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Legal Management of Urban Space in Japan and the Role of the Judiciary

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1. Introduction

In the early 2000s, Japan was engaged in a project of judicial reform. The Opinion of the Justice System Reform Council (June 12, 2001) proposed the re-examination of the administrative litigation system with the aim to reinforce the 'judicial check function *vis-a-vis* the administration.'[1] The basic idea behind this opinion was to 'transform the excessive advance-control/adjustment type society to an after-the-fact review/remedy type society.' Based upon this opinion, the Administrative Case Litigation Law[2] in Japan underwent important amendments in 2004.

The aim of this paper is to examine the of the role of the judiciary in the context of urban space management in Japan, both in terms of how it actually operates, as well as possibilities for its

[1] http://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html

[2] Law No. 139 of May 16, 1962 (http://www.japaneselawtranslation.go.jp/law/detail/?id=1922) The terminology in this paper does not necessarily follow the above translation.

reform.

In section 2, I will examine the background rules in the legal management of urban space. I will show the understanding of property as a product of the 'dual partition of the common space,' which aims at the solution for the 'tragedy of commons' (2.1). However, commons-like nature of space will nevertheless remain, which serves as the inherent limitation of solutions based on the creation of property rights. The problem of landscape protection is a typical example of such residual commons (2.2). On the other hand, actual land legislation in Japan is based on the idea of private property/public interest dichotomy and the 'minimum intervention principle' (2.3).

In section 3, I will describe three development stages of City Planning in Japan, namely the transformation from the 'urbanizing society' (3.1) to the 'urbanized society' (3.2) and finally in the context of 'shrinking cities' (3.3).

In section 4, I will propose two models of legal governance of urban space: a 'rights-based model' and a 'consultation and coordination model.' After showing the two models (4.1), I will show that the concept of judiciary in Japan is determined by the function of solving 'legal disputes' (4.2.1). After that I examine the content of the 2004 amendment of the Administrative Case Litigation Law, which was rather lukewarm but had nonetheless had considerable impacts (4.2.2). However, in the context of city-planning, these effects were limited by the perceived function of the judiciary (4.2.3). I try to find a hint for the future possible role of the judiciary that would contribute to 'consultation and coordination model' (4.3)

Lastly, I will give a very short reflection on the role of the judiciary in the theoretical model of principal-agent relationship (5).

2. Background rules in the legal management of urban space

2.1 Dual partition of the common space

Any administrative activities related to urban space are done against the background rule of web of entitlements. With the existence of multiple stakeholders surrounding a piece of urban space, the problem of allocation of 'entitlements' will inevitably occur. Needless to say, the 'entitlement' is not a product of nature, even if 'the law's entitlement granting rules seem . . . so sensible and natural that they are not a legal allocation at all' (Sunstein 2005: 188). Rather, entitlements are man-made: 'the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail' (Calabresi and Melamud 1972: 1090). Entitlement is therefore a consequence of a decision of the legal order.

The law performs such allocation by 'dual partition of the common space.' Land is ultimately continuous, so it is not possible to possess it as one's own unless it is artificially divided up. The law divides up the land horizontally into parcels, assigning each parcel a lot number and recording it in a registry, which makes it subject to ownership and transactions. This division logically precedes legal ownership. In addition, the law also establishes land ownership of

underground property and air space above, hence dividing the space vertically. The Japanese Civil Code states in Article 207, 'Ownership in land shall extend to above and below the surface of the land, subject to the restrictions prescribed by laws and regulations.'[3]

City planning regulations are conceived as a restriction of such ownership as a result of the partition, from the viewpoint of 'public interests.' The dichotomy of 'rights vs. public interests' has determined the lawyers' perspective. This perspective is of course a product of legal history. In the case of Japan, this is determined by the reception of the civil law tradition of 'absolute ownership', especially that of late-nineteenth-century Germany.

However, if we are to find consequentialist justification for this perspective, it is commonplace to mention 'the tragedy of commons' (Hardin 1968) or the internalization of externalities (Demsetz 1967, 354-6). The concept can be summarized as follows. There is a pasture open to all. Various herdsman let their cattle to graze on this pasture and determine the number of cattle based upon their own costs and benefits. If a given herdsman puts more livestock on the pasture, the benefit will be exclusively attributed to the owner but the cost (deterioration of the pasture by overgrazing) are shared by all the herdsmen. Therefore, the only sensible course for each herdsman is to add more cattle on the pasture. As a result, too much cattle are turned loose, and no herdsman is able to maintain his own cattle, and no one ends up with their desired result. In order to avoid this tragedy, the common pasture will be divided into parcels and exclusive right of usage

[3] Law No. 89 of April 27, 1896, http://www.japaneselawtranslation.go.jp/law/detail/?id=2057, accessed 15 September 2016.

attributed to each herdsman. This is a commonplace justification of ownership rights.

