."*) or normative (*"the courts are intervening in those areas that are essentially reserved to ..."*). This paper attempts the former approach. I include examples from recent Japanese court decisions, in which the courts have taken a more active position towards controlling administrative activities.

To be sure, these decisions may not reflect general tendencies. It is also debatable whether the courts are performing "more" regulation in these decisions, when we consider the relativity of the "regulation" concept discussed above. If we assume that the "right to sunshine" is regarded as a "regulation" of property rights or an imposition thereupon, court decisions affirming such rights are moving towards "more" regulation. However, if we take the view that it is a problem of interest coordination, we cannot necessarily conclude that there is more regulation. We might even go further. If we take the existence of the "right to sunshine" for granted, we can see the situation from the perspective of the neighborhood and argue that the courts have contributed to preventing "regulation" with their "right to sunshine." These points are discussed at the end of this paper.

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3. Ronald Coase emphasizes this reciprocal nature in his monumental article "The Problems of Social Cost" (3 *Journal of Law and Economics* 1 (1960)).

2. Institutional backdrop: "legal dispute"

2.1 The concept of "legal dispute"

Under the present Constitution, Japan has adopted a unitary court system which functions under the Supreme Court. A special constitutional court does not exist. The power of judicial review is conducted by ordinary courts, including inferior courts.[4] The nature of such a review is understood as incidental, courts cannot rule upon the constitutionality of a statutory law abstractly, but only in relation to a particular legal dispute.

Article 3 of the Court Law provides that the courts have the power to "decide all legal disputes, and have such other powers as are specifically provided for by law." The Supreme Court defines the concept of "legal disputes" as disputes "that relate to the existence of concrete rights and duties or legal relations between parties" and "that can be finally settled by the application of law."[5] The concept serves as a limitation upon when and by whom a judicial remedy may be invoked. It functions, so to speak, as a **gatekeeper**. Competence over "legal disputes" is commonly understood to be identical to "judicial power" in the Constitution.[6]

2.2 Administrative litigation as a "legal dispute"

2.2.1 "Legal dispute" as a gatekeeper: Subject matter (administrative disposition) and standing to sue

Today, administrative litigation is considered to involve a "legal dispute"[7]; therefore, the power of ordinary courts to handle administrative cases is guar-

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4. The Constitution Article 81 stipulates: "the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act." Although the article only mentions the Supreme Court, inferior courts can find a statutory law to be unconstitutional and void, and render a decision according to such finding. The decision will be, however, naturally subject to reversal by higher courts, and the Supreme Court has the final say about constitutional issues. See Narufumi Kadomatsu, Judicial Governance Through Resolution of Legal Disputes?—A Japanese Perspective, 4-2 *National Taiwan University Law Review* 141, 145.

5. Supreme Court, Apr. 7 1981, 35 *Minshu* 1369

6. Constitution of Japan. Article 76 para 1 stipulates: "All judicial power is vested in a Supreme Court and in such inferior courts as are established by law." However, if we equate "judicial power" with "power over legal disputes," it is a difficult question to explain the constitutional nature of the power of the court in "other powers as are specifically provided for by law" (Court Law Art. 3).

7. Before World War II and under the former Meiji Constitution (1889), administrative litigation was handled by the Administrative Court, a special tribunal in Tokyo. However,

anteed by the constitution, but at the same time is limited by the boundary of the concept of "judicial power."

The Administrative Case Litigation Law (hereafter ACLL)[8], which governs the procedures to be used in administrative litigation[9], at least as interpreted by the Supreme Court, is based upon the same premise. The law stipulates four categories of litigation: (1) Complaint *(Kokoku)* Litigation (judicial review of administrative disposition) (Art. 3); (2) Inter-party *(Tojisha)* Litigation (litigation relating to a legal relationship under public law); (3) Citizen Litigation (litigation based on his/her status that is irrelevant to his/her legal interest); and, (4) Inter-agency litigation (litigation relating to a dispute between agencies of the State and/or a public entity). The first two categories are understood to be "legal disputes," and the latter two are understood to be "other powers as are specifically provided for by law" (Court Law, Art. 3).

