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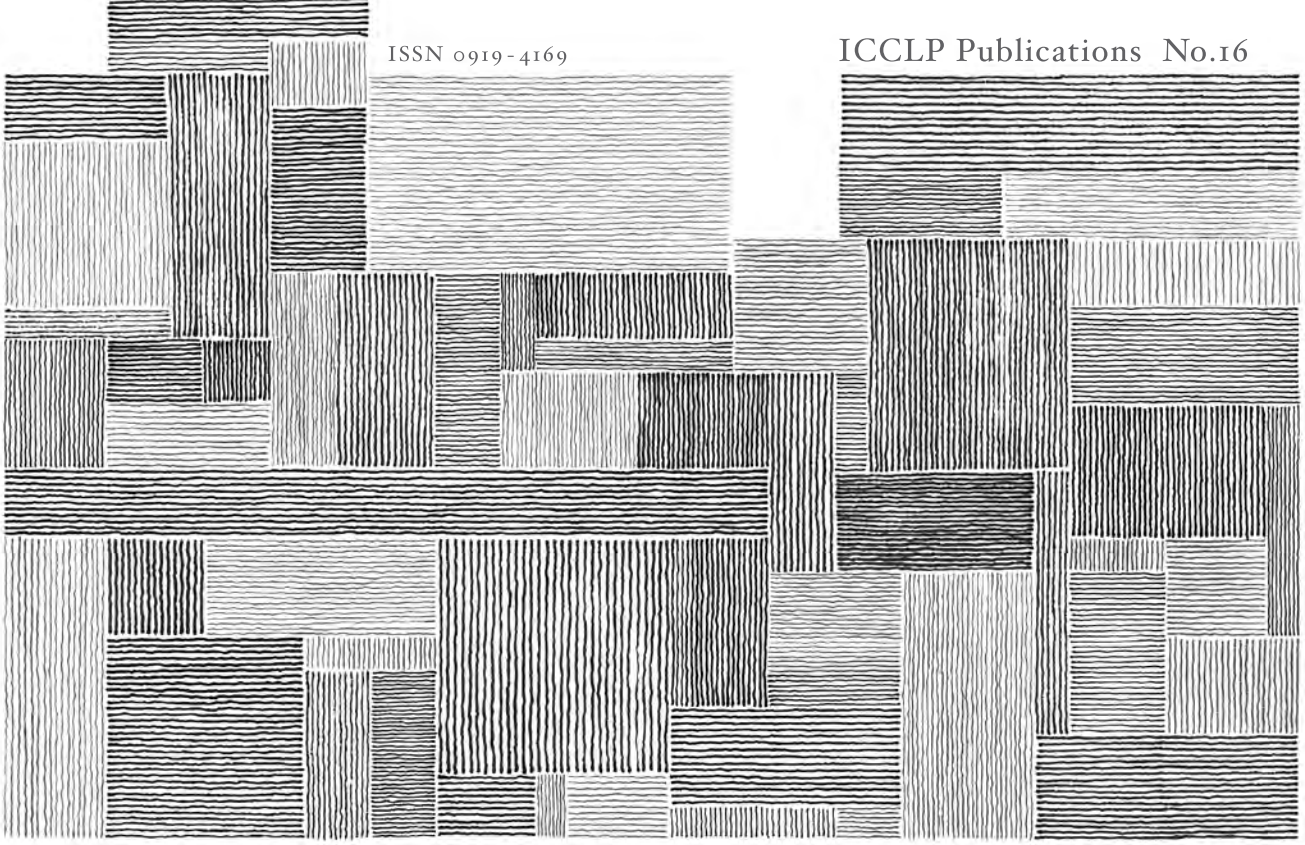

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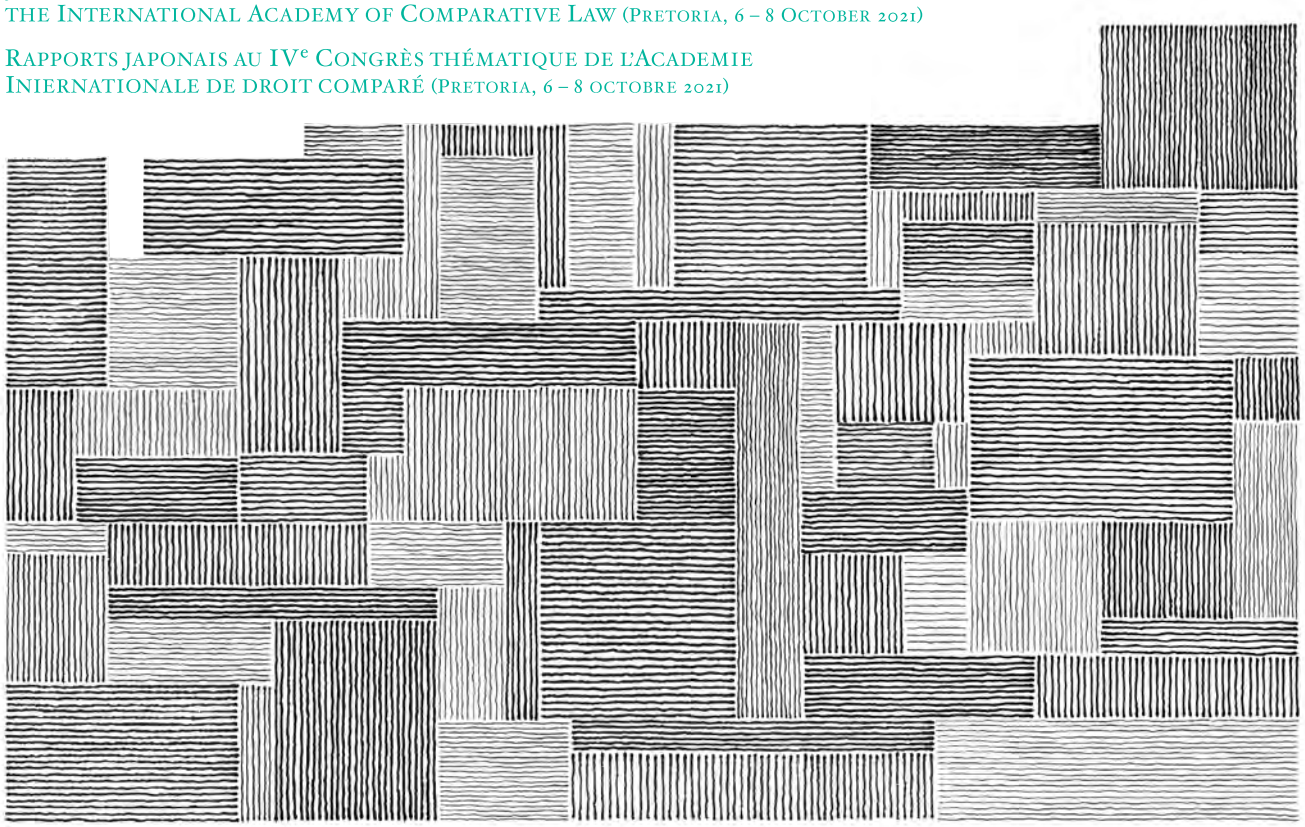

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RAPPORTS JAPONAIS AU IV[e] CONGRÈS THÉMATIQUE DE L'ACADEMIE INTERNATIONALE DE DROIT COMPARÉ (PRETORIA, 6-8 OCTOBRE 2021)

**2023**
**International Center for Comparative Law and Politics**
Graduate Schools for Law and Politics, the University of Tokyo
7-3-1 Hongo, Bunkyo-ku, Tokyo 113-0033 JAPAN

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# FOREWORD

This volume contains Japanese national reports for the XXIst Congress of the International Academy of Comparative Law that was held between 23 and 28 October 2022 in Asunción.

Seventeen reports by twenty-five reporters or co-reporters that cover fifteen thematic sections of the Congress are reproduced here. Some of them were revised by their authors after the meeting. We sincerely appreciate these reporters' contributions to the success of this tremendous occasion for lawyers from all the participating countries to exchange ideas.

Moreover, one report for the Fourth Thematic Congress of the International Academy of Comparative Law held from 6 to 8 October 2021 in Pretoria is reproduced here.

We express our gratitude to the institutions and staffs of the University of Tokyo, namely, the International Center for Comparative Law and Politics (ICCLP), Graduate School of Law and Politics, for their attentive and continuous support ranging from preparation for the Congress to the publication of this volume. Our special thanks go to Ms. Michiko Kawakami, Assistant Professor at the Center, who assured the provision of secretarial services in our committee.

We hope these reports will be helpful to those in all countries seeking a better understanding of Japanese Law in its various aspects, and wish that they will further stimulate studies in comparative law.

(May 2023)

Kichimoto ASAKA
Professor
The University of Tokyo
President
Japanese Committee of the International Academy of Comparative Law

# AVANT-PROPOS

Nous sommes très heureux de réunir ici les rapports nationaux japonais déposés au XXI[e] Congrès international de droit comparé, qui s'est tenu les 23-28 octobre 2022 à Asunción.

Sont reproduites dans ce volume, au total, dix-sept contributions réparties en quinze branches de droit et rédigées par vingt-cinq rapporteurs ou co-rapporteurs, et déposées à notre bureau, avec modifications ajoutées selon les cas, par leurs auteurs après le Congrès. Nous les remercions sincèrement d'avoir bien voulu répondre volontiers à notre demande et contribuer ainsi au succès de cette grande occasion de rencontre des juristes du monde entier.

Est également reproduit ici un rapport pour le IV[e] Congrès thématique de l'Académie internationale de droit comparé qui avait été tenu du 6 - 8 octobre 2021 à Pretoria.

Nos remerciements vont, par ailleurs, au Centre international de droit et de politique comparés, institué auprès de l'Ecole doctorale de droit et des sciences politiques de l'Université de Tokyo - qui nous a apporté, comme à l'occasion des précédents congrès, une aide attentive et chaleureuse tant dans la phase de la préparation que dans celle de la publication de ces travaux - et notamment à Madame Michiko Kawakami, assistante dudit Centre et qui assure le secrétariat de notre comité.

Nous espérons que ces rapports seront utiles pour les lecteurs de tous pays, afin de comprendre différents aspects du droit japonais et à stimuler davantage les recherches de droit comparé.

(mai 2023)

Kichimoto ASAKA
Professeur
à l'Université de Tokyo
Président
du Comité japonais de l'Académie internationale de droit comparé

# INTRODUCING ICT INTO JAPANESE LEGAL EDUCATION: THE POSTGRADUATE LAW SCHOOL MOVEMENT AND COVID-19 AS CORNERSTONES

**Ken'ichi YONEDA**
Kagoshima University

**Luke NOTTAGE**
University of Sydney

## 1. INTRODUCTON

This chapter traces the historical development of legal education based on information and communication technology (ICT) at universities in Japan. It highlights how ICT-based legal education came to be widely used through wider institutional reforms of the judicial system, the socio-economic constraints of the novel coronavirus (COVID-19) pandemic, and the support and regulations of the Ministry of Education, Culture, Sports, Science and Technology in Japanese government (MEXT).

The degree of diffusion of ICT use in the legal education field can be measured by the degree to which the Legal Information Database[1], the Class Management System (CMS)[2], and the Remote or Online Meeting System[3] are used in education. This depends partly on funding for them. In addition, teaching in Japanese universities must be conducted in accordance with the School Education Law (Gakko Kyoiku Ho) and related laws and regulations, as well as guidelines established by MEXT in line with this law. The achievement and setting of these guidelines will enable Japanese students to enjoy ICT-based legal education.