2.2 The inevitability of residual commons

It is impossible, however, to completely carry through the above-mentioned 'dual partition of the common space' and internalize externalities as Hardin or Demsetz envisages. The commons-like nature of urban space will remain or will be rediscovered even after the partition. The nature of urban space as a 'place' of encounter can never be fully partitioned and individually owned as a private property, but remains to be placed in the relationship and networks among people.

Another typical example of the residual commons is urban landscape. Although the source of good urban landscape is mostly privately owned buildings, the benefit of landscape is commonly enjoyed by various stakeholders in the region such as property holders or residents.[4] While the benefit can be preserved if the use of space is appropriately controlled, it can also be easily destroyed by 'short-sighted quest for profit' by a few stakeholders(Ito 2006,20).

This commons-like understanding of urban space was clearly articulated in two district court judgments concerning a condominium conflict in a suburb of Tokyo—the *Kunitachi* condominium conflict (cf. Kadomatsu 2017a):

[4] There is a great diversity of stakeholders a with multi-layered interest structure concerning a good landscape, ranging from local residents and landowners to the tourists or the people in general. A district court decision about the interest in landscape shows this diversity. While it affirms the standing of local residents based on the interest in the landscape of a historical harbor, it emphasizes that the value of the harbor landscape is 'a national asset'. Judgment of the Hiroshima District Court, October 1, 2009, 2060 *Hanrei Jiho* 3 (*Tomonoura*).

Building owners or residents can enjoy the landscape only when they themselves strive to maintain their beauty. In addition, the landscape can easily be destroyed if any of the users does not observe the rules necessary for its maintenance. One can enjoy the interest in the landscape continuously only when all users of the space form a relationship in which they mutually maintain and respect the landscape. Landscape can be maintained only when all the users of the space observe its rules. It is highly dependent on a consciousness of community of the users of the space.[5]

There are cases in which the property right holders establish certain standards on height, color or design for the buildings within the area and thus a certain landscape of the area evolves. When not only the residents but also the society at large considers it to be a good landscape, it gives added value to the lot. Such added value of urban landscape is by its nature different from enjoyment of the natural landscape of mountains or coast, or from enjoyment of historical buildings which are preserved at a cost to their owners. It is the property-right holders who enjoy the added value of the landscape themselves that have brought forth the value by their continuous effort. It required their mutual understanding, solidarity and self-sacrifice. In order to maintain such added value, the above standards must be observed by all the property-right holders. Only one property-right holder can

[5] Judgment of the Tokyo District Court, December 4, 2001, 1791 *Hanrei Jiho* 3

immediately destroy the uniformity of the landscape by a building that violates the standard and deprives other property-right holders of the above added value.[6]

The law has divided the common space into parcels as private property in order to avoid the 'tragedy of commons.' However, it we focus on the landscape aspect, the commons-like nature of the space will re-appear. The destruction of good landscape out of the quest for profit brings the 'tragedy of commons' back to the stage.

2.3 Private property/public interest dichotomy and the 'minimum intervention principle'

Needless to say, the law does not go so far as to assume that the 'double partition of space' is the final solution. The law always presupposes the possibility of the restriction of property right based on the 'public interest.'

Such private property/public interest dichotomy perspective, however, does not clearly capture the role of other stakeholders. The conundrum of the standing to sue of residents in environment-related administrative litigations shows the limitation of this dichotomy (Kadomatsu 2017a).

In addition, 'the minimum intervention principle' underpins the whole practice of Japanese land legislation, although it is not a clearly stated constitutional principle. Abiding by this principle

[6] Judgment of the Tokyo District Court, December 18, 2002, 1829 *Hanrei Jiho* 36.

means restricting private property only where and insofar as it is necessary to overcome clear and present hindrances to the public interest (Kadomatsu 2006). Thus, there is no guarantee that the actual restriction on the property rights will fit the actual interest structure of diverse stakeholders[7]. This point will be further elaborated in the next chapter, where I describe the actual development of City Planning in Japan

3. Three development stages of city planning in Japan

As in many industrialized countries, the task of city planning in Japan underwent three stages: 'urbanizing society' in the era of city expansion; 'urbanized society' in the era when restructuring of built-up areas became an important concern, and the current era of 'shrinking cities' when the strategic and smart shrink of urban area has become necessary in the era of population decrease.

3.1 1968 City Planning Law-The law in the 'urbanizing society'

The basic feature of the Japanese City Planning law enacted in 1968[8] was based on the idea

[7] One may also suggest a solution according to the Coase theorem (Coase 1960). Public interventions in order to cope with the problem of the externalities of land use may either focus upon a certain regional space such as zoning or neighborhood interest coordination or extend to a wider range of space such as the formation of national land structure or infrastructure development. As for the former, an efficient outcome may be attained as a result of bargaining regardless of initial distribution of property rights, provided that there is no transaction cost. However, there is inherent limitation of setting up 'rights' as objects of bargaining. To be sure, we can use private law schemes for the restriction of property e.g. easement for the preservation of a good landscape. This may function when clear numerical standards such as height restriction serve as the tool for the preservation. However, when the good landscape depends upon more subtle factors such as historical features of the area, legal bargaining will not function well. On the other hand, if we could refine legal tools in order to enable more segmentation of legal entitlements that surround property, there is a risk that we will fall into the tragedy of the anti-commons in which heavy transaction costs will hinder effective use (Heller 1998).