The first category, Complaint Litigation, plays a central role in Japanese administrative litigation. The subject matter of the litigation is "administrative disposition." This concept is derived from the traditional German concept of "*Verwaltungsakt*" (administrative act). According to the Supreme Court, the concept does not include "all administrative activities, but is limited to those administrative activities that have direct and particular legal effects on the rights and duties of individuals" (Tokyo Waste Disposal Facility Case).[10] Therefore, on the question of subject matter, the "rights and duties" requirement in the concept of "legal dispute" has an influence.

Another question is the standing to sue,[11] namely the question regarding "who" can invoke the intervention of the judiciary in Complaint Litigation. The ACLL only stipulates that the plaintiff must have a "legal interest" (Art.9) to be admitted to have standing.

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after enactment of the present Constitution, ordinary courts took over competence. Cf. Kadomatsu(n.4), 146–149.

8. Law No. 139 of 1962. This law underwent important amendments in 2004. http://www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=04&re=01&new=1 (the terminology in this paper does not necessarily follow the above translation).

9. The ACLL is not a self-sufficient law that governs the whole procedure. The Civil Procedure Code shall be applied *mutatis mutandis* for matters not provided for in the ACLL. See Kadomatsu (n.4), 146.

10. Supreme Court, Oct. 29 1964, 18 *Minshu* 1809

11. See Kadomatsu, "The rise and fall of the 'relationship of reciprocal interchangeability' theory in Japan—productivity of "misinterpretation?" 43 *Kobe University Law Review* 1, 4–5.

In determining this "legal interest," the Supreme Court focuses on the legal ground of the respective administrative disposition and requires that: (i) the subjective interests of the plaintiff should be **damaged** by the disposition; (ii) such subjective interests should fall under the **protected realm** of statutory law, which serves as the legal ground of the disposition; and, (iii) such subjective interests remain as **specific interests** of the plaintiff and not entirely absorbed by the "public interest."[12]

The origin of this doctrine is the German *"Schutznormtheorie"* (protection norm theory), but its actual implementation in Japan is very narrow, especially given the strict interpretation of the "specific interest" requirement. Regardless, we can confirm that the idea of "legal dispute" has an influence on forming the boundary of standing to sue.

"Inter-party litigation," the second category of Administrative Litigation, is litigation relating to a legal relationship under public law. Typical examples of this litigation concern a conflict over a public employee's salary or regarding the right to compensation in the case of legal deprivation of one's property. Here, it is clear that this type of litigation relates to "legal relations between the parties" included in "legal dispute."

In summary, the concept "legal dispute" serves as a **gatekeeper**. The "administrative disposition" requirement, including the subject matter and the "legally protected interest" requirements in the ACLL are an embodiment of the concept. Both requirements presuppose the existence of "rights and duties or legal relations between the parties."[13]

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12. 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) 43–55.

13. To avoid misunderstanding, two points should be mentioned here.

First, not only administrative litigation, but also civil litigation can serve as tools to control administration. State liability litigation, a special type of tort liability, which arises as a result of illegal and negligent "exercise of public authority" by national/local public officials, sometimes functions as a powerful tool. Civil injunctions against the operation of public facilities may also be a way to control administrative action when the facilities are operated by the government. If the management of public facilities does not constitute "exercise of pubic authority," it can be a target of civil litigation. For example, a Supreme Court Decision in 1995 clearly acknowledged that people living near a national road who suffer from noise and emission gases can seek a civil injunction against operation of the road (Sup. Ct., July 7, 1995, 49 Minshu 1870; Sup. Ct., July 7, 1995, 49 Minshu 2599).

Second, if the legislature seeks to create the possibility of a judicial review in a certain situation, it can do so by two means and will not be hampered by the traditional realm of the judiciary. The legislature may stipulate "rights or duties" by a statutory law, so that the issue

2.3 The concept of judiciary limited to judgments on "questions of law"

Let me return to the concept of "legal dispute." The concept has two elements: it must be that such disputes: (a) relate to the existence of concrete rights and duties or legal relations between the parties and (b) can be finally settled by application of law (2.1). Issues concerning "administrative disposition" and "standing to sue" relate mainly to (a). The other element (b) is also a result of an underlying concept of "judicial power" whereby the judiciary is an organ entitled to answer "questions of law." Although it is not a function of the concept of "legal dispute" itself, the underlying notion—"question of law"—serves not only as a "gatekeeper" but also as a limitation on the content of judicial findings, namely, the issues and to what extent a court can make a judgment.