Based on the above framework, we will describe the ICT-based legal education in Japan in three major periods: before the 2004 establishment of new postgraduate law schools, after their establishment, and since the COVID-19 pandemic in 2020. Situational factors have triggered major changes in ICT-based legal education that define the circumstances of each period. By writing about the various social reactions to these changes, we can gain an insight into how (university and other) online legal education interacted with the legal professions, university systems and ICT infrastructures in each phase, and how online legal education developed before and after the pandemic.

## 2. OVERVIEW OF JAPAN'S LEGAL EDUCATION SYSTEM AND PROFESSION

Japanese legal education has been traditionally conducted by a Faculty of Law (Ho Gakubu) at the

* Respectively: We thank especially Professor Makoto Ibusuki for helpful information and feedback on earlier drafts, and Amelia Frey (through the University of Wollongong's Transnational Law and Policy Centre) for editorial assistance.

[1] This system is the equivalent of the Westlaw and LexisNexis services in American legal education. It consists mainly of a system for searching the text of Japanese court cases, with links to court cases related to the trial level of the case and court cases cited, as well as references to related legal articles. In addition, it is possible to search and display laws and regulations, as well as educational materials.

[2] This refers to a system that has functions equivalent to Blackboard or Moodle, well-known for example in the United States.

[3] This refers to a system that connects different points to conduct classes. Remote System refers to a meeting system using H323 protocol and Global IP base, like Polycom, while Online System refers to a system using HTTP connections such as Zoom, MS-Teams, Webex etc.

undergraduate level, with about 36000 students enrolling each year.[4] The curriculum includes topics useful not only for future legal professionals (especially the elite core called 'Hoso', comprising '*bengoshi*' lawyers, who are allowed to provide all types of legal services, judges and public prosecutors). It also covers topics useful for law graduates going on to become legal professionals with a narrower scope of permitted practice as well as national and local civil servants or corporate employees. Almost all of these law students do not go on to become 'Hoso' or even other types of legal professionals. However, under the Justice System Reform that began in 1999, an attempt was made to increase the Hoso population, which led to the establishment of new law schools (Hoka Daigakuin) in 2004, where students study at the postgraduate level for two years (envisaged if students have already completed an undergraduate law degree) or three years.[5] Since then, the law school has become the core of the legal professional training process (Hoso Yosei). There were years when more than 5,500 students were enrolled in 74 law schools, but by 2022 there were only 39 law schools and about 1,700 new students enrolling each year.

To become a legal professional (Hoso), in principle one must study at the law school, pass the National Legal Examination, and undergo about one year of training in a programme provided by the Judicial Training Institute (Shiho Kenshujo) attached to the Supreme Court. The number of students has roughly corresponded to the number of those who have passed the Examination, which in the last few years has been no more than 1,500 under a 2015 decision by the government (consulting mainly with the Ministry of Justice, the judiciary and the National Federation of Bar Associations).[6] Upon completion of their training, legal apprentices are employed by courts, prosecutors' offices, law firms (mostly), and so on. Since this report will focus mainly on university education, it will not discuss the use of ICT in training at the Judicial Training Institute.[7]

This report focuses on the process of diffusion of the use of ICT in legal education in Japan, using the status of undergraduate-level legal education and graduate-level professional development programmes in law schools as indicators. In Japan, there are other graduate-level education programmes that train students to be researchers or other law-related practitioners (with narrower scope of practice than *bengoshi* lawyers), but they provide approximately the same services as undergraduate-level legal education.

Regarding continuing legal education for lawyers, the Japan Federation of Bar Associations has

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[4] MEXT 'School Basic Survey (Gakko Kihon Chosa 2019 nendo)'. See also generally Nottage and Ibusuki, in this volume.

[5] For early quite pessimistic assessments, compare L. Nottage, 'Reformist Conservatism and Failures of Imagination in Japanese Legal Education' (2001) 2 *Asian-Pacific Law & Policy Journal* 28, manuscript at https://ssrn.com/abstract=837045l; L. Nottage, 'Build Postgraduate Law Schools in Kyoto, and Will They Come - Sooner *and* Later?' (2005) 7 *Australian Journal of Asian Law* 241, manuscript at https://ssrn.com/abstract=986529.

[6] Until the Justice System Reform, gatekeeping to the legal profession in Japan was negotiated among the courts, prosecutors' offices, and bar associations. However, since the Justice System Reform, the political sector has intervened more, and the decision has been made more by the government. To increase the legal professional population (Hoso Jinko), the goal was to have 3,000 people pass the National Legal Examination each year, but after some confusion, the number is now around 1,500, based on a government decision in 2015. In 2021 there were 43,206 *bengoshi* lawyers, according to the Japan Federation of Bar Associations White Paper (2021, materials 1-1-2) available at https://www.nichibenren.or.jp/document/statistics/fundamental_statistics2021.html (in Japanese). For the situation until 2010, see K. Anderson and T. Ryan, 'Gatekeepers: A Comparative Critique of Admission to the Legal Profession and Japan's New Law Schools' in S. Steele and K. Taylor (eds), *Legal Education in Asia*, Routledge, New York, 2009, pp. 183-212.

[7] Explaining legal professionals (Hoso), other qualified law related professionals and non-qualified legal specialists in Japan as part of an overview of Japanese law as a whole, see M. Abe and L. Nottage, *Japanese Law*, in J. Smits (ed) *Encyclopedia of Comparative Law*, Elgar, Cheltenham 2012, pp. 157-168, with forthcoming new edition manuscript at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672112.

been providing optional learning opportunities on various subjects using ICT in addition to face-to-face education since before the COVID-19 pandemic. This was mainly provided remotely, with lawyers gathering at their local-level bar association to take the course, or offered on demand. There were also two mandatory training courses: one for newcomers at the time of registration, and another on lawyer ethics to be undertaken on a regular basis. These were conducted in face-to-face group sessions in each region, but after the pandemic, on-demand classes were mobilized, with the addition of online and e-learning, and the number of classes that could be taken from lawyers' offices increased.

## 3. REGULATION OF ICT-BASED EDUCATION IN JAPANESE UNIVERSITIES

The Japanese universities that provide legal education must conduct classes in accordance with the Standards for the Establishment of Universities (Daigaku Setchi Kijun) under the School Education Law (Gakko Kyoiku Ho) and the standards for the establishment of individual curricula based on these standards, as well as the methods approved by government ordinances and public notices.

The Standards for the Establishment of Universities, enacted in 1956, were based on the premise of face-to-face teaching, and basically did not envisage distance learning. However, in response to the spread of various means of communication and the internet, the Standards for the Establishment of Universities were revised in 2001 to allow for 'advanced use of a variety of media' and for classes to be held in locations other than classrooms. MEXT issued a 'Media Notice' (Media Kokuji) on 10 March 2001 (Notification No. 51), which sets the maximum number of credits that can be obtained and the method of conducting classes using ICT. However, teachers were not allowed to transmit lessons from home, and students were not allowed to take lessons at home. What was envisaged was for students to gather for classes in a place similar to a prepared classroom, albeit not in another university or college. In such cases, it was stipulated that the students should be given an opportunity to ask questions and exchange views on the content of the class by the teachers and assistants immediately after the class. In addition to this, there was a limit of about a one-third of the number of credits required for graduation of law school and half of it for undergraduate education.[8]

Figure 1: Japan's in Using ICT in Legal Education

◎ = Everyone ○ = Almost △ = Rare × = Nothing

| | | | Internet-based Legal Information Databases | CMS (Course Management System) | Remote/Online Meeting System |
|---|---|---|---|---|---|
| After Windows 95 | 1995 | Under-Graduate | × | × | × (△Remote) |
| After Law Schools | 2004 | Law School | ◎ | ○ | △ (△Remote) |
| | | Under-Graduate | △ | △ | × (△Remote) |
| After Covid-19 | 2020 | Law School | ◎ | ◎ | ◎ (Online) |
| | | Under - Graduate | ○ | ◎ | ◎ (Online) |

[8] In non-professional graduate schools, all credits can be earned in ICT classes as long as there is sufficient instruction in research.

University education in Japan (provided by both public and private universities) is essentially subject to this regulation, and legal education is no exception. Although this regulation has now been temporarily loosened due to the COVID-19 disaster, the 'Media Notice' remains the standard and guiding principle for the development of measures. To better understand the introduction of ICT into legal education in Japan when organized from the above perspective, the overall situation can be outlined as Figure 1.

## 4. THE LEGAL INFORMATION ENVIRONMENT AND DISTANCE LEARNING IN LEGAL EDUCATION BEFORE THE JUSTICE SYSTEM REFORM

The reason for the establishment of law schools, a key break in Japan's legal history, came from the 'Recommendations of the Justice System Reform Council'[9] published in 2001. One of the three reform pillars was expansion of the legal profession (human resources base) to support the justice system. The future profession was to have not only specialist legal knowledge but also a professional ethics based on a broad education to play active roles in various fields of society. To achieve this goal, the Reform proposed setting up new postgraduate law schools.

Before this change, we need to consider the state of legal education and ICT in universities. When Microsoft Windows 95 was released in 1995, Japanese universities as a whole, not only law faculties, installed facilities for using the Internet in libraries and laboratories, set up homepages, assigned personal computers (PCs) to all faculty members, and distributed e-mail addresses to them. Gradually, students were also given e-mail addresses issued by the university too. However, except for some students who had their own PCs at home, they still had access to PCs only in certain classrooms in the university and were generally not allowed to use them.[10]

Until 2004, the Japanese Legal Information Database in the field of Japanese legal education was not available through a network. For example, it was possible to use data stored on multiple CDs by operating a specific application on a specific PC with a five-in-one CD drive. In essence, it was a stand-alone environment that could only be used on a specific PC. In many cases, these were the few PCs that were shared by teachers and students in university libraries, reference rooms and classrooms designed for PC use.

Databases on Anglo-American law (such as Westlaw) were available on the Internet, but they were often subscribed to by individual researchers who had specialized in Anglo-American law and had relatively large amounts of research funds. The accounts were very expensive when subscribed to as an organisation, and when subscribed to as an individual, the cost of the account plus connecting to it was also expensive. In addition, there were restrictions on the number of accounts for simultaneous use when a university or law school made a contract. As with the Japanese Law Database, some universities were unable to introduce the system because it was for shared use by teachers and students in libraries, reference rooms and PC classrooms. In addition, although a graphical user interface for the search screen

[9] The Justice System Reform Council 'Recommendations of the Justice System Reform Council- For a Justice System to Support Japan in the 21st Century' (June 12, 2001) (Shiho Seido Kaikaku Shingikai Ikensho), available in English at https://web.archive.org/web/20220128094617/https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html.

[10] In 1995, just when Windows 95 was introduced, the Kagoshima University Research Group for Legal Information conducted a questionnaire survey of law teachers in Japan. They indicated a positive attitude toward future network use, even though even the use of existing databases was not widespread. See Kagoshima Daigaku Ho-Joho Kenkyu Kai, 'Research Report on Using Internet by Legal Scholars' (1996) 31(2) Hogaku Ronshu (Kagoshima University) 132 (in Japanese).

was available at the time, more advanced use was possible once the user became proficient in command line input. This meant that Anglo-American law researchers and postgraduate students who needed to use such a system were able to learn how to use it, but researchers in other fields and students in general had to overcome many hurdles to access and use it as they wished.