[8] Law No. 100 of June 15, 1968.

of ‘urbanizing society’. The expansion pressure of urban areaswas presupposed. The role of the City Planning Law was to control and guide such pressure so that the orderly development of the cities would be attained. The central concern was the avoidance of housing sprawl.

On the one hand, this form of city planning restricted the expansion in certain areas (*Shigaika Chosei Kuiki* [Urbanization Control Areas]) by imposing regulation. On the other hand, it designated areas to be urbanized in the near future (*Shigaika Kuiki* [Urbanization Areas]) and established a project plan for the provision of necessary infrastructure (Kadomatsu 2006: 2). As said above, the urbanization pressure was presupposed and the creation of such pressure was not an issue for the city planning. It was left to private initiative governed by the market.

The enactment of the 1968 law undoubtedly marked significant progress, which formed a classic structure of the Japanese city planning legal scheme. The legislation and its actual implement, however, were strongly determined by the ‘minimum intervention principle.’ In the final stage of legislative process, the initial idea of drawing distinction between four types of areas was abandoned and the dichotomy of Urbanization Areas/Urbanization Control Areas was adopted instead (Ishida 2004: 257-8). The 1968 law defined the Urbanization Area as ‘those areas where urban areas have already formed and those areas where urbanization should be implemented preferentially and in a well-planned manner within approximately the next 10 years.’[9] Despite this, the actual designation of Urbanization Areas was by far too large, without a realistic prospect of concrete projects or

[9] City Planning Law, Art. 7 para.2

necessary fiscal capacity. The amendment of the Building Standard Law in 1970[10], together with the 1968 law, set a system of land use zoning, which laid down 'objective' numerical standards for buildings without any discretion of building authorities (Kadomatsu 2006: 3-4)..

3.2 The 1998/2000 Amendment – A reaction to the 'urbanized society'

As in many western European countries, the pressure for city expansion quieted down in the late 1990s. Urban land use policy shifted its focus from the orderly expansion of the urban areas to the improvement of the quality of living in already built-up areas. Call for the improvement of 'amenities' or the attempts of people to deploy cities for the creation of 'values' began to attract policy attention. A report of an advisory body for the Ministry of Construction calls this situation as a 'transition from the *urbanizing society* to the *urbanized society*' (Central Deliberative Council for City Planning 1997).

In the 'urbanizing society' with the trend of one-way expansion of urban areas, a 'bird's-eye' approach to regulation in the form of objective and numerical regulation did have a certain effectiveness. In the 'urbanized society', however, contextual regulations that correspond to individual situations gained importance. In 2004, the Landscape Law[11] was enacted. The above mentioned *Kunitachi* condominium conflict lawsuits, in which 'the interest in landscape' was the central issue, served as a stimulus for the enactment of the law. The regulations in the new law

[10] Law No.201 of May 24,1950
[11] Law No.110 of June 18,2004

opened the possibility of making a breakthrough in the classical structure of Japanese city planning law.

At the same time, local decentralization of city planning regulations proceeded (Kadomatsu 2006: 6-8). A number of competences were transferred from prefectures to municipalities. This decentralization is related to the above mentioned shift of focus in city planning. Such undefined aims as ‘amenities’ or ‘activation of cities’, which gained importance in the phase of ‘urbanized society’ were difficult to attain through ‘rational-comprehensive process model of planning’ led by the central government experts (Cf. Healey 1993). The aims better be realized by small regional authorities with help from active participation of the citizenry, which possesses ‘local knowledge’ and can claim to have ‘cognitive leadership’ (Kadomatsu 2001).

3.3 Late 2000’s—Shrinking cities

Presently, Japanese city planning is faced with new tasks of shrinking cities as a result of population reduction. One of the most difficult tasks in this phase is that the pressure to shrink has not emerged spontaneously but rather must be created artificially. In addition, consultation and coordination among stakeholders has gained importance.

While the classic housing sprawl has become less important with the decrease of expansion pressure, the sprawl of large commercial facilities such as shopping malls in the suburban areas, which became economically profitable as a result of motorization, continues to increase. This brings

about changes in the city structure. The center-periphery structure of the cities has been supplanted. Suburban commercial facilities undertake the city-central functions while the classic center has hollowed out.