However, a short explanation is needed in order to avoid any misunderstanding. The judiciary is understood to be an organ that applies the law to relevant factual circumstances. Therefore, it is believed that **not only the interpretation of law, but also the determination of facts, belong to the core competence of the judicial power. Even in administrative litigation, deter-**

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is subject to judicial control. An example can be seen in the field of information disclosure. At the initial stage of such a legal scheme, it was not clear whether the information requester can file a Complaint Litigation against a non-disclosure decision. The Yokohama District Court judgment denied this, stating that the requested public document did not affect the applicant's concrete rights or interests. On appeal, however, the Tokyo High Court reversed the decision. It stated that the ordinance fictitiously regards any person who has an interest in prefectural administration generally to have an interest in having access to prefectural public documents, hence giving them an individual and concrete right to request access to public documents. Since this High Court decision, the issue has rarely been disputed.

The other possibility for the legislature to enable a judicial review of administrative activities is the use of "other powers as are specifically provided for by law," stipulated in the Court Law Art. 3 next to "legal dispute." For example, the Inhabitants Litigation (Local Autonomy Law 242-2) functions as a powerful tool to pursue responsibility concerning financial matters in local administration. The litigation is used for pursuing responsibility not only for typical financial misconduct, but also for such policy issues as a city mayor granting public subsidies to an ailing third-sector (public/private joint) corporation (Hiroshima High Court Decision May 29, 2001 ordered a city mayor to pay JPY 341 mil. yen (about USD 2.8 mil.) for an illegal subsidy. However, the Supreme Court (Mar. 20, 2005) reversed the decision) based on constitutional issues related to a prefectural governor giving offerings to a Shinto shrine (Supreme Court, Apr. 2 1997, 51–4 Minshu 1673). If the legislature adopts a similar system at the national government level, such litigation may serve as a powerful tool to control administration.

mining "bare facts" lies within the competence of the courts. True, the substantial evidence rule has been adopted in some special laws, such as the power of the Japan Fair Trade Commission under Art. 80 of the Antimonopoly Law, but this is only when there is an *expressis verbis* statutory basis.

2.3.1 Administrative discretion and "questions of law"

Therefore, in administrative litigation, the notion of "question of law" has an influence—although it does not function as a conceptual tool—mainly in relation to administrative discretion. Contrary to the practice under the Meiji Constitution, administrative discretion is currently not treated on the basis of a dichotomic classification of fully judicially reviewable acts and non-reviewable discretionary acts. So long as the contested administrative activity belongs to "administrative disposition," it is judicially reviewable. The problem is on which issues discretion shall be admitted in the application of law.

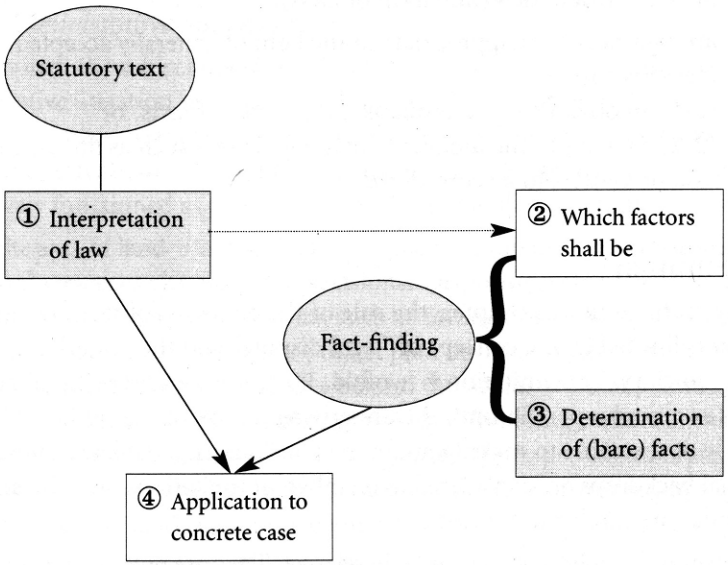
Let me illustrate this point schematically. The application process for administrative dispositions can be classified into the following logical steps: (a) legal interpretation of the text of the statute that serves as the basis of the disposition; (b) fact-finding on the circumstances; and, (c) application of the statute to the relevant factual circumstances.[14] Because, as stated above, interpretation of the law (① in Chart 1 (hereafter the same)) and determination of the "bare facts" (③) is the role of the court, it always performs a full review of these issues and substitutes its judgment for the administrative judgment. Therefore, administrative discretion can only be granted to a decision of the administration (②) as to which factors are to be considered in a particular case, based on the interpretation of law and the application of the law in a narrower sense (④), namely how the administration evaluates factors that have been considered and renders its decision after balancing the factors.