During this period, each university had facilities for distance learning that could be used in the field of education, but with the exception of some very advanced initiatives in legal education, they were not used at all. The distance learning system that was available at Japanese universities during this period was the Space Collaboration System (SCS). The system used satellites and radio waves to connect 100 sites, mainly national universities, and was capable of connecting multiple sites as well as one to one (all sites could be connected at the same time). However, the system needed such extensive equipment that a large parabolic antenna had to be built on the roof of the building where the classrooms were located. To use the system, it was also necessary to make an appointment with the institution that manages the whole system through the department that manages the SCS at the university, and the hourly fee for using the system was more than 70,000 yen (US$650). Furthermore, the number of classrooms was usually limited to one at each university, and the number of lines used at the same time was also limited.

The distance learning system, which combined the exchange of teaching materials and assignments by post along with some seminars, and the Open University of Japan (Hoso Daigaku) which opened in 1985, were the only two systems available to the general public. At the Open University, classes were held on television channels and radio broadcasts that were accessible to the general public, and students received instruction through the submission and correction of assignments, as well as some seminars. Some distance learning courses offered a bachelor's degree in law (LLB), and some courses at the Open University of Japan were taught by professors of academic authority, so the content of these courses developed a certain reputation. However, mainstream university education, the so-called full-time universities (Zen-nichi Sei) and universities with evening classes (Yakan-bu), were based on the premise that classes were held in the classrooms of the universities to which they belonged, and the implementation of distance learning was not envisaged either for law or at the university level.

At this time, law classes were conducted by teachers and students who met in classrooms with textbooks, casebooks and commentaries[11], plus the compendium of the six main codifications and laws (Roppo).[12] Other teaching materials, such as summary handouts, were copied from case law books and journals in the library or reference room and distributed by the teacher when necessary for the class. The typical style of teaching was the lecture, in which the teacher was the transmitter of information, and the students were its recipients. In many cases, discussion was not included, and students were able to attend classes without having done any preparation, which was to be expected. For reports and discussions at the seminars, and for each student's research for his or her graduation thesis, each student had to go to the library or reference room to borrow or photocopy and acquire the necessary materials, read and understand them, prepare a summary handout, and print and distribute it to the participants.

During this period, all the materials and references used in the class were in paper form and the amount of them held by each university was limited, so it was physically impossible for all the students attending the class to have access to the full text of the cases dealt with in the class. For this reason, it was usual to publish a collection of precedents (like Hyaku-sen) with short extracts of the important

[11] The best known of these books is the 'Hanrei Hyakusen (Leading Cases)' series, commonly referred to as 'Hyakusen'. Each is so named because of the original idea of compiling a collection of 100 (Hyaku) persuasive precedents for each sub-field.

[12] Roppo refers to the Constitution, Civil Code, Criminal Code, Commercial Code, Criminal Procedure Code, and Civil Procedure Code as main areas of law originally, but more generally refers to volumes (published annually) that list these plus other laws (including Administrative Law) that are frequently used or important for legal studies.

parts and longer explanations required for the class, and to designate these as textbooks. Amendments to the law in the six core fields studied at university were extremely rare, so students were allowed to use the compendium (Roppo) they had purchased when they entered university until they graduated. Indeed, what year the students were in could be identified by the design of the cover of the Roppo.

Surveying the period from the popularisation of Windows 95 to the establishment of law schools in 2004, Ibusuki's 2001 report [13] shows that although the responses of legal education provider organisations showed a positive attitude toward ICT use, individual law teacher and student responses did not.

Thus, before the establishment of the law school, legal education had limited diffusion of ICT infrastructure. The circumstances for the provision of legal information were really appropriate for individual use, and similarly, it was mostly physically impossible to use ICT in the classroom. Therefore, institutionally, the use of ICT-based distance learning systems was not even considered, with very few exceptions.

## 5. DRASTIC CHANGES IN THE LEGAL INFORMATION ENVIRONMENT AND DISTANCE LEARNING DUE TO THE LAW SCHOOLS

### 5.1. DEVELOPMENT AND SPREAD OF JAPANESE LEGAL INFORMATION DATABASES

It was the establishment of law schools as a result of the Justice System Reform that triggered a drastic change in legal education, which had been conducted with teaching methods filled with such analogue methods. The policy objective of increasing the number of students passing the bar exam to 3,000 (by 2010) from around 1500 in 2004, and the prospect of establishing postgraduate law schools in many universities, accelerated this change.

The most notable impact, and one which has been carried through to the present day, is the proliferation of the Japanese legal information database via the internet. The emergence of law schools that advocated 'bridging theory and practice', as urged by the Justice System Reform Council Recommendations, created the prospect of a huge market for Japanese legal information database, as students at law schools would use the information on laws and judicial precedents for their classes, and graduates would mostly become legal practitioners who would continue to use it in the future. The need for legal information databases, which had been limited to legal practice and exceptional researchers, university units and some public libraries, was expected to increase rapidly. In the context of activities expected by graduates and the trend towards digitalisation in society as a whole, the prospect of a steady and rapid increase in the digitalisation of legal information itself in the future was also added to the development of full-text search databases of laws and judicial precedents by the companies concerned.

The databases developed by the various companies were characterised by the entry of the first search terms, such as keywords, dates of precedents, laws and articles. In addition, the databases included the option to view and print in PDF format the main law journals and publications containing commentaries on precedents frequently used as teaching materials in universities. The databases of each provider were differentiated by their content and access methods. From the outset, there was a wide range of services available, from direct access to the vendor's server via the internet (including from home), to on-premises use where the server was located on campus, and access to the vendor's server from campus via a special proxy server. A wide variety of services were available and marketed.

[13] Makoto Ibusuki, 'Research Report on Information Technology and Legal Education [Joho Gijutsu to Hogaku Kyoiku ni Kansuru Jittai Chosa Hokokusho]' 74(3) *Horitsu Jiho* 58-60 (2001). Compare also Makoto Ibusuki and 'IT and Legal Practice and Education in Japan and Australia' 4 *UTS Law Review* 31-54 (2002).

In this way, the decision to establish law schools not only triggered competition among the sellers of these legal information databases, it also led to competition among the universities providing these databases for the learning environment of the new law schools. This led to the rapid spread of legal information databases.

The financial resources of each university to respond to this competitive marketing were supported by subsidies and grants from the government to each university. With the decision to establish law schools, MEXT allocated money from the national budget to each university every year for the establishment and operation of law schools. For example, a national university could aggregate all the expenses for the legal information database as part of the operating expenses for the law school and the library, and include them in their application to MEXT for university-wide operating funds. This allowed the legal information database and its costs to be included in legal education as essential costs.

In the preparations for the establishment of law schools, it was thought that all students of law schools, like their teachers, should have access to these legal information databases. To create such an environment, some universities also used government funds to lend dedicated PCs to all students. The fact that 'legal research' became a mandatory course of study at law schools also provided a boost.

In this way, the introduction and spread of legal information databases in law school education created a completely new situation in the legal information environment in Japan. Basically, the convenience was most enjoyed by the faculty members of law schools and their students, but the policy of each university was to set up a place to access the contracted database as part of the website of the library, and to make the legal information database available for any connection from within campus (even though there was a limit to the number of simultaneous accesses in most cases). The availability of the database to undergraduates also increased, as more and more universities made the database available to all law students. Some universities even purchased and provided accounts for all law students, including those at the undergraduate level.

Importantly, the legal information databases developed here were also sold to law firms and companies, which supported the establishment of law schools and the need to improve their educational environment. Accordingly, the spread of the legal information ICT infrastructure in the field of legal information databases progressed rapidly.

## 5.2. IMPACT OF THE PROJECT TO SUPPORT THE FORMATION OF LAW SCHOOLS

### *5.2.1. Implementation of the 'Project to Support the Establishment of Law Schools'*

In preparing for the establishment of law schools, the policy was to allow more forms of establishment to realize the appropriate nationwide allocation of law schools as recommended by the Justice System Reform Council. For example, the government allowed establishment of a single law school in cooperation with several universities, or organisation of a curriculum in which courses are shared among several universities. In addition, to cope with the situation of some universities having their main campuses in the suburbs, which is disadvantageous for securing applicants and inconvenient for practicing teachers, some universities established satellite campuses of law schools in convenient locations and organized curriculums to enable students to take courses there. This was based on the use of remote meeting systems.[14]

In addition, to introduce the Socratic method and to conduct classes based on preparation and review to grant credits related to the study hours stipulated by legislation, and to deal with students who also had jobs, the introduction of ICT was expected for the CMS and the on-demand class delivery system.

[14] At this time, the system was based on H323 protocol and needed a Global IP address.

Therefore, in addition to the steady supply of funds from the establishment of law schools, MEXT was able to provide a start-up programme in which the law schools would implement a completely new educational programme as a university in Japan. MEXT implemented the 'Project to Support the Establishment of Professional Graduate Schools of Law (Keisei Shien Jigyo)[15]' to provide the necessary funds for a certain period of time to enhance the educational system and facilities of law schools and to establish a new educational environment, by conducting a competition to select and support projects that were planned and developed through cooperation and collaboration among law schools. In this project, cooperation among multiple law schools was encouraged, and among the project plans selected for this project, many introduced remote meeting systems, and many law schools, both large and small, installed such systems. In addition, projects to share teaching materials on the internet and to conduct joint academic staff development activities to improve educational cooperation between law schools were also adopted.[16]

### *5.2.2. Case Studies of Innovations*

#### *5.2.2.1. Remote Meeting Systems*

At the Ehime University-Kagawa University United Law School, for examples students are located at Kagawa University in Takamatsu City, but faculty members affiliated with Ehime University in Matsuyama City (in a neighboring prefecture) are also full-time faculty members of this law school, and there were times when classes were held, or faculty meetings were held using a remote meeting (video-conferencing) system. In addition, Seikei University Law School connected its main campus in Kichijoji, a suburb of Tokyo, and its satellite campus in Otemachi, in the city center, by a remote meeting system so that students working downtown could attend classes delivered from the satellite campus after work.

The most large-scale introduction and use of a remote meeting system was the Kyushu-Okinawa Law School Education Collaboration, in which four southern law schools (Kyushu University, Kagoshima University, Kumamoto University and the University of the Ryukyu) cooperated to organise a curriculum in which some class subjects were shared. The mainframe system of Kyushu University, Kagoshima University, and Kumamoto University allowed the power to be turned on at any of the locations, even if the operator was not present in the classroom at the other university. In addition, it was very easy to operate the six cameras in the classrooms at each site, and to project any three of the images taken by the cameras on the three screens or monitors at each site, using a touch panel from any site, so that the class could be controlled. This enabled the smooth running of classes involving interactive and multi-directional discussions and question and answer sessions between classrooms able to seat up to 50students. Teachers were also able to apply this system to hold a mock trial remotely by placing the judge on the middle screen and the lawyers on the left and right. These systems also had the ability to

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[15] 'Hoka-daigakuin to senmonshoku daigakuin keisei shien proguram'. See the list of supported law school projects at https://www.mext.go.jp/a_menu/koutou/kaikaku/houka.htm and the overview at https://www.kantei.go.jp/jp/singi/sihou/komon/dai17/17siryou4.pdf (in Japanese).

[16] For an example of a cross-border teaching project that involved law students from Ritsumeikan University Law School and overseas partner universities, established mainly by Professors Makoto Ibusuki and Luke Nottage and which has endured beyond the initial three-year MEXT funding, see http://www.ritsumei.ac.jp/japanese-law/kyoto-seminar/, https://japaneselaw.sydney.edu.au/2021/02/guest-blog-japanese-law-in-context-in-the-context-of-a-global-pandemic-report-on-a-podcast-series/ and L. Nottage et al, 'Beyond Borders in the Classroom - The Possibility of Transnational Legal Education' (2008) 25 *Ritsumeikan Law Review* 183, also available at https://ssrn.com/abstract=1161016. See also more generally T. Kasahara, K. Yoneda, L. Nottage and N. Inagaki, 'Hogaku Kyoiku no IT-ka - Daigaku-kan Renkei wo Shiya ni Irete [Developing Information Technology for Legal Education: Bringing Inter-University Links Into Perspective]', (2009) *Joho Netwaku [Information Network] Law Review*, pp. 191-244.

record video footage, which could be lent out on DVD media or provided on demand for students who were absent or for review after class.