The policy reaction to this trend was the slogan of 'concentrated city structure.' The 2006 amendment of the City Planning Law modified decentralization policy to a certain extent. Although the 1998 and 2000 amendments already introduced legal tools for the municipal governments to cope with the sprawl of commercial facilities—such as 'Special Land Use Restriction Zone,' and 'Quasi City Planning Area' (Kadomatsu 2006: 7-8)—this did not function well. Many suburban municipal governments did not dare to use such tools because they were attracted by the prospect of increased tax revenues and employment that the commercial facilities may bring about. Without the active will to intervene, the economic incentive for the facilities create a *fait accompli*. In order to escape from this classic 'prisoner's dilemma' situation, the 2006 amendment restricted building of large-scale (more than 10,000 square meters) to certain land-use areas. It also emphasized the prefectural governments' power for large-scale coordination of municipal interests (Kadomatsu 2006: 11-12).

This development gives us a lesson. First, giving municipal governments the legal power for regulation may not function well when there is a conflict of interest between municipalities and there is not an effective scheme of interest coordination. Second, the local decision-making process, with citizen participation and deliberation, may have high democratic normative value. It may also have the potential to mobilize 'cognitive leadership'. However, when the 'default setting' of the legal

situation starts from the freedom to build, and the intentional active intervention of local governments are required for regulation, economic incentives will continue to drive the trend towards suburban sprawl before any deliberative decision making will be made.

In 2008, the Ministry of Land, Infrastructure and Transportation began the attempt for a comprehensive reform of the City Planning Law. Slogans such as 'eco-compact city' or 'smart shrink' emerged in the interim report of a deliberative council in the Ministry (Council on Infrastructure Development 2009). However, actual legislation has not yet followed. Instead of the comprehensive reform of the City Planning Law, the Diet passed an amendment of the 2002 Law on Special Measures Concerning Urban Renewal[12] in 2014 (Kadomatsu 2006: 8-10), in 2014. The amendment introduced a scheme of Location Improvement Plan *(Ricchi Tekiseika Keikaku)* to be enacted by municipal governments. The plan designates 'habitation-inducing districts' in order to stimulate concentration of housings. Outside of such districts, the notification to the mayor is required for the development of housing. The plan also designates 'city-function-inducing districts.' Outside of such districts, the notification is also required for the construction of facilities that serve important city functions, such as medical facilities, welfare facilities and large commercial facilities. The scheme is regarded by the ministry to be 'a higher level version of municipal master plan'[13].

In this era of 'shrinking cities', the 'underuse' of property becomes a serious problem. The

[12]Law No.22 of April 5, 2002.
[13]Ministry of Land, Infrastructure and Transportation, *Ricchi Tekiseika Keikaku no Igi to Yakuwari* (The significance and role of Location Improvement Plan) http://www.mlit.go.jp/en/toshi/city_plan/compactcity_network2.html, accessed 15 September 2016. The scheme of municipal master plans without legal binding power already existed since 1992.

symbolic symptom is the increase of vacant, abandoned housings[14], which rapidly attracted social attention since the 2010s. The traditional city planning and building legal regulations cannot cope with this problem, because they focus on the prevention of 'overuse.' Apart from extreme situations, the trigger for the administrative intervention will generally be given only in the case of new building construction, or enlargement of building, and so on. Hence the law cannot effectively cope with the negative externalities created by vacant housings (danger of collapse, hygiene problems, deterioration of landscape, and so on). Many local governments enacted new ordinances to cope with this problem. The national government enacted new legislation in 2014.[15] In addition to more active administrative intervention, the measures to facilitate circulation of existing housing are important. Moreover, the conversion of vacant housing into attractive spots for the development of a community has been attempted in various regions. There are several cases of conversion of traditional Japanese folk houses into Japanese inns. These are the attempts to create new values based on the history and memories of the community.

4. Two models of legal management of urban space – 'rights-based model' and 'consultation and coordination model'

4.1 Two models

[14] According to the estimate by the Bureau of Statistics of the Ministry of Internal Affairs and Communications, vacant housings in Japan amount to 8,200,000(13.5% of total housings) as of Oct.1,2013.
[15] Law on special measures for the promotion of countermeasures against vacant housing (Law No.127 of Nov.27, 2014).

Admitting that they are still under-development, I would like to propose here two models of the legal management of urban space: a ‘rights-based model’ and ‘consultation and coordination model’ to understand the historical and legal developments I traced above in section 3.

The former model divides the common space and gives each stakeholder exclusive rights to use the space (in principle at will). This model is de-centralized in the sense that the rights are distributed among variety of stakeholders, but on the other hand, within each divided parcel, the power to decide upon its usage is centralized in the property holder. The latter model seeks to develop a certain legal scheme that will facilitate consultation and coordination among stakeholders.

Needless to say, these two models are not mutually exclusive. One of the aims of the division of space based upon the idea of the Tragedy of Commons or the Coase Theorem (see 2.1.) was to establish rights with a clear boundary that will fit as objects of transaction, so that negotiations among right-holders will be possible. However, we can still distinguish different features of the models.