2.3.2 Relativity of "questions of law"

It probably goes without saying that the distinction between "interpretation of law" (=always question of law) and "application of law" (=possibility of administrative discretion) is only relative. It always depends on whether the court takes an active or a cautious stance in interpreting the law. If the court, for example, in "interpreting" a certain clause in the Constitution or a certain statu-

14. Cf. Kadomatsu, Functions of Proportionality Principle in Japanese Administrative Law (Unpublished manuscript. Paper at the Comparative Administrative Law in Asia workshop in Taipei 2013).

[Chart 1] (Gray=question of law, White=administrative discretion)



tory law as the law, includes a certain value judgment or a certain priority setting, it can said that "application" should be done within the interpretative framework.

There is another possibility for the court to intervene in administrative discretion. Article 30 of the ACLL stipulates that the court may revoke a discretionary administrative disposition "only in cases where the disposition has been made beyond the bounds of the agency's discretionary powers or through an abuse of such power" (boundary control and abuse control). The concept of "abuse" is naturally vague.[15] There is no logical limit, whether upper limit or lower limit, as to how far the court might go.

Currently, the courts employ the discretion control formula, which integrates "generally accepted social ideas" control and "judgment making process" control method. Discretionary dispositions may be found to be illegal by the courts when they:

15. Mitsuo Kobayakawa, Sairyo Mondai to Horitsu Mondai, (On administrative discretion and question of law), *Hogaku Kyokai Hyakushunen Kinen Ronbunshu Dai Ni Kan* (Festschrift commemorating 100 year anniversary of Hogaku Kyokai Vol.2) (1987, Yuhikaku) pp. 342–344.

(1) lack a critical factual basis (the premise is that the courts can exercise de novo control of determination of facts);

(2) are significantly inappropriate in the light of generally accepted social ideas because of:
(2-1) an obviously unreasonable assessment of facts, or
(2-2) a failure in the judgment-making process such as due consideration of matters to be considered.[16]

2.4 Summary

As described in this chapter, the role of the court in controlling administration is limited by the concept of "legal dispute" and the underlying notion of the judiciary. The limitation is twofold. First, the concept of "legal dispute" stands as a gatekeeper. Second, the underlying notion of the "judiciary" limits the role of the court to making judgments on "questions of law." Those institutional backdrops are considered to be inherent limitations on judicial power and today are rarely questioned.

However, both limitations are only relative. They are open to various interpretations and applications. Therefore, **theoretically, there is always the leeway that the courts can expand their power *vis-à-vis* administration.** In reality, this has not been the case. The courts have been very cautious in enforcing their potential control powers, and have shown deference to the administration. However, some recent judicial findings, which I examine in the next chapter, might show that Japanese courts are using the above leeway to produce more effective judicial review.

3. Tug of war over the limits of the judiciary

In the 2000s, there were some interesting court decisions that hint at the possibility of relativizing the "gatekeeper function" of the "legal dispute" concept and the notion of the judiciary (3.1). Because the gate has been partially opened, the judiciary faces the decision of whether or how to intervene further in administrative decisions. Courts have not developed stable and effective methods of control, but we see some possibilities in a few decisions (3.2).

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16. Supreme Court, Nov.2, 2006. 60–9 *Minshu* 3249. English translation can be found at: http://www.courts.go.jp/english/judgments/text/2006.11.02-2004.-Gyo-Hi-.No..114.html For details, see Kadomatsu, supra note (14).