The remote meeting systems in use at this time required a global IP address in even the simplest of configurations, which could be set up either by securing an IP address within the university network or by contracting with an external provider. The system was designed to be used in small meetings where camera operation was not required, and it was possible to see the participants' facial expressions by using the attached remote control, but when there were many students in both classrooms, it was difficult to keep up with the camera operation for interactive and multi-directional discussions where facial expressions could be seen.

At this time, Skype was the best-known PC-to-PC conferencing system, as an online meeting system, but it was not suitable for use with large groups of students. Students had to get a Microsoft account, the network bandwidth was not available for large classes, and the image quality was not good enough to be projected onto a screen via a projector. Under these circumstances, Kagoshima University Law School introduced a different online meeting system, which was developed as a product for corporate use, and added a mock trial function to the system, so that all students could bring their own PCs to the classroom for a joint class between Kagoshima University and Kyushu University Law School. In this class, all students brought their PCs into the classroom and used one of the many conference rooms provided on the system to discuss in small groups the issues raised by teachers.

The online meeting system mainly used at this time was a connection between classrooms, and it was costly in terms of equipment to accommodate large classes with many students in law school classes, where interactive and multi-directional discussions were a prerequisite. In addition, the system with the simplest configuration could not be introduced in regular classes because of the cost and the time required to operate it using remote control functions. In addition, these systems were used only in postgraduate law schools and, with few exceptions, were not used in undergraduate legal education.

However, there were quite a few cases in which remote meeting systems via the internet started to be introduced into actual legal education and used formally in classes, including the Kyushu-Okinawa Collaboration's system as well as simpler systems of a smaller scale. The results were sufficient to prove that such systems provide video and audio of a quality that could be used in legal education.

*5.2.2.2. Distribution of Video Teaching Materials*

At the time of the establishment of the law schools, an attempt was made, along with the use of remote meeting system just discussed, to create a database of internet-shared case study materials and image data (such as disputed trademarks related to intellectual property rights) for use in clinical legal education courses at the law schools.

Many law schools participated in this initiative led by Nagoya University, with more than 30 law schools at its maximum, and which is still operating.[17] Scenarios of mock trial and mock consultation cases and examples of necessary legal documents, which were prepared by participating schools for their classes or subcontracted to related organisations, were assembled. Scenes of mock legal consultations by professional actors were shared in the form of on-demand distribution of teaching materials used in clinical legal education courses and used in the classes of participating schools.

[17] This initiative, called the Professional Skills Instruction Materials Consortium (PSIM Consortium), is still one of the activities of ICT-based recurrent education in legal practice and clinical legal education in Japan. See https://psimconsortium.law.nagoya-u.ac.jp/en/.

*5.2.2.3. Introduction of the Course Management System (CMS)*

With the establishment of law schools, the Course Management System (CMS) was also introduced in legal education. In Japanese university education, Blackboard and Moodle had already appeared just before 2000, and their existence was known. There were also some commercialised CMSs that were based on corporate groupware. However, when the law schools were established in 2004, there were very few universities or faculties that had introduced a CMS and managed their educational content using such a system. Even where introduced, the use of such systems was often left to the discretion of the teaching staff and was usually based on their own individual skills and used on a subject-by-subject basis. For internet-based course management, individual teachers often set up a public website for the courses they needed to teach, and then restricted access to it. A similar systematic use of ICT was made by providing the syllabus of the class on the internet, where course plans and summaries were made available each term via the website before registration for classes that students took part in. However, the use of CMSs, including communication with students as individual classes progressed, was not linked to systematic activities at the faculty or university level.

In this context, the law schools were oriented from the beginning to the systematic use of ICT for class management. There are several reasons for this. One is that, when establishing these schools, MEXT strongly demanded that classes be conducted on the basis of the preparation and review time stipulated in the Standards for the Establishment of Universities, and each university had to respond to this demand. In addition, the Justice System Reform, which recommended the introduction of the law school system, called for classes at law schools to be conducted through more interactive and multi-directional discussions. As a result, there was a growing need for information to be provided in accordance with the progress of the class, for information on the contents of preparatory work and review to be communicated efficiently, and for students to be provided with such information in a centralised manner. In response, some of the vendors of Japanese legal information database offered CMSs developed for each such database together with the legal information databases as an option, and many law schools started to use such system. In addition, some law schools developed and implemented their own CMSs and used that instead.

Furthermore, the fact that accreditation was imposed on law schools had a significant impact on the spread and establishment of CMSs. To grasp the status of classes in a unified manner, such as confirming whether the class format required by the establishment standards was being implemented and whether classes were being managed appropriately, it was important and very efficient to have information on a server using ICT. In this way, CMSs became indispensable for the organisation and management of the new law schools.

***5.2.3. Summary: Before the Pandemic***

Overall, the establishment of law schools and MEXT funding through the ‘Law School Formation Support Project’ provided an opportunity and fuel for the introduction of ICT into legal education in Japan. Each university introduced a legal information database, a remote or online meeting system, and a CMS. Remote meeting systems, in particular, showed new possibilities for legal education, including the creation of cooperation that transcended university boundaries.

However, the law school system in Japan suffered a sharp decline in applicants from around 2010. The Council for the Promotion of Reform of the Legal Training System[18], established by the government in 2015 to examine ways to deal with the problem, advocated the active use of ICT in education and

[18] See ‘Hosoyosei Seido Kaikaku Suishin Kaigi’, with an overview available at https://www.kantei.go.jp/jp/singi/hoso_kaikaku/index.html in Japanese.

tried to create an environment that would make it easier for more students to study at law schools. In addition, the 'Conference of Collaborators for Research and Study on the Use of ICT (Information and Communication Technology) in Law School Education'[19] was established to examine the pros and cons of conducting classes in a way that goes beyond the government's earlier 'Media Notice'. The conclusion of the meeting was to allow working students to participate in classes from any place outside the university, including their homes, as long as they could communicate with the teachers and students in the classroom in an interactive and multi-directional manner.

Against this backdrop, the number of law schools in Japan, 74 in 2006, decreased to 39 by 2022. Many of the law schools that used to offer collaborative education through remote meeting systems also closed. During this period, education at law schools in Japan substantially shifted to one in which preparation for the National Legal Examinations became the most important issue, and the breadth and richness of educational content was no longer required as much.

Under these circumstances, few law schools continued to use the remote meeting system, which relies on IP addresses to connect classrooms, because it had exceeded its depreciation period and service life, and also because of resistance at the time of use due to the complexity of a operation and of securing classrooms. Remote meeting systems and on-demand delivery systems were used continuously in some exceptional cases, but they did not become widely established in general.

By contrast, legal information databases became established not only in law schools but also in research and education at the undergraduate level, and they were also widely used in legal practice in local governments and companies.

In addition, if we look at the use of CMS at the organisational level, they have been used in law schools since 2004, and were used earlier. Around 2010, a Japanese-developed CMS appeared, and we began to see cases of its introduction at the university level or at the faculty level, including in law schools.

After 2015, the use of remote meeting systems and on-demand delivery systems was stagnant, but this was a time when university education as a whole was generally making widespread progress in using CMS to manage classes. At this time, the use of CMSs for legal education remained sparse, as the systems of postgraduate law schools were sometimes separate from those of the university as a whole or of law faculties, and in some cases the use of CMSs was left to individual faculty members, even if they were prepared for it as an organisation. However, the use of CMSs started to steadily spread throughout legal education, thanks to the cutting-edge efforts of law schools, and the promotion of their use at the undergraduate level linked to the broader trend of university education as a whole.

Feedback from one pre-pandemic survey was generally positive.[20] Results showed that many of the postgraduate law school students who took part in those initiatives evaluated the educational effects of remote classes and face-to-face classes to be the same as or better than those of face-to-face classes. Law School students need good marks to start their programme, but there was no selection bias in terms of teachers surveyed. The classes covered in that survey were designed to consist of teachers using ICT

[19] See 'Houkadaigakuin kyoiku niokeru ICT (Joho Tsushin Gijutsu) no Katuyou ni kansuru Chosa Kenkyu kyouryoku-sha Kaigi.' The result of discussion is available at https://www.mext.go.jp/b_menu/shingi/chukyo/chukyo4/041/siryo/__icsFiles/afieldfile/2017/05/09/1384129_08_2_1.pdf (in Japanese).

[20] 'FY 2015 MEXT Commissioned Project for Promoting Leading University Reforms: Survey and Research on the Use of ICT in Law School Education: Report of Outcomes of the Commissioned Project (Heisei 27 nendo Monbu Kagakusho Sendouteki Daigaku Kaikaku Suisin Itaku-jigyo Hoka Daigakuin Kyoiku ni okeru ICT No Katsuyo Ni Kansuru Chosa-Kenkyu Itaku-Jigyo Seika Hokokusho), available via https://www.mext.go.jp/a_menu/koutou/itaku/1371442.htm.

for the first time, as well as some of the compulsory law courses. Even though the survey was agreed upon, these were not necessarily classes in which teachers and students wanted to use ICT. Accordingly, the positive response was quite surprising to those involved in the survey. It seems that when teachers did try using ICT, the outcomes were fairly good. This set a decent platform for the forced shift to more online education from 2020.

## 6. CHANGES IN THE LEGAL INFORMATION ENVIRONMENT AND DISTANCE LEARNING DUE TO THE PANDEMIC

### 6.1. THE COVID-19 ONSLAUGHT AND RESPONSES

At the end of 2019, the spread of COVID-19 in China was reported, and in January 2020 cases of infection appeared in Japan. On 1 February, the government of Japan issued a decree designating COVID-19 as a 'designated infectious disease', and the World Health Organization declared a pandemic on 11 March 2020. On 2 March, the Japanese government issued a directive to close all schools, including universities, for the remainder of the school year, forcing Japanese universities to deal with the effects of COVID-19.[21]

Fortunately, this was the spring holidays and time to prepare for the new academic year starting in April in Japan. During this period, various measures were prepared by the universities, the main goal of which was realise fully remote education using ICT. This was to change the whole landscape of legal education, including law schools and undergraduate law faculties.

### 6.2. TRANSFORMATION IN THE FIELD OF LEGAL EDUCATION

#### *6.2.1. Background to Introducing Fully Remote Education*

In response to the outbreak of COVID-19, three major changes in the internet environment for teaching made the full deployment of remote education possible in a short period of time. The first was the increase in the speed of internet network services used by students at home, which provided enough bandwidth for PCs and smartphones to receive video feeds and participate in online meeting systems. In some cases, the network bandwidth provided by their home was too small, or the bandwidth was insufficient for family members to use the network at the same time, but this was dealt with in different ways by the efforts of each student or with the support of their family. In addition, for contracts with data limits on smartphones, mobile phone service providers supported student learning by increasing the data limits per month for students.

Secondly, PC-to-PC video-conferencing services for large numbers of participants were expanding. These systems were simple to connect to using HTTP communication, easy to operate, and provided high quality images and sound. In particular, the fact that Zoom allowed users to join by simply providing the URL of the meeting room, and that it was free for unlimited one-on-one meetings and free for 40 minutes for multiple people, made it easy for experienced users to introduce the service to new users, and for users to try it out. Zoom also had the advantage that by this time it had implemented features for active learning, such as voting and breakout sessions for group discussion, which were becoming popular.