Based upon this view, the above described development of Japanese city planning legal schemes can be summarized as follows. In the ‘urbanizing society’ period, the law attempted to regulate urban expansion with a ‘rights-based model.’ However this form of land use law could not fully function because of the ‘minimal intervention principle’ that determined the actual land legislation. The operation of the legal scheme failed to develop adequate rights allocation that fit the actual interest of diverse stakeholders.

With the transition to the ‘urbanized society’ and the ‘shrinking cities’, the importance of the ‘consultation and coordination model’ is increasing. As shown (3.2.), in the phase of the ‘urbanized society’, the attainment of undefined values such as amenities is impossible without participation of residents who can deliberate together over their diverse knowledge and values.

The situation in the phase of shrinking cities requires some more explanation. In this era, the demand for the use of space has decreased. In some areas, the problem of ‘underuse’ has become be acute(3.3). On one hand, the clarification of rights will be useful to facilitate market transaction. On the other hand, resident participation and coordination of their interests is essential for the revitalization of the region, because creation of new values will be effective when it is based upon history and memory of the place.

4.2 Strengthening ‘the judicial check function vis-a-vis the administration’: How does it function?

As stated in the introduction, the opinion of the Justice System Reform Council proposed the re-examination of the administrative litigation system with the aim to reinforce the ‘judicial check function *vis-a-vis* the administration.’ Based upon the opinion, the Diet amended the Administrative Case Litigation Law in 2004. The content of the amendment was rather lukewarm, but it did have considerable effects.

4.2.1 The ‘legal dispute’ as the role-model of the judiciary

Under the present Constitution, Japan maintains a unitary court system which functions under the Supreme Court. The administrative litigation in Japan is conducted by ordinary courts and not by special administrative courts. There exists a special law governing administrative adjudication, the Administrative Case Litigation Law(ACLL)[16]. However, it is not a self-contained codified set of procedural rules for administrative litigation and the Civil Procedure Code shall be applied *mutatis mutandis* for matters not provided in the law. The relationship between administrative litigations and civil litigations is still disputed (Kadomatsu 2009: 145-6).

The understanding over the role of judiciary in administrative litigations is strongly determined by the concept of the 'legal dispute' (Kadomatsu 2017b). 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 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.'[17] The concept serves as a limitation upon when and by whom a judicial remedy may be invoked. It functions as a gatekeeper. Like in the United States, competence over 'legal disputes' is commonly understood to be identical to 'judicial power' in the Constitution.[18]

This understanding of the role of the judiciary is reflected in the limitation of access to

[16] Supra note 2.
[17] Judgment of the Supreme Court, Apr. 7 1981, 35 *Minshu* 1369
[18] 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).

administrative litigation under the ACLL. In regulating the 'complaint litigation' as the central category of the administrative litigation[19], the law provides two gatekeeping limitations: The 'administrative disposition' concept as an objective limitation of the subject matter to be handled by the judiciary, and standing to sue as a subjective limitation concerning the eligibility as the plaintiff to challenge the administrative disposition at issue.

The concept of the 'administrative disposition' 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.'[20] The ACLL adopts this concept in defining the 'complaint litigation' as a suit against the 'exercise of public authority' (Art.3).

The other gatekeeping limitation--standing to sue—restricts '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. 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

[19] The Administrative Case Litigation 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).

[20] Judgment of the Supreme Court, Oct. 29 1964, 18 *Minshu* 1809.

the legal basis for the disposition; and, (iii) such subjective interests at stake must be 'specific interests' of the plaintiff and not entirely absorbed by the 'public interest' (Kobayakawa 1998).

In sum, the first gatekeeping limitation, 'administrative disposition' functions as the regulation of the timing of the judicial remedy. A judicial intervention may be invoked only when the 'right' of someone is infringed by administrative activities. The second gatekeeping limitation, standing to sue, defines the stakeholders concerning a certain administrative activity. Here, infringement of 'rights' of the plaintiff is not an absolute requirement. Non-addressee (third parties) of the administrative disposition may be admitted of their standing to sue, despite the fact that their 'rights' are not infringed in a strict sense. However, they cannot control the timing of judicial intervention. They must basically wait until the addressee's right has been affected by the administrative disposition.

4.2.2 Lukewarm amendment, but considerable effects

At least concerning the above two 'gatekeepers' for the access to the administrative litigation, the 2004 amendment of the ACLL was rather conservative. It did not touch upon the Article 3, which incorporated the 'administrative disposition' concept[21]. The amendment did not change the definition of 'standing to sue' as 'legal interest'. It only stipulated 'factors to be considered' in judging standing according to the newly added paragraph 2 of the Article 9. Actually,

[21] Instead of touching upon the issue of the subject matter of the complaint litigation, the amendment suggested a more active use of another type of administrative litigation, namely the inter-party litigation stipulated in Art. 4. (Kadomatsu 2009: 155-156).

the paragraph was nothing but a codification of the existing Supreme Court case law (Kadomatsu 2009: 156).