3.1 Relativization of "gatekeeper" function

3.1.1 Administrative disposition

As noted, the subject matter of Complaint Litigation, the central type of administrative litigation in Japan, is "administrative disposition." Complaint Litigation is limited to those administrative activities that have **direct and particular legal effects on the rights and duties of individuals.** This limitation effectively functioned as a restriction on the possibility of a judicial review.

In the area of land-use law, the most typical example of "administrative disposition" concerns city planning decisions. Disposition character was denied for both (i) regulatory city planning such as zoning decisions[17] and (ii) project city planning decisions such as a project plan decision regarding a land readjustment project.[18, 19] The basic idea behind the denial was that planning decisions do not directly influence the rights of land/building owners at this stage and those right-holders may file suits at some later stage, for example, when they receive denial of building permission (in the case of zoning) or designation of substitute land (land readjustment project).

However, the Supreme Court expressly altered its previous judgment in 2008[20] with regard to (ii) (land readjustment) and affirmed the administrative disposition character of the project plan. It said:

> *"(W)e can find that the owners of residential land within the implementation zone, etc. are, upon a decision to adopt a project plan, forced to be subject to a disposition of land substitution through the procedure in the land readjustment project which involves the aforementioned regulations and, in this sense, their* ***legal status*** (bolded by the author) *should be deemed to be directly influenced; therefore, we cannot say that the legal effect of the decision to adopt the project plan is only general or abstract."*

Here, it is noteworthy that the Supreme Court did not change its definition of "administrative disposition," or the interpretative framework. At this stage, there is no attempt to make a decision regarding substitute land for the previous landowner. However, the notion that the land will in the future be subject

17. Supreme Court, April 22 1982, 36–4 *Minshu* 705.

18. Supreme Court, Feb.23 1966, 20–2 *Minshu* 271.

19. Land readjustment projects are one of the most important tools in Japanese city planning, which is sometimes called "the mother of city planning."

20. Supreme Court, Sep.10 2008, 62–8 *Minshu* 2029 (http://www.courts.go.jp/app/hanrei_en/detail?id=96 8)

to the readjustment project has already been determined. The Supreme Court described this situation using the vague notion of "legal status" and found a "direct influence" on the status, which affirms the administrative disposition character. **The relativity of the "rights and duties" requirement, part of the definition of "administrative disposition" and for which the "legal dispute" underlies, is demonstrated here clearly.**

Another interesting thing about this 2008 Supreme Court decision is its relation to the 2004 amendment of the ACLL. This was part of the Japanese government's overall judicial reform initiative, one of the aims of which was to make the judicial check on administration more effective. However, Art. 3, which defines "administrative disposition," was not amended during the reform. It seems that the reform paved the way for emancipating the courts from "self-fossilization,"[21] even without the expressed amendments of the relevant article.

3.1.2 Standing to sue

Standing to sue as a "gate keeper" is another important obstacle for the intervention of the judiciary in administrative disposition. After the 2004 Administrative Litigation Law reform, there was an important Supreme Court decision[22] in this area. *Odakyu*, a private railway company, had a plan to enlarge its railway as part of a city planning project of the Tokyo Metropolitan Government. Railside residents opposed the plan and filed Revocation Litigation opposing the Minister of Construction's approval of the development project. The Supreme Court expressly overturned its precedent and affirmed that the neighborhood residents had standing to sue.

In its decision, the Supreme Court did not change its understanding of "legal interest" (see above 2.2.1), but did affirm the "specific" nature of the neighborhood residents' interests because:

> *(T)he scope of people directly damaged by noise, vibration, etc. arising from such project would be limited to inhabitants living within a certain range of areas in the vicinity of the project site, and the extent of damage would increase for residential areas that are nearer to the project site.*

Here again, the basic premise of the Supreme Court, which is determined by the "legal dispute" concept, and its "right and duties" requirement, was not

21. Kadomatsu (n.4).158. It should also be noted that the decision expressly emphasizes the importance of "effective remedy."

22. Supreme Court, Dec.7 2005, 59–10 *Minshu* 2645 (http://www.courts.go.jp/app/hanrei_en/detail?id=7 95).

changed. **The relativity of the concept, however, allowed room for a more flexible interpretation and an expansion of standing to sue.**

The 2004 reform of the ACLL did amend Art.9's the standing to sue clause. However, the amendment—inserting paragraph 2, which inserts "factors to be considered" was nothing more than a codification of existing case law. It is ironic that the codification of case law paved the way for the overturning of judicial precedent. Undoubtedly, the court "not only accepted the express mandate given by the legislator through the 2004 amendment, but also its general message for more effective relief and protection of rights and interests of citizens,"[23] and changed its attitude.