Thirdly, the introduction of CMSs at the university level was well underway. In addition to active

[21] Despite such measures, imposed on some suppliers, Japan remains comparatively unusual in not enacting widespread mobility restrictions on citizens. See generally e.g. T. Ono and S. Matsui, 'Japan: Keeping the Death Toll to the Minimum' in V. Ramraj (ed) *COVID in Asia*, Oxford University Press, Oxford, 2021; and related webinar summary and recording available via Joseph Black, Guest Blog (27 August 2021) https://japaneselaw.sydney.edu.au/2021/08/guest-blog-pandemic-pressure-points-economics-governance-and-society-in-japan/.

learning, the use of CMS-based portfolios and rubrics was being promoted to prospective students and high school guidance counsellors as part of competition for higher education places. There was an increase in the number of cases of systematic use of this system across universities and faculties. This was partly due to the fact that MEXT had been recommending the introduction of active learning, portfolios and rubrics since around 2000. Universities that practised these methods were regarded as being at the cutting edge of the field, and were therefore more likely to win grants, which led to the introduction of CMSs that were convenient for implementing these methods, and hence their use was becoming more widespread.

#### *6.2.2. Widespread Use of Online Meeting Systems and Class Management Systems*

In preparation for full-scale remote education in response to COVID-19, each university proceeded rapidly with the selection of the system to be used and the contracting procedures. MEXT procured and allocated to each university the cost of the system necessary for such classes, together with the cost of equipment necessary for infection prevention, and promptly provided support for the establishment of such a system.

Amidst these efforts, an information exchange site was set up on Facebook, where very many university teachers participated in a lively exchange of information. Several tools were introduced and questions about how to use them were answered, and a wide range of information was shared, including not only teaching methods but also data on the spread of infection and the responses of each university. The number of participants on the site quickly exceeded 10,000, and as of January 2022, there were more than 20,000.

A 'State of Emergency Declaration (Kinkyu Jitai Sengen)' was issued almost simultaneously with the start of the new school year in April 2020. In response, the Japan Association of Law Schools (Hoka Daigakuin Kyokai) conducted a survey of all law schools asking whether they are able to conduct classes that meet accreditation requirements. One of the questions asked what kind of educational methods would be used to conduct classes during the semester from April to August 2020. Around 86% of the law schools responded that they would conduct 'online classes,' and the combined total of 'face-to-face and online classes' was 100%. The survey includes the aggregate results of responses to a set of questions about operational difficulties as well as free answers at the time. It shows the perception of educational difficulties faced just prior to the implementation of classes in the wake of the COVID-19 pandemic.[22]

When classes began, some universities that had been using CMSs saw their servers and networks go down due to unprecedented simultaneous access. There were also reports of CMSs using cloud services that crashed because they could not handle the access volume. Both the service providers and the end users had no experience of this situation, but they overcame the difficulties in individual classes and implemented the entire educational curriculum by increasing the network bandwidth and adjusting access times.

University teachers acquired in a very short time the skills to use online meeting systems, record meetings, distribute recorded videos, and use the CMS and file-sharing system in a coordinated manner. It became a matter of course that students' learning should be based on the CMS and proceed under it.

Despite the realities already in the new postgraduate law schools, legal education had previously been seen as conservative and slow in its use and diffusion of ICT. Nonetheless, it seems to have adapted to the new environment relatively smoothly compared to other fields. This is probably due to the fact that the law schools had a good number of teachers, students and administrative staff with experience in

[22] Association of Law Schools, 'Japan Association of Law Schools Survey Results (Hoka Daigakuin Kyokai Anketo Kekka)' (2020), https://www.mext.go.jp/content/20200512-mxt_senmon02-100009037_1.pdf (in Japanese).

the use of CMSs, and that information could be extended quite smoothly to undergraduate education.[23]

In any case, a system was set up for the full implementation of remote education using ICT in a university-wide response, not only in legal education at the law school, where cutting-edge initiatives were implemented, but also in legal education at the undergraduate level. The system is now firmly in place in Japan.

### 6.3. ESTABLISHMENT OF RULES FOR REMOTE TEACHING

As mentioned earlier, classes at Japanese universities were conducted under the constraints imposed by the School Education Law, the Establishment Standards of the Respective Curricula, and the Media Notice. However, it was clear that full remote teaching could not be carried out under the restrictions of the Establishment Standards and Media Notice.

Therefore, in parallel with the period when each university was preparing to implement full remote teaching, MEXT announced models and guidelines on how to conduct classes that could be accepted as temporary exceptions to the Establishment Standards and Media Notices under the influence of COVID-19, and MEXT asked each university to follow them. The dissemination of information on these models of teaching, together with the use of online meeting systems and CMSs, led to the spread of methods of teaching based on communication with students, which MEXT had instructed to be thorough in its models. This has also led to a change in the way students learn, with an increase in submissions of assignments and an increase in learning outside class time. This may also have been influenced by the fact that the use of CMSs made it easier for teachers to communicate information and for students to submit work and manage class information efficiently.

In addition, under the Copyright Act in Japan, teaching materials used for classes could be used without permission from the author for that purpose. However, it envisaged them being distributed in paper form and not them being provided via the internet. Although the Copyright Act had been amended before COVID-19 struck and discussions were underway to enforce it, this issue was stalled because of the lack of agreement between copyright holders and educational institutions. As a result, it could have become illegal to distribute similar reference materials and teaching materials via the internet to provide education using materials that could have been provided during face-to-face teaching sessions before COVID-19. Therefore, before the May 2020 holidays, when classes were due to start at many universities, discussions between the parties concerned were hastily carried out and an agreement was reached to allow the provision of materials via the Internet, and MEXT provided information on implementation.

Thus, legal measures were taken on how to conduct classes and provide teaching materials to cope with COVID-19, the environment for teaching in universities was set up, and a system for conducting university education through fully remote teaching was created and implemented.

## 7. FUTURE PROSPECTS

In March 2022, Japan was affected by a sixth wave of COVID-19 caused by the Omicron variant. Japanese universities have been flexible in allowing face-to-face classes or switching to remote classes according to the trend of infected students.

If we take a broad view of the relationship between legal education and ICT to date, from the time

[23] For example, the Japan Clinical Legal Education Association (Rinsho Hogaku Kyoiku Gakkai) set ‘The Potential of Online Clinical Education’ as one of the theme subcommittees for its 2021 annual conference, and two essay reports by law school students on the impact of the pandemic were published in volume 13 of its annual journal, ‘*Hoso Yosei to Rinsho Hogaku* [Lawyers and Clinical Education]’.

of the spread of Windows 95 until the establishment of law schools in 2004 ICT-based education was not widely used, although there were some cutting-edge initiatives. In particular, students were rarely exposed to ICT-based education and received instead an analogue-based education.

The establishment of law schools in 2004, triggered by the reform of the judicial system, led to the development and provision of a legal information database in Japan, which is available via the internet to a wide range of society, including law firms, companies and government agencies. This was the start of a 'revolution' in the way legal research is conducted in Japan, with digital technology taking centre stage. At the same time, law schools introduced CMSs, provided materials on demand, and built up a track record of education using distance learning systems. At the undergraduate level, however, the spread of distance learning remained limited.

With the spread of the internet and the increasing sophistication of the usage environment due to the progress of technological development, when COVID-19 struck, an environment was set up in which full remote education could be easily implemented as long as the system in the environment of legal education was actually used. The necessary guidelines for the teaching style were provided, and at the same time the law on the treatment of copyrighted material was amended and this knowledge was disseminated. Thus, due to the COVID-19 pandemic since 2020, the use of online meeting systems and CMSs has become widespread and established not only in law school education, but also in education at the undergraduate level.

At the present stage, the limitations of ICT have naturally been pointed out for the implementation of practical classes on mock trials and negotiations, and for education requiring on-site experience such as internships. However, the recognition that ICT-based legal education is at least different from face-to-face teaching, but more than minimally adequate as an alternative, has been established. As the impact of COVID-19 becomes small enough to allow face-to-face teaching we will get a more concrete picture of what will happen to the use of ICT, which has been promoted in a certain way to excess during the peak pandemic period. However, not all legal education will return to normal, but will continue to develop and evolve in some areas.

In this report, we have traced the events that took place during the long period of ICT diffusion from 1995 to the present. In doing so, we describe how introducing ICT in legal education in Japan did not progress much at all when it was left to the initiative of individual students and faculty members. Instead, it developed when educational organisations created a situation in which students and faculty members were forced to use ICT. (by spending huge amounts of money). It is evident that this was done against a background of innovation in ICT technology and its diffusion in society. Further, when organisations had to move with new mechanisms, they were widely introduced, and this process has been repeated. Overall, Japanese society after COVID-19 is sometimes referred to as 'after corona' or 'with corona' but however ICT in legal education will never be a case of 'after ICT' but only 'with ICT'.

# The Effectiveness of International Legal Harmonization through Soft Law (with a Focus on the UCP 600): National Report for Japan*

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## 1. Introduction

Documentary credit is a genius invention of trade and banking practitioners. It has provided a solid infrastructure for safe and smooth international payment in trade and has supported the development of international trade for decades. In most cases, it is not supported by a legal (i.e., state law) regime[1]. Instead, documentary credit transactions rely on a privately created soft law norm: the Uniform Customs and Practice for Documentary Credits (UCP) developed by the International Chamber of Commerce (ICC). The first edition was published in 1933 and was subsequently revised in 1951, 1962, 1974, 1983, 1993, and 2007. The UCP achieved a universal character with the 1962 revision when the UK and Commonwealth banks, which were skeptical of the earlier versions, accepted the 1962 version[2]. The latest revision, which came into force on 1 July 2007, is known as the UCP 600. The number 600 is taken from ICC's publication number allocated to the 2007 revision of the UCP.

Arguably, UCP is one of the most successful soft law instruments that is actually and widely used. That applies to documentary credit transactions in Japan as well[3]. In light of the significance of the UCP, this national report focuses on the UCP 600 in order to examine how and whether effective international harmonization through this soft law instrument is achieved in Japan.

## 2. An Overview of the Japanese Legal System

### 2.1 General Overview

#### *2.1.1. One Unitary Civil Law Jurisdiction*

Japan is a civil law country, as opposed to a common law country. The foundation of the Japanese legal system is heavily influenced by continental European law. The influence began in the late nineteenth century when Japan was undergoing a transformation from a feudal state to a modernized nation-state[4]. There is little continuity between the traditional law prior to that era and the law thereafter[5]. The influence of common law, or rather that of the laws of the United States, began to grow after World War II, during the post-war occupation period, but the changes happened mainly in the field of public law, criminal procedure, corporate law, anti-trust law, and labor laws. As far as general private law, such as contract law and tort law, is concerned, the foundation is still firmly rooted in the European civil law tradition.

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1 Only a handful of jurisdictions have legal rules governing documentary credits. One notable exception is US law, where Article 5 of the Uniform Commercial Code provides legal rules for letters of credit. See, Kozolchyk (1979), p.10.

2 Mitsubishi UFJ Research & Consulting (2010), p.14.

3 It has also been pointed out that deference to the UCP as a primary source of letter of credit law was apparent in Japan. See Kozolchyk (2013), p.451 (fn 113). See also Izawa, Sono & Shattuck (1963) for an overview (in English) of Japan's documentary transaction around the time when the 1962 version of the UCP was adopted.