Ironically, these amendments, which had been criticized by scholars as too lukewarm, did bring about considerable changes in the attitude of the courts. As said, the 'administrative disposition' concept was not changed in the amendment, but the Supreme Court began to issue several judgments that relaxed this requirement in the early 2000s, shortly before the 2004 amendment. It did not change the general interpretative framework but began to try more flexible applications (Kadomatsu 2009: 156; Kadomatsu 2017b).

Traditionally, the courts have denied the status of 'administrative disposition' to city planning decisions, as well as regulatory city planning decisions such as zoning[22] and project city planning decisions such as decisions concerning land readjustment projects.[23] The basic idea behind the denial was that planning decisions do not directly influence the rights of land and building owners at this stage. However, a Supreme Court judgment in 2008 expressly altered its legal precedent with regard to land readjustment and affirmed the administrative disposition character of the project plan.[24]

On the issue of standing to sue, the Supreme Court gave a landmark judgment in 2005 (*Odakyu* Judgment)[25], which expressly overturned its judicial precedent and admitted standing to sue

[22] Judgment of the Supreme Court, April 22 1982, 36-4 *Minshu* 705.
[23] Judgment of the Supreme Court, Feb.23 1966, 20-2 *Minshu* 271. Land readjustment projects, which are sometimes called 'the mother of city planning' are one of the most important tools in Japanese city planning.
[24] Judgment of the Supreme Court, Sep.10 2008, 62-8 *Minshu* 2029.
[25] 59-10 *Minshu* 2645.

of a neighborhood resident in a complaint litigation against a city planning project by the Tokyo Metropolitan Government. This planning project included enlargement of railways by a private company. It is noteworthy, though not altogether peculiar to Japan,[26] that a codification of the administrative case law paved the way for the overturning of a judicial precedent (Kadomatsu 2017b).

In addition to relaxing of the 'gate-keeper' functions, we can observe several interesting court decisions regarding city-planning activities. Let me cite just one example. A Tokyo High Court judgment in 2005 found a city planning decision concerning the widening of a road to be illegal.[27] According to the judgment, the prospect of 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 court thus rendered hard look review on the existence of 'critical factual basis.'[28]

In sum, the courts seem to have 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 (Kadomatsu 2009: 159).

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[26] A comparison with *Universal Camera Corp v. NLRB, 340 U.S. 474* (1951) may be interesting. Although the U.S. Administrative Procedure Act of 1946 mostly codified existing administrative procedures and standards of judicial review, the judgement derived from the legislative history that the Congress 'expressed a mood' of dissatisfaction with the deferential posture of review. It led the Court to heighten its scrutiny of administrative adjudications under the already existing 'substantial evidence' standard. In the Japanese context, it is debatable whether the Diet had expressed such a 'mood,' although such a mood could be seen during the discussion in the Judicial Reform Commission (Blake Emerson brought me up this point. I also want to thank Takehisa Nakagawa (Kobe University) for his suggestion).

[27] Judgment of the Tokyo High Court, Oct 20 2005, 1914 *Hanrei Jiho* 43. This case does not have any relevance to the relaxing of the gatekeeping limitations, 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. (Kadomatsu 2017b).

[28] Another example of stricter review can be found in Supreme Court Judgment, Sep.4,2006, 1948 *Hanrei Jiho* 26 (*Rinshi no Mori*), in which a city planning project for the enlargement of a city park was in question.

4.2.3 The judiciary and the 'rights-based model' in the context of city planning

So far I have confirmed that the Japanese judiciary is slowly strengthening the prospects for intervention in administrative activities in the wake of the 2004 amendment of the Administrative Case Litigation Law. Two gatekeeper functions— 'administrative disposition' and 'standing to sue'—have been somewhat relaxed. We can also find several court decisions that review legality of city planning more stringently.

At the same time, we can observe that this expansion trend is still based on the 'rights-based model.' The role model of the judiciary continues to be determined by the concept of 'legal dispute.' As noted above, the Supreme Court has not changed its interpretative framework regarding either administrative disposition standing.

For example, what does the above 2008 Supreme Court judgment that affirmed administrative disposition character of land readjustment project plan mean? It means that the property right-holders can more effectively defend their rights, in that they can file a suit at an earlier time than the rule of the former legal precedent, before a *fait accompli* of urban development transpires. Of course, this is a progress.

However, note that the judiciary is a second-order organ that monitors and guarantees the functioning of first-order legal system (statutory law) created by the legislator. If the first-order legal system is based upon the 'minimum intervention principle,' the more effective judicial remedy

would mean that the principle will be more effectively carried through.

On the other hand, expanding 'standing to sue' might function slightly different. By interpreting the law that serves as the basis of the administrative activities, the court may acknowledge the existence of a 'legally protected interest', not only for the property holders but also for other stakeholders of the urban space. Those stakeholders may be able to invoke the judiciary to judge upon the legality of the expected transformation of the urban space. Here the judiciary may depart to some extent from the 'right-based model' and consider a wider array of affected interests.