A later Supreme Court decision, however, set a limit to expansion. The decision denied standing to sue to neighborhood residents challenging the grant of permission for an off-track betting facility for bicycle races. The Court concluded that the requirement of the Bicycle Racing Law mandated that the facility should "be in harmony with the living environment" and therefore required the court to focus on protecting "the general public interest"[24] and not the specific interests of neighbors. This decision shows that the Court's interpretative framework regarding standing to sue may go in either direction, expansive or restrictive.

3.2 Possibilities for more active intervention

Now that the gate has been (partially) opened, the courts have further opportunities to more actively intervene in administrative decisions. However, it seems that they have not yet developed an effective and stable tool or formula for such intervention.

There are, nevertheless, interesting decisions that might hint at future potential possibilities.

3.2.1 Determination of facts and prognosis

As stated above (2.3), determining "bare facts" remains a role of the court, even in administrative litigation. Also, discretionary administrative dispositions may be found illegal by the courts when they lack a "critical factual basis."

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23. Kadomatsu (n.4), 159.

24. Supreme Court, Oct.15 2009, 63–8 *Minshu* 1711 (http://www.courts.go.jp/app/hanrei_en/detail?id=102 5).

A Tokyo High Court decision in 2005[25] found a city planning decision concerning the widening of a road to be illegal. According to the decision, the prospect of an increase in future traffic volume, which served as the basis of city planning, lacks reasonability because the prospect uses the method of calculating future population based on the "remaining capacity" of respective areas.

The decision faces two objections, namely: (i) whether the court can intervene in planning matters that require professional expertise and (ii) whether one can treat a future prognosis as a question of "fact" which is subject to judicial review.

On this issue, the Supreme Court decision in 1992[26] on an atomic power plant revealed its position. When a court judges the safety of a nuclear reactor, the decision stated, the court should examine "whether or not the judgment given by the supervising agency on the basis of specific and technical research carried out by the Atomic Agency Board or the Nuclear Safety Special Examination Committee is unreasonable." Although refraining from using the term itself, the Supreme Court decision grants a certain amount of discretion to the supervising agency, and avoids a *de novo* review of the facts. However this approach may be legitimate because: (i) future prognosis can be differentiated from facts that have already occurred[27] and (ii) the relevant field requires a comprehensive evaluation of various areas of science; therefore, the experts' committee is believed to have cognitive advantages. Compared to the case of nuclear reactors, the prognosis in city planning does not have such a comprehensive character; therefore, judicial intervention may be more easily affirmed.

In my view, the court has used "latecomer advantage" in the Tokyo High Court case. A considerable time had passed since the city planning decision. At the time of the court's judgment, the court could see that the predictions of the agency had failed. Theoretically, the court should base its judgments on

25. Tokyo High Court, Oct. 20 2005, 1914 *Hanrei Jiho* 43. Actually, this case is not relevant to the "widening of gates" because the plaintiff was a landowner whose land might in future be expropriated for the road, who will clearly be admitted standing to sue even before the 2004 amendment of the ACLL.

26. Supreme Court, Oct.29, 1992 46–7 *Minshu* 1174.

27. For the latter, discretion is not granted even for matters that require a high level of scientific expertise. For example, courts do not hesitate to perform a *de novo* review also in medication-related health disaster cases or medical malpractice cases. Recently, there was a distinctive Supreme Court decision on Minamata disease, one of the worst public-pollution tragedies in Japan (Apr.16,2013, 67–4 *Minshu* 1115 http://www.courts.go.jp/app/hanrei_en/detail?id=1196).

the legal and factual situations at the time of a city planning decision and not at the time of a judgment. But, because the court actually saw what had happened, the facts may have given the judges psychological leeway to intervene.[28]

3.2.2 Interpretation of law and "judgment making process control"

3.2.2.1 Drawing attention to neglected norms and values

As stated above, Japanese courts also retain their power to "interpret" the law, in addition to making a "determination of facts" in the case of discretionary administrative dispositions. This power serves as an effective tool to guide "judgment-making process control" of discretionary dispositions, especially when designating which factors should be considered in administrative decision-making. This approach sometimes goes so far as to control the proper "weighting" of each factor.