4 Noda (1976), pp.41-58.

5 Noda (1976), p.39.

Japan is one unitary jurisdiction, and there is only one nationwide judiciary. Although there are forty 'prefectures' and numerous 'municipalities' which are given the power of local autonomy, including the power to create Ordinances (*jorei*), their power is limited to those conferred by the national government (Art 94 Constitution of Japan and the Local Autonomy Act (Act No. 67 of 1947)) and is not relevant for the purpose of this paper.

The Japanese government consists of three branches: the legislature, the executive, and the judiciary. We turn to that next.

#### *2.1.2. The Legislature*

The primary source of law in Japan takes the form of acts of the legislature (the Diet). The Diet is the highest organ of state power and is the sole law-making organ of Japan (Art 41 Constitution of Japan). In addition to Diet members, the Cabinet (i.e., the executive branch) also has the power to submit bills to the Diet. In fact, the overwhelming majority of laws in Japan are proposed by the Cabinet.

#### *2.1.3. The Executive (or the Regulators)*

The executive power is vested in the Cabinet, headed by the Prime Minister (Art 66 Constitution of Japan). The Prime Minister is designated from among the members of the Diet by a resolution of the Diet (Art 67 Constitution of Japan). The executive branch also has the power to create Cabinet Orders (*seirei*) or Ministerial Orders (*shorei*) that supplement legislation details.

Apart from that, the administrative organs as regulators make use of de facto rules (or soft law) in the form of various guidelines to softly regulate business activities (e.g., Financial Service Agency's Corporate Governance Code (first edition published in 2015) and Stewardship Code (first edition published in 2014) as well as METI's recent 'Guidelines on Respecting Human Rights in Responsible Supply Chains' (2022)), etc.

#### *2.1.4. The Judiciary*

The Japanese judiciary is structured as a three-tier court system: the Supreme Court, High Courts, and District Courts [and Family Courts and Summary Courts] (Art 76 Constitution of Japan and the Court Act)[6]. There is no special Constitutional Court, and the regular judiciary is given the power of constitutional review (Art 81 Constitution of Japan). The lower courts deal with questions of both fact and law, whereas the Supreme Court deals only with questions of law. The current Supreme Court was established after World War II in 1947, replacing the Great Court of Judicature (*Daishin'in or Taishin'in*) as the highest court of Japan. Decisions of the Great Court of Judicature still have weight for issues that the Supreme Court has not yet addressed.

Court decisions play an important role, although they are not formal sources of law. The principle of stare decisis does not exist in Japan. Accordingly, court decisions interpreting and applying legislative acts are not binding sources of law, although they have de facto influence as precedents[7].

First, when the Supreme Court hands down a decision contrary to a previous Supreme Court decision, the law requires the decision to be reached by a 'Full Bench.' There are fifteen Justices of the Supreme Court who usually sit in three independent 'Petty Benches,' which each consist of five Justices. A 'Full Bench' consisting of all fifteen Justices must be formed, however, when the court seeks to depart from precedents of the Supreme Court (Article 10(iii) Courts Act). Thus, once the Supreme Court decides on an issue, that decision is given a certain weight vis-à-vis subsequent Supreme Court decisions.

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[6] For a general overview, see e.g., Tanaka (1976), pp.48-54.
[7] Noda (1976), p.226; Oda (2021), pp.41-44.

Secondly, decisions of the Supreme Court have de facto binding power vis-à-vis lower courts: i.e., High Courts and District Courts. Lower courts regularly follow the decisions of the Supreme Court because otherwise, their decisions will be overturned if appealed to the Supreme Court[8].

Thirdly, decisions of the lower courts have lesser influence as precedents. Even High Court decisions do not bind District Courts; there are often conflicting decisions among them. Nonetheless, when a trend emerges through the accumulation of interpretation and application of law among lower court decisions, then that may influence the decisions of the Supreme Court[9]. It is also an open secret that decisions of certain High Courts or District Courts are regarded as more important and influential than others. Among the High Courts, the most influential is the Tokyo High Court. With respect to District Courts, the courts located in major cities are considered more influential than those located in smaller cities.

### 2.2. Soft law in the Japanese Legal System

As noted in 2.1.3 above, regulators often rely on soft law instruments to carry out their policy objectives.

#### *2.2.1. Soft law in the Legislative Process*

Legislators also consider soft law in adopting or modifying substantive law. In preparing bills, it is usual for the responsible ministry to conduct research on foreign laws during the drafting process, including research on soft law instruments.

A recent example is the major reform of the law of obligations in the Civil Code. This was a revision of the Civil Code of 1896, of which the law of obligations, and contract law in particular, has been left almost unchanged for the past 120 years. The reform was enacted in June 2017 and entered into force on 1 April 2020. During the drafting stage, comparative research of foreign national laws, such as the laws of Germany, France, the Netherlands, the US, Korea, China, etc., was conducted. The United Nations Convention on Contracts for the International Sale of Goods (CISG), which Japan has been a party since 2008 (entering into force in 2009), also served as an inspiration for the legislators. In addition to such binding instruments, non-binding soft law instruments such as the UNIDROIT Principles of International Commercial Contracts (PICC), Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR), and Common European Sales Law (CESL) were consulted. The impact of CISG, PICC, PECL, DCFR, and CESL on the Japanese Civil Code reform can be seen in some core issues of contract law. For example, the fault-based damages rule was changed and became a damages rule based on strict liability with some rule for exemption (Art 415 Civil Code); termination of contracts for breach is not allowed when it is a minor breach (Arts 541 & 542 Civil Code); fault on the part of the breaching party is not a requirement for termination for breach (Arts 541 & 542 Civil Code). It is true that these issues are already seen in the CISG, which is a binding hard law instrument. However, since its scope of application extends only to the sale of goods, the other soft law instruments that cover general contract law were essential to lend persuasiveness to the soundness of the legal principles.

In addition, there are several legislations based on model laws. First, the Act on Recognition of and Assistance for Foreign Insolvency Proceedings (2000) is based on UNCITRAL Model Law on Cross-Border Insolvency (1997). Secondly, the Arbitration Act (2003) is based on UNCITRAL Model Law on International Commercial Arbitration (1985). In light of the amendment of the Model Arbitration Law in 2006, the Arbitration Act is currently undergoing a revision process.

[8] Noda (1976), p.226; Oda (2021), p.43.
[9] Oda (2021), p.43.

Reform is also underway for the law of secured transactions. However, the prospect is that UNCITRAL's various texts in this field (such as the UNCITRAL Legislative Guide on Secured Transactions (2007) and the UNCITRAL Model Law on Secured Transactions (2016)) will have minimal impact on the reform. This is likely because a change in line with these texts would require a structural change of law (including establishing a registry) and disrupt established practice that seems to be functioning well.

#### *2.2.2. Soft Law in the Courts and Arbitration*

In Japan, courts and arbitral tribunals consider soft law in the decision-making process.

If the parties have agreed on the use of a particular soft law instrument and incorporated it into their contract, or if the soft law instrument represents customs or trade usages, courts and arbitral tribunals will certainly consider them. Typical examples are the use of ICC's Incoterms and the Uniform Customs and Practice for Documentary Credits (UCP 600 or its earlier versions).

On the other hand, if the parties have not incorporated a specific soft law instrument into the contract, or if a specific soft law instrument does not amount to usage or does not represent the standard of care expected of relevant parties, Japanese courts do not usually explicitly consider them in the decision-making process.[10] However, in order to put things into perspective, there is also general reluctance among Japanese judges to refer to foreign laws in their opinions. Thus, this does not necessarily mean that soft law instruments are ignored because they are soft law (in the sense of emanating from a private body).

Nonetheless, soft law instruments may be considered by judges indirectly through scholarly writings and without direct reference to them. Scholarly opinions are not sources of law and are rarely cited in court decisions[11]. Nonetheless, judges do study scholarly opinions before making a decision. Especially in the Supreme Court, many qualified judges serve as 'Supreme Court Research Officers' (*saikosaibansho chosakan*) who assist the Justices in making decisions. They conduct extensive research on case law, as well as scholarly writings, before reporting to the Justices. In this way, scholarly opinion is relevant to the development of the law in Japan. Soft law may also have an impact on the judges indirectly through scholarly opinions that study soft law (Cf. 2.2.4).

#### *2.2.3. Soft Law and Legal Practitioners*

Since the regulators, as well as courts and arbitral tribunals, will consider soft law, this has a trickle-down effect on legal practitioners. Practitioners will consider soft law, for example, in advising clients, drafting contracts, or pleading before courts or arbitral tribunals if they are relevant.

Thus, legal practitioners will certainly consider and advise clients on Incoterms and UCP 600 but would do so less, for example, for the UNIDROIT Principles.

#### *2.2.4. Soft Law and Academics*

Japanese academics are active in considering soft law in their work. Being 'soft law' in itself is usually not a reason to exclude them from doctrinal analysis. But the manner in which they are treated may be different depending on the nature of the instrument.

For example, the UPICC, PECL, DCFR, and CESL are considered to be sources of convergence of modern contract law and are consulted as a source of inspiration for legislative proposals and also for the interpretation of national law. In other words, they are seen as 'good practices.' It should also be

[10] For an analysis on this matter focusing on the PICC, see Sono and Morishita (2021).
[11] Sono and Morishita (2021), p.247.

added that Japanese language translations of these instruments are available, making them accessible to a wider audience[12]. In most cases, these translations are done by academics on their own initiative. They include not only the black letter rules but also the entire volume(s), including the comments and comparative law notes where they exist. The publishing process itself is also a study of those instruments, and once they are published, they aid other academics and students in studying these instruments.

On the other hand, for example, since Incoterms and UCP 600 are actually applied to sales contracts or documentary credits, the analysis of their interpretation is treated no different from the interpretation of binding hard law instruments (or a binding contract). It should also be added that the ICC Japan Committee publishes Japanese translations of both Incoterms and UCP 600.

## 3. UCP in Japan

### 3.1. Documentary Credit in Japan

Documentary credits are heavily used in export/import transactions in Japan. Historically, foreign trade in the post-war era was heavily controlled and required export/import licenses. The exception was export trades where the Japanese exporters obtained an irrevocable letter of credit to secure payment from the foreign importers[13]. This requirement, known as the 'principle of letter of credit' (*shin'yojo gensoku or shin'yojo shugi*), incentivized Japanese traders to rely on documentary credits. However, such restriction met with criticism from abroad and was eventually removed in 1980[14]. But for almost thirty years, letter of credit transaction was the norm for Japanese exports.

Technological innovation, as well as further liberalization of foreign exchange in 1998 made other means of international payment available. Moreover, the increase in foreign direct investment created an environment where more foreign trade is conducted between parent companies and their subsidiaries. This led to a decrease in the need and use of documentary credit. In 2014, one source cited that letter of credit transactions accounts for 20% of the international payment for Japan's foreign trade.[15] Nonetheless, documentary credit remains indispensable in foreign trade.

One note on terminology. The term 'documentary credit' under the UCP means an 'arrangement' that constitutes a definite undertaking of the issuing bank to honour a complying presentation. It is not a prerequisite that there is a 'letter' of credit. In this sense, the Japanese term for 'documentary credit' may be a misnomer as it is translated as '*shin'yo-jo*.' Since '*jo*' means 'letter,' this gives the impression that 'documentary credit' is not only an 'arrangement' but always a 'letter of credit'[16].

### 3.2. The Banking and Financial legal framework relevant to the UCP 600 in General

#### *3.2.1. Substantive Law and Private International Law*

Japan is one of the many countries that do not have a law that specifically addresses letters of credit or similar instruments such as bank guarantees[17]. As we will see later, the parties contractually incorporate UCP 600 (or earlier versions) into their relationship, but it is not formally incorporated into Japanese law. Japanese law applicable to documentary credits is general private law.