However, there are still limits. First, even when such stakeholders succeed in invoking the judiciary, the issue will move forward to the substantial legality of the relevant administrative activities. Here again, when the statutory law is governed by the minimum intervention principle, it does not change the situation.

More importantly, as said above (4.2.1), those stakeholders that are admitted of standing cannot control the *timing* of judicial intervention. The existence of an 'administrative disposition' is a prerequisite before going into the questions of standing. In deciding whether or not an 'administrative disposition' has been issued, those stakeholders' interests cannot play any role. The timing of judicial intervention is determined by when the 'legal effects on the rights and duties' (definition of the 'administrative disposition') of the property holders—not the 'legally protected interests' of the stakeholders— are affected by administrative activities[29].

[29] In 2006 and 2009, a research institution (*Toshikeikaku Kyokai,* City Planning Association of Japan) that is affiliated with the Ministry of Land, Transportation and Infrastructure, issued two reports with legislative proposals that were not

Lastly, I have said that there are interesting court decisions which reinforced judicial review against city planning decisions. It should be noted, however, that they are all about project-type city planning decisions, including plans for improvement of urban facilities such as railways, roads, and city parks, as well as a plan for urban development projects such as land readjustment. The judiciary has not found an effective tool to review the legality of regulation-type city planning decisions, including plans that restrict land use such as zoning regulations or district planning.

4.3 Possibility of judiciary that contributes to 'consultation and coordination model'?

I have confirmed above that the present legal governance of urban space is determined by the 'rights-based model', which is not ideal in the ages of urbanized society or shrinking cities. I have also suggested that the on-going strengthening of judicial intervention is again determined by the 'rights-based model.' Is there a possibility, then that the judicial intervention may contribute to the 'consultation and coordination model'?

The 'consultation and coordination model' aims at legal scheme that will facilitate consultation and coordination among stakeholders. The primary task of constructing and implementing such a legal system belongs to the legislator and the administration. The judiciary primarily assumes the second-order role of guaranteeing proper enforcement of the system. In

realized. The reports proposed a special system of remedy (either administrative or judicial) that challenges legality of city planning decisions in general, without considering whether a decision has 'administrative disposition' character. In these reports, the problem of relationship between timing of the remedy and timing of the actual transformation of the urban space are given focus.

addition, however, there may be a chance for the judiciary to function as a stimulus or 'trigger' for the coordination.

A judgment of the Hiroshima district court in 2009 (*Tomonoura)* may hint at such a possibility.[30] In this case, Fukuyama City and Hiroshima Prefecture jointly planned a reclamation project in a historical, beautiful harbor in order to build a bridge. The issue in question was the legality of reclamation license, which is an administrative disposition.[31] The plaintiffs argued that the reclamation and the bridge will destroy the historical landscape. The court affirmed the contention of the plaintiffs and ordered ex-ante injunction of the license.[32]

The defendant－the prefectural governor－appealed to the high court. However, at the same time, the governor established a consultation forum of the residents in the area and organized discussions. After discussions in 19 sessions of the forum for about two years, the governor announced that the prefecture gave up the reclamation project in June 2012[33].

The *Hiroshima* District Court judgment focused on the 'lack of research and consideration' on the side of administration when it declared the license to be illegal. The court, so to say, 'threw the ball back' to the administrative process. In other words, the 'feedback function' of the judicial process was realized in this case.

In my view, this feedback was possible because the judgment of illegality was based on the

[30] Judgment of the Hiroshima District Court, Oct.1, 2009, 2060 *Hanrei Jiho* 3.
[31] Therefore, technically it is not a city planning case.
[32] This type of 'injunction litigation' was a newly introduced type of complaint litigation in the 2004 amendment. While the former law only provided ex-post remedy against administrative dispositions such as revocation litigation, the amendment opened the (limited) possibility of injunction litigation and mandamus litigation.
[33] However, it still took a long time to get consent of the Fukuyama City and the residents who supported the project. The prefecture finally retracted the application for the reclamation in February 2016.

court's finding that there was an error in the decision-making process,[34] namely the lack of research.[35] This judicial finding made the above consensus-building attempt possible. It is difficult to determine which aspects of the judicial process that facilitate this feedback function[36]. It is nevertheless important to think about the future role model of the judiciary that serves as a trigger and stimulus for the facilitation of consultation and coordination of the stakeholders.

5. Reflections: on monitoring activities of the judiciary in the principal-agent relationship

We have so far examined a question of legal governance of urban space from a normative perspective. However, can this analysis contribute to a more descriptive question of the role of judiciary, namely about its role in the principal-agent relationship?