A typical and classic example of active judicial intervention in this area is provided by the *Nikko Taro Sugi* Decision of the Tokyo High Court.[29] In that case, a prefecture planned to expand a national road, which included a site owned by *Nikko Toshogu*, a famous and historically significant Shinto shrine located within a special protection area based on the Natural Parks Act. Because the shrine did not sell the land voluntarily, the Minister of Construction authorized the use of land expropriation after it received an application from the prefecture. The shrine filed suit. The decision of the Tokyo High Court proclaimed that it had employed "judgment-making process control," which was the first court decision to do so. The court went on to note that, in order to meet the requirements of the Land Expropriation Law, it is not sufficient that the project meets the public interest in responding to traffic increases. The project must be supported by a showing of necessity that justifies sacrificing landscape, scenic, and cultural values of the expropriated land. This is because "irreplaceable landscape, scenic, and cultural values and necessities of environmental protection are worth the utmost respect in the administrative

28. Another issue to be taken up is the use of a cost-benefit analysis in a judicial review of city planning decisions. It is now general practice for a planning agency to perform such an analysis before making a decision. The validity of a cost-benefit analysis is often brought up in litigation. However, courts are rather reluctant to give special status to a cost-benefit analysis, because the analysis is not a necessary requirement of the law. A decision of the Tokyo High Court (Jul. 19,2012) states that a cost-benefit analysis is only "one of the reference materials" available to judge the legality of land expropriation for the purpose of building a highway.

29. Tokyo High Court, July 13, 1973, 24–6/7 *Gyosaireishu* 533.

process because the values form the wholesome and cultural living conditions of people."[30]

Here, the court clearly imposes a normative evaluation, which was probably not prevalent in society at the time of the expropriation (in 1964, shortly before the first Tokyo Olympic Games), into its decision. Naturally, this point is criticized because the court is not being true to its proclaimed "judgment process control" method. **However, this approach reveals the possibility of using the judicial process to re-activate values and interests that were (and often are) neglected in the administrative decision-making process. In that way, such values and interests rise to the surface and can be evaluated by a neutral third party.**

Another case worth mentioning is the *Nibutani* Dam Decision of the Sapporo District Court[31], which declared that land expropriated for a large dam project was illegal because it would destroy "sacred sites" of Japan's indigenous Ainu people. The decision employed the "judgment process control method," and stated that the Minister of Construction "neglected investigative and research procedures that were necessary to judge the priority of competing interests accompanying accomplishment of the Project Plan."

While these decisions have the positive aspect of shedding light on neglected values and interests, the courts must further elaborate methods of judicial reasoning in order not to be influenced by subjective values of the judge.[32]

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30. The term "wholesome and cultural living" is a quotation from Art. 25 (see above note (35)) of the Constitution of Japan.

31. Sapporo District Court, Mar.27,1997, 1598 *Hanrei Jiho* 33 (English translation of this decision by Mark Levin can be found at International Legal Materials, Vol. 38, p. 394, 1999 (also at http://ssrn.com/abstract=1635447).

32. It should be added that the court decisions, in which administrative decisions concerning land use were found to be illegal, were cases of project-type city planning or land expropriation. There have been, however, no recent judicial decisions that have declared regulatory city planning decisions, such as zoning decisions, to be illegal. This is mainly because the "gatekeeper" function of "administrative disposition" is still active in this area. However, while the conflict of interests in a project-type city planning decision is rather simple (interests of the landowner vs. public interest attained by the project), it would be much more complex with a full range of diverse interests in the case of regulatory-type city planning. Currently, the government is discussing the possibility of introducing a special legal scheme of "city planning litigation" as "other powers are specifically provided for by law" (Court Law Art.3, see 2.2.1). When such proposals are legislated in the future, the courts may come across the difficulty of effectively controlling planning activities, especially in the area of regulatory-type city planning.