Under Japanese law, the legal nature of a letter of credit is considered a combination of 'order' (*sashizu* in Japanese or *Anweisung* in German) and 'mandate' (*inin*). Japanese law lacks express

[12] UNIDROIT (2020); Lando and Beale (2006-2008); von Bar (2013); Uchida (2012).
[13] Cabinet Order on Export Trade Control, Art. 1(1)(iii), enacted in 1949.
[14] Cabinet Order on Export Trade Control, Art 1(1)(iii)(b), enacted in 1980.
[15] Nishiguchi (2014), p. 110.
[16] Kanda (1983), p.150.
[17] Kozolchyk (1979), p.10. However, interestingly, regulatory law recognized the practice of 'letter of credit' and has rather promoted its use, as seen at the outset of this report.

provisions on the concept of 'order,' but it is generally accepted that the concept of order under Japanese law is the same, *mutatis mutandis*, as that provided in Articles 783-792 of the German Civil Code (BGB). The general rules on mandate are provided in Articles 643-656 of the Japanese Civil Code. Under the framework of 'order', the applicant (who is the drawer) orders the issuing bank (who is the drawee) to pay the beneficiary (who is the payee) on account of the applicant. The order itself does not obligate the issuing bank to issue a letter of credit or to pay the beneficiary, but the issuing bank is obligated to *the applicant* to do so under the agreement of 'mandate'. Once a letter of credit is issued and advised to the beneficiary, the issuing bank assumes an independent obligation to *the beneficiary*.

Therefore, general private law principles related to orders and mandates apply to the relationship between the applicant and the issuing bank. Under the private international law of Japan, if the parties have chosen the law that governs the contract, that law is the applicable law (Act on General Rules for Application of Laws, Art 7). In the absence of a chosen law, it would be the law of the place that is most closely connected to the contract (Act on General Rules for Application of Laws, Art 8(1)). Since there is a presumption that the place of the habitual residence or place of business of the party providing the characteristic performance is the place most closely connected to the contract (Art 8(2)), the law governing the relationship between the applicant and the issuing bank is the law of the place of business of the issuing bank[18].

Regarding the relationship between the parties involved in an issued letter of credit, namely, the beneficiary, issuing bank, confirming bank, advising bank, nominated bank, negotiating bank, etc., Japanese courts seem to consider that there is one law that governs the entire chain of relationships, rather than bifurcating and applying different laws to each relationship[19]. Since the issuing bank usually does not designate the governing law in the letter of credit, the governing law will be determined according to Article 8 of the Act on General Rules for Application of Laws. The applicable law is the law of the place most closely connected to the letter of credit. The presumption is that the place of business of the party providing the characteristic performance is the place most closely connected to the letter of credit. Thus, the law of the place of business of the issuing bank is the governing law. However, Nishitani argues that, in case there is a confirming bank, the performance of the undertaking of the confirming bank is the characteristic performance, and thus the place of business of the confirming bank (which is likely to coincide with the place of the beneficiary's place of business)[20]. The position of the court is not clear.

### *3.2.2. Incorporation of UCP 600 into the Transaction*

When Japanese banks issue letters of credit, they are unanimously and expressly made subject to UCP 600.

More specifically, the contract between the issuing bank and the applicant to open a letter of credit is based on a standardized 'Agreement on Letter of Credit Transactions' (*shin'yojo torihiki yakujosho*)[21]. This standard agreement was prepared by the Japanese Banker's Association (*Zenginkyo*) in 1975. At that time, *Zenginkyo* decided to adopt the 1974 version of the UCP. The 'Agreement on Letter of Credit Transactions' thereafter expressly provides that the UCP governs the letter of credit for 'matters not provided in this Agreement' (Art 21). In accordance with the standardized 'Agreement on Letter of Credit

[18] Nishitani (2008), p.229.
[19] E.g., Tokyo High Court decision of 30 March 2004, *Kin'yu Homu Jijo*, No. 1714, p.110, applying the old private international law rules that was replaced by the current law in 2006. See also, Nishitani (2008), p.231.
[20] Nishitani (2008), pp.234-235.
[21] The standard agreement is reproduced in Zenginkyo (1988), pp. 69-56.

Transactions,' all the letters of credit issued by Japanese banks expressly state that they are subject to UCP 600 for matters not provided in the Agreement.

Courts are not entirely clear on the basis for the application of the UCP 600. However, since it is generally understood that the Japanese private international law rules do not allow parties to choose non-state law, UCP 600 cannot be chosen as the applicable law[22]. Accordingly, the basis for the application of UCP 600 is (i) contractual or (ii) by trade usage.

The basis can be contractual because Japanese banks issue letters of credit based on *Zenginkyo's* standardized 'Agreement on Letter of Credit Transactions,' which explicitly provides that letters of credit are subject to UCP 600. This binds at least the applicant and the issuing bank. In addition, the letters of credit themselves also state that they are subject to UCP 600. Since the orders are based on UCP 600 and since the beneficiary, confirming bank, nominated bank, or non-nominated negotiating bank voluntarily enters into the letter of credit transaction, that would be an adherence to the UCP 600.

On the other hand, the application of the UCP 600 can also be based on trade usage. Some lower court decisions held that there is a 'trade usage' to make letters of credit subject to UCP[23]: The Supreme Court has not spoken on this point. Note that the content of the trade usage is to make the letters of credit subject to the UCP; it is not that the content of the UCP is trade usage.

It follows from the above that UCP 600 supersedes the application of the non-mandatory contract law rules. Such result was reached in the Tokyo District Court Decision of 29 May 1987 (cited above)[24] and the Tokyo District Court Decision of 28 August 1989[25]. This is because the parties' agreement supersedes non-mandatory rules of the law (Art 91 Civil Code); and because trade usage overrides non-mandatory rules of law (Art 92 Civil Code. Cf. Art 1 Commercial Code).

### *3.2.3. UCP 600 and Arbitration*

In theory, documentary credit disputes can be resolved by arbitration in Japan, provided that the parties have entered into a valid written arbitration agreement (Art 13 Arbitration Act)[26]. Under Article 13(1) Arbitration Act, disputes are arbitrable if it "is a civil dispute (excluding disputes of divorce or dissolution of adoptive relation) which can be settled between the parties." As documentary credit disputes can be settled between the parties, they can be solved by arbitration. Needless to say, the arbitral award would be binding only upon the parties to the arbitration proceeding and not on the other parties involved in the letter of credit transactions who were not parties to the proceeding.

However, in practice, arbitration, including the Documentary Instruments Dispute Resolution Expertise (DOCDEX) procedure[27], is not used to solve documentary credit disputes in Japan. Court proceedings are used instead. Letter of credit disputes that reach courts are those that involve customers and banks. Letter of credit disputes between correspondent banks are usually solved amicably in accordance with the UCP. This is because inter-bank disputes can be resolved straightforwardly by applying the UCP and because it is not in the interest of banks to spend their resources on such disputes

[22] However, there are some commentators who argue that non-state law can be chosen as the governing law, and that the UCP can be an example. In the context of UCP, see Takasugi (2001), pp.116-119.
[23] Tokyo District Court Decision, 29 May 1987, *Kin'yu Homu Jijo*, No. 1186, p.84 (dealing with the 1973 version); Osaka District Court Decision, 8 February 1990, *Hanrei Jiho*, No. 1351, p. 144 (dealing with the 1983 version).
[24] Tokyo District Court Decision, 29 May 1987, *Kin'yu Homu Jijo*, No. 1186, p.84.
[25] Tokyo District Court Decision, 28 August 1989, *Kin'yu Shoji Hanrei*, No. 829, p. 33.
[26] The Arbitration Act requires that arbitration agreement to be in writing; this requirement may be relaxed after the ongoing amendment of the Arbitration Act is completed.
[27] https://iccwbo.org/dispute-resolution-services/docdex/ . Although DOCDEX is a service to resolve documentary credit disputes efficiently, it is not arbitration in the strict sense. Article 2, paras 5 and 6 of the 2015 DOCDEX Rules.

because ultimately, the merits of the disputes fall on the applicant and the beneficiary[28].

### 3.3. Digitalization

Digitalization has the potential to make not only documentary credit transactions but also global trade more efficient. The most obvious would be to use electronic letters of credit instead of advising the beneficiary with a paper-based letter of credit. To that end, ICC has developed the eUCP[29].

However, the eUCP is not used in Japanese practice. Electronic letters of credit will require that the bills of lading, as well as other documents such as the certificate of origin, be in electronic form. Moreover, the customs clearance also needs to be digitized in order to fully utilize eUCP. Such legal infrastructure is not established yet in Japan.

It is not clear when that will change. The Ministry of Justice is currently preparing a revision of the Commercial Code that will set out rules for electronic bills of lading (and possibly other documents of title, such as warehouse receipts). It is expected that the revision will take place in the next few years, and even with that, there are other conditions that must still be met.

However, on the other hand, digitized documentary credit can be possible within a 'closed' network where all the participants agree to utilize certain services such as the Bolero since 1999 (utilizing an electronic title registry) or essDOCS since 2013[30]. EssDOCS is used in trade for primary commodities such as crude oil.

## 4. A Uniquely Japanese Practice: Obligation of the Beneficiary to Purchase-Back Drafts

### 4.1. A Shift in the Paradigm of Negotiation: Extending Credit to the Beneficiary, not the Issuing/Confirming Bank

There is one unique Japanese divergence from international documentary credit practice that affects the entire scheme of documentary credits[31]. This stems from the general practice among Japanese banks that they do not negotiate a bill of exchange with a drawer whose financial credibility is not known to the bank. This is, in one sense, an extension of the practice regarding the negotiation of promissory notes. Both negotiations of promissory notes and bills of exchange are regarded as extending credit to the customer. This is in stark contrast to the international practice where negotiating banks are extending credit to the issuing bank or the confirming bank.

### 4.2. Beneficiary – Negotiating Bank Relationship

First, if a negotiating bank is refused reimbursement on the bills of exchange drawn against a letter of credit, it has a right to require its customer (beneficiary) to purchase back the bill of exchange. This is based on a contractual agreement between the beneficiary and the negotiating bank. Furthermore, for foreign exchange transactions, banks require their customers to enter into a basic agreement known as the Agreement on Foreign Bills of Exchange Transactions (*Gaikokumuke Kawase Tegata Torihiki Yakujosho*) (hereinafter 'Foreign Bills Agreement')[32]. This is in addition to the general Agreement on Bank Transactions (*Ginko Torihiki Yakujosho*) (hereinafter 'Bank Transactions Agreement'), which sets

[28] Interview (2021).
[29] https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf. For more of ICC's other initiatives toward digitalization, see ICC's Digital Roadmap https://iccwbo.org/publication/icc-digital-roadmap/ and the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0 published in 2021.
[30] Interview (2021).
[31] See generally, Kozuka (2000).
[32] The standard Foreign Bills Agreement is reproduced in Zenginkyo (1983), pp. 12-46, together with a commentary prepared by the drafters.

out the basic contract between the customer and the bank[33]. These agreements are based on standard agreements prepared by the *Zenginkyo* (in the same way as the 'Agreement on Letter of Credit Transactions' discussed above).

Article 15 of the standard Foreign Bills Agreement provides[34], among other things, that the customer automatically becomes obliged to purchase back the bills of exchange when payment or acceptance is rejected (Art 15(1)(iii)). It also provides that the negotiating bank reserves the right to require the customer to purchase back the draft when (a) collection or renegotiation of the draft is rejected; (b) the bank is required to make recourse; (c) the bank is not reimbursed; (d) when any other similar justification exists (Art 15(2)). The customers will also be required to provide security and/or a guarantor to secure their obligation to purchase back (Bank Transactions Agreement, Art 4).