Several authors propose a theory of judicial review from a perspective of principal-agent relationship. For example, Tom Ginsburg understands the *raison d'etre* of the constitutional courts as an insurance for the constitutional drafters which face the risk of losing power in the future

[34] As noted, the litigation was an example of newly introduced injunction litigation, but in my view, this was *not* the factor that made the feedback function possible. Since the injunction litigation is an ex-ante litigation, it is usually not possible to determine that there was a 'lack of research and consideration' in the administrative process (the administrative process has not yet finished!). Certain exceptional situations in the *Tomonoura* case have made it possible, but this is not the usual case. The judgment of 'lack of research and consideration' is more fit for revocation litigations, the standard ex-post complaint litigation.

[35] The *Tomonoura* judgment itself does not deal with consultation and coordination process, but on the lack of research.

[36] The judicial function of 'shedding light on neglected values and interests' may be one of such factors. In some court cases, the judicial process functioned 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. See, for example, *Nikko Taro Sugi* Judgment (Judgment of the Tokyo High Court, July 13, 1973, 24-6/7 *Gyosaireishu* 533), which stopped the land expropriation for the expansion of national road which may destroy historically important cedar tree, and *Nibutani* Dam Judgment(Judgment of the Sapporo District Court, Mar.27,1997, 1598 *Hanrei Jiho* 33), which declared that land expropriation for a large dam project was illegal because it would destroy 'sacred sites' of Japan's indigenous Ainu people interests. For an English translation translation, see Kayano et al. v. Hokkaido Expropriation Committee: 'The Nibutani Dam Decision,' Mark A. Levin (trans.), in *International Legal Materials* 38, p. 394 (1999), http://ssrn.com/abstract=1635447, accessed 15 September 2016. For details, see Kadomatsu 2017b.

(Ginsberg 2003). He also understands the nature of administrative law as a system of 'meta-regulation'[37] (Ginsburg 2005: 326). The judiciary can serve as a monitoring tool that solves the information asymmetry between the principal (legislator) and the agents (bureaucrats). The above mentioned proposal of the Judicial Reform Commission for a more effective 'judicial check *vis-à-vis* administration' is based on the recognition of the malfunctioning of such monitoring and a hope for more effective form of judicial review.

In such analysis of judicial monitoring of the principal-agent relationship, it is important to think about the contexts and structural constraints of the judiciary. The monitoring tool cannot always check whether the agents' activities accurately reflect the principal's interest, but only in limited scenarios and only with the limited indicators.

In the context of Japanese law, this is highly determined by the self-understanding of the judiciary. First, noted, the Japanese judiciary limits its function to solving 'legal disputes.' Therefore, the situation when it can be invoked will always be limited. We have seen that the rights-based model of the judiciary has its limits in performing effective governance of contemporary urban space.

Second, the indicator that can be used in the monitoring is limited to the 'question of law.' For the city planning decisions concerning city facilities, the Japanese Supreme Court grants 'broad discretion to the administrative agency' because 'when deciding the sizes and locations of city

[37] Thomas B Ginsburg, The Regulation of Regulation: Judicialization, Convergence, Divergence in Administrative Law, in *Corporate Governance in Context*, 2005,pp.321-337(p.326).

facilities under such standards, it is absolutely necessary to make determination from policy and technical perspectives while comprehensively considering various circumstances concerning the city facilities'[38]. To be sure, such discretionary decision can also be controlled by the judiciary. Courts may declare an administrative decision illegal when the decision 'lacks a critical factual basis due to errors in fact-finding' or when the agency 'has not taken into consideration the matters that should have been considered in making determination'[39]. Using this formula, some project-type city planning decisions were declared or suggested illegal[40]. However, what comprises 'critical factual basis' or 'matters to be considered' must be in principle derived from the statutory law, which often uses vague concepts.

The concretization of indicators is a difficult task for the judiciary. Concerning regulation-type city planning decisions such as zoning, the judicial control may be even more difficult. While there is no significant Supreme Court judgment about the legality of this type of planning, we may assume the Court will also grant administrative discretion here. Moreover, since such regulation-type city planning decisions require an even wider range of interest coordination, judicial control using 'critical factual basis' or 'matters to be considered' standards is more difficult.

Third, judiciary as a monitoring tool is basically not effective in monitoring against 'inaction' of administrative activities. It may produce a natural bias for the administrators to prefer

[38] Judgment of the Supreme Court,Nov.2,2006,60-9 *Minshu* 3249, English translation available http://www.courts.go.jp/app/hanrei_en/detail?id=863, accessed 25 September 2016.
[39] Judgment of the Supreme Court, Nov.2,2006,60-9 *Minshu* 3249
[40] Judgment of the Tokyo High Court, Oct 20 2005, 1914 *Hanrei Jiho* 43(n.29) (critical factual basis); Supreme Court Judgment, Sep.4,2006, 1948 *Hanrei Jiho* 26 (n.30)(matters to be considered).

inaction so that their actions will not be declared illegal in courts. This may be good if we take a standpoint of 'minimal intervention principle', but not necessarily so if we are to aim at new model of urban governance that is fit for the phases of urbanized society and shrinking cities.

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