3.2.2.2 Bias in administrative decision-making process

Another important possibility for the "judgment process control method" of administrative discretion control is that **the method be oriented towards the concrete administrative decision-making process that actually took place.** The court must verify the process from a neutral point of view, while at the same time being inspired by questions raised by the plaintiff. Biases in decision-making can be highlighted hereby.

Although not in the area of land-use law, an interesting Supreme Court decision should be mentioned here. In a decision on Feb. 7, 2006,[33] the decision of a public school principal to refuse use of a school facility for an educational study meeting by the teacher's union was found to be illegal. The stated reason for refusal was that the use was likely to cause turmoil because in the past, vehicles of right-wing organizations had come to other schools where such meetings had been held. However, the Supreme Court concluded that the school principal's decision was "obviously unreasonable" because the possibility of right-wing vehicles coming was purely abstract. Also even if they come, the result would not be so serious because the meeting was to be held on a holiday when pupils would not be present. On the other hand, the educational study meeting was important for teachers as a self-training activity, and school facilities provide a very convenient location for such meetings.

The court also noted the fact that the Prefectural Board of Education had a "tense relationship with the teachers' union over the issues of hoisting the national flag and singing the national anthem, as well as regarding issues related to training systems." Here, the Supreme Court hints at the possibility of bias against the union in rendering the decision to refuse permission. Although the logic of the court is cautious, and the fact was not mentioned in the direct reasoning behind the decision, one might suppose that it was actually an important point.

Similar consideration can be found in the Supreme Court decision[34] that found a prefectural governor's refusal to give permission for occupancy of a public seacoast area by a quarrying business to be illegal.[35]

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33. Supreme Court, Feb.7 2006, 60–2 *Minshu.* (http://www.courts.go.jp/app/hanrei_en/detail?id=814)

34. Supreme Court, Dec.72 007, 61–9 *Minshu* 3290(http://www.courts.go.jp/app/hanrei_en/detail?id=924).

35. In this case, the application for occupancy of a coastal area was made for the purpose of building a pier for the conveyance of rocks. Although no damage to the environment or traffic was expected, the prefectural governor repeatedly made an unreasonable recommendation to build the pier in a remote area, which was difficult to realize, and finally

4. Conclusion

In this paper I argue that the concept of "regulation" is relative or reciprocal, at least in the context of land-use law (1). Next, I describe the institutional backdrop of the Japanese judiciary's handling of administrative cases. The concept of "legal dispute," specifically its component of "rights and duties," plays an important role as part of the "gatekeeper" (2.2) function. The other component, "question of law" and underlying concept of the judiciary, form a limit on how far the judiciary may intervene (2.3). However, because the concept of "rights and duties" is flexible, the gatekeeper function may be either stringent or loose, depending upon the attitude of the court (3.1). When courts are entrusted with reviewing the legality of a city planning decision, they can use either their traditional power to "determine facts" (3.2.1) or they can "interpret the law" (3.2.2). The latter may be assisted by the method of "judgment process control," but the tool for effectively controlling administration is still at the development stage (3.3).

Let us return the initial question of the relativity of the concept of "regulation." As I have stated (1), if the court is to set a limit on the liberty of construction under the idea of the "right to sunshine," the situation seems, from the viewpoint of the constructor, "regulation" of her property rights. However, from the perspective of the neighbor who believes in her "right to sunshine," the situation seems to involve the coordination of two conflicting rights and not "regulation."

If we put another actor the administration into the analysis, the situation becomes even more complex. Relaxing the "gatekeeper" function in the area of administrative disposition may give the landowner a more effective tool to fight a land readjustment project that she does not want. Relaxing the "gatekeeper" and "standing to sue" requirements may seem to a private railway company to have strong "regulation" on its activities. However, from the perspective of neighborhood residents, the standing requirement seems to be a barrier to their defense against a railroad project that infringes their legally protected interests. The implications will be different when the court employs more rigid controls for a project city planning decision or for a regulatory decision.

Land-use or city planning law is nothing but an allocation of power between property right-holders, other stakeholders, such as neighbors, and the administration during a decision-making process about the utilization of space. When the judiciary is thrown into such a process, its function totally depends upon the context in which the judiciary is invoked.

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refused permission. One may suspect that the governor refused in order to stop the quarrying business itself, which had already been (albeit against the governor's will) approved.