Courts have upheld such obligation even when the draft is drawn against a letter of credit[35]. This means that Japanese banks, when negotiating drafts, do not rely on the credibility of the 'drawee' or of the 'issuing bank' of the letter of credit. Rather, they rely on who the beneficiary (i.e., the 'drawer') is, because they view the negotiation of a draft as extending credit to the beneficiary[36].

### 4.3. Inter-bank relationships

#### *4.3.1. The Court's View: Trade Usage*

Such obligation to purchase back drafts is extended to inter-bank relationships. If a nominated (or non-nominated) bank re-negotiates a bill of exchange drawn against a letter of credit, but if the issuing bank refuses to reimburse that bank, the renegotiating bank has a right to require the negotiating bank to purchase back the bills of exchange. The Osaka District Court upheld such conclusion in 1990[37]. In reaching this conclusion, the court relied on an expert opinion of a leading expert on the letter of credit transactions who was a staff member of the Bank of Tokyo at that time who later joined the academia[38]. Note that the case involved an Indian negotiating bank and a nominated Korean bank, both operating in Japan. Although neither of them used the model Foreign Bills Agreement with its customers, the court held that the negotiating bank still owed a duty to purchase back the bills because that was 'trade usage' in Japan[39].

On its face, such obligation defeats the very purpose of the letter of credit transaction and that of the UCP 600. From such viewpoint, this trade usage is inconsistent with the UCP 600. There is criticism against such practice as it defeats the very purpose of documentary credits[40].

However, this practice is generally viewed favorably in Japan. First, it is considered that this

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[33] The standard Bank Transactions Agreement, first published in 1962 and revised in 1977, is reproduced in Suzuki (1993), pp. 286-492. *Zenginkyo* announced the abolishment of the standard agreement in April 1990. However, the standard remains an important starting point for individual banks in drafting their own Bank Transactions Agreement. In fact, the Bank Transactions Agreement employed by individual banks are not much different from the older model. See the table comparing the model Agreement and the Agreement of major banks available in Keizai Horei Kenkyukai (2000), pp.16-43.

[34] Translation owes to Kozuka (2000), p.151.

[35] Tokyo District Court Decision, 19 November 1990, *Kin'yu Homu Jijo*, No. 1272, p.37; Tokyo High Court Decision, 26 August 1991, *Kin'yu Shoji Hanrei*, No. 888, p. 16; Tokyo District Court Decision, 22 February 1993, *Kin'yu Shoji Hanrei*, No. 932, p. 9.

[36] Iida (1991), p. 29.

[37] Osaka District Court Decision, 8 February 1990, *Hanrei Jiho*, No. 1351, p. 144

[38] His views on this practice can be seen in: Iida (1988), p. 4; Iida (1991), p. 29.

[39] Kubota (2019), p.115 criticizes the lack of explanation in this court decision as to the reason why this trade usage prevailed over the parties' intent. Perhaps the court's intention was that the two foreign banks involved had intention to become subject to the Japanese trade usage by doing business in Japan.

[40] Nagakubo (1993), p. 17; Hashimoto (1991), p.11; Nishiguchi (2006), p. 95.

practice is not inconsistent with the UCP 600. Second, the practice is reasonable. We turn to these justifications in turn.

#### *4.3.2. Consistency with UCP 600*

Osaka District Court's 1990 judgement argued that this is not in conflict with the UCP because such an obligation to purchase back is independent of the obligations under the letter of credit. In other words, the practice does not concern a matter provided in the UCP 600 (*ex lege* gap).

Granted, this practice would be inconsistent with the confirming bank's undertaking under Art 8 UCP 600. The Tokyo District Court Decision of 19 November 1990[41] held that a *confirming bank* may demand repurchase against the beneficiary. However, the dispute involved the 1983 version of the UCP. Under that version, it was not entirely clear whether the confirming bank's undertaking was the same as that of the issuing bank. This point was clarified in Art 9.b and 14.e of UCP 500 (1993 revision) and Art 8 of the UCP 600 (2007 revision). In view of this change, it is reported that Japanese banks consider the trade usage is no longer applicable to confirming banks. In fact, the commentary of the model Agreement on Foreign Bills of Exchange Transactions [Agreement on Purchase or Negotiation of Bills], written by its drafters, already stated in 1983 that Article 15 does not override the undertaking of the confirming bank[42].

On the other hand, if the bank involved is not a confirming bank (including a nominated bank that has not confirmed the letter of credit), it is under no obligation to pay or negotiate under the UCP. It is not the obligation of the negotiating banks to go after the confirming or issuing bank, because it is simply extending credit to the beneficiary. Thus, it would *not* be inconsistent with the UCP 600 for such banks to demand purchasing back of the documentary bills of lading.

#### *4.3.3. The Rationale of the Japanese Practice*

Secondly, there is a rationale for this practice. According to Kozuka, since under this practice, the negotiating banks will ultimately be dealing with their immediate customers (beneficiaries) whom they can trust, and from whom they have procured security, this prevents fraud by a rogue beneficiary. This practice is also advantageous for honest beneficiaries because they will be able to obtain smooth and rapid payment under this practice[43]. Since the banks can rely on their right to require purchase back when necessary, their examination of discrepancies can become lenient, thereby shortening the time until the beneficiary can obtain payment. Also, there will be fewer situations where the banks will insist on the collection of the draft as an agent instead of negotiating it. This also speeds up payment to the beneficiary. It is also important to note that even when the beneficiaries are required to purchase back the draft, they do not lose their right upon the letter of credit against the confirming bank or the issuing bank.

One caveat is in order: there is an exception. If the right to require purchase back is abused, the courts will refuse to enforce such right. For example, in the Tokyo District Court Decision of 25 March 1998[44], the court rejected the negotiating bank's exercise of the right to require purchase back against the beneficiary as it was against good faith to do so. In that case, the negotiating bank induced the beneficiary to engage in the negotiation transaction with itself by offering to check the documents.

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[41] Tokyo District Court Decision, 19 November 1990, *Kin'yu Homu Jijo*, No. 1272, p.37 (already cited above).
[42] Kozuka (2000), p.157. See also Nishitani (2008), p.228.
[43] Kozuka (2000), p.156 states that, additionally, "the negotiating bank in Japan […] makes effort to defend the interest of the beneficiary, when the latter is a familiar customer". For example, even if the issuing bank refuses to pay due to discrepancy, if the beneficiary has reason to believe that the applicant nonetheless wished the payment would be made, the negotiating bank will try to make the issuing bank accept the documents.
[44] Tokyo District Court Decision, 25 March 1998, Kin'yu Shoji Hanrei, No. 1056, P. 35.

However, it ended up giving an erroneous instruction to the beneficiary which resulted in causing a discrepancy. The issuing bank refused payment due to that discrepancy. In that situation, it would be against good faith for the negotiating bank to rely on its right to require purchase back.

### 4.4. Consequences: Lenient Examination of the Documents

This trade usage may in turn allow lenient examination of the documents. Egashira reports that while one bank officer in a US bank, which conducts strict examination of discrepancies, processes only a few examinations per day, one bank officer in a Japanese bank process several dozen examinations per day[45].

It will be explained in 5.2 below that examination of documents is conducted consistently with the ISBP 745 (or its earlier versions). However, when the solution under ISBP is not clear, Japanese courts tend to be lenient in determining that there is no discrepancy.

Courts have held that not all discrepancies justify a refusal to honor the letter of credit. The Tokyo District Court Decision of 26 September 2003[46] demonstrates the attitude of Japanese courts. The court held (and was affirmed upon appeal[47]) that "although strict compliance on the face of the letter of credit and the documents are required, given that the function of letter of credits is to provide a swift and safe settlement of accounts in international transactions, it cannot be that a word-by-word match of the letter of credit and documents is required; *a practical and reasonable judgment* is required in the examination." An example of a practical and reasonable examination can be found in Tokyo High Court Decision, 27 May 2003[48]. It was held that when the letter of credit requires three 'PHOTO-COPIES' of the certificate of origin, attaching only two photo-copies of the certificate of origin is not a discrepancy that justifies a refusal to pay because photo-copies can easily be made.

There is criticism that Japan's negotiating banks tend to be overly lenient in finding non-discrepancy. It is further pointed out that this may be the result of trade usage among Japanese banks that if the issuing bank refuses to reimburse or to pay, the negotiating bank may require the preceding party in the letter of credit chain to purchase back the documentary bills of exchange.

## 5. Disputes Relating to the Interpretation of UCP 600

### 5.1. The Role of ICC's Recommendations regarding the Interpretation of the UCP 600

Disputes other than those relating to the 'obligation to purchase back' and the examination of discrepancies (see 3.3) include the following.

Generally, banks are mindful of ICC's various recommendations regarding the interpretation of the UCP 600. Such recommendations include the UCP 600 Commentary as well as the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP 745). ISBP 745 is translated into Japanese by the ICC Japan Committee[49], and its use in examining documents is recommended[50]. In fact, major banks regularly consult ICC's opinions (the 'isbp's in small characters) for the purpose of examination of documents.

On the other hand, Japanese courts generally do not rely on secondary materials. Thus, they would

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45 Egashira (2008), p.135.
46 Tokyo District Court Decision, 26 September 2003, *Kin'yu Homu Jijo*, No. 1706, p. 40.
47 Tokyo High Court Decision, 20 March 2004, *Kin'yu Homu Jijo*, No. 1714, p. 110.
48 Tokyo High Court Decision, 27 May 2003, *Kin'yu Shoji Hanrei*, No. 1178, p. 43.
49 ICC Japan Committee (2013). For ISBP 645 published in 2003 regarding banking practices for the examination of documents under UCP 500, a commentary written by a leading expert was published in the same year, in addition to the publication of its Japanese translation: Iida (2003).
50 Mitsubishi UFJ Research & Consulting (2010), p.100.

not explicitly refer to the UCP 600 Commentary even if they have relied on them in reaching the decision. However, it may happen in the future that the courts would refer to ISBP 745 as a source of determining what standard of care is required in the trade concerned.

### 5.2. Examination of documents – determination of discrepancies

The following are short presentations of cases that decided on the finding of a discrepancy, together with a brief comment on their consistency with ISBP 745. They illustrate that it is not entirely clear whether the examination of documents or determination of discrepancies in these cases are consistent with ISBP 745. However, it is likely that cases where the determination of discrepancy is clear according to ISBP 745 will not reach the courts to begin with. Where the solution under ISBP 745 is not clear, Japanese practice is rather lenient in finding that there is no discrepancy as demonstrated in 4.4 above.

#### *5.2.1. Tokyo High Court Decision, 26 April 1984*[51]

The Credit required a 'packing list' to be included in the shipping documents but did not specify the form. A document combining a 'packing list,' 'certificate of inspection,' and 'weight list' was presented. The court held that there was no discrepancy. The principle in ISBP 745 that pertains to this situation is not clear.

#### *5.2.2. Tokyo High Court Decision, 27 May 2003*[52] *(already cited above)*

The Credit required "three photo-copies" of the certificate of origin. Two photo-copies were presented. The court held there was no discrepancy. It is not clear if this resolution is consistent or not with A29 ISBP 745.

#### *5.2.3. Tokyo District Court Decision, 26 September 2003*[53] *(already cited above)*

The Credit required the certificate of inspection to be issued by the manufacturer. A certificate of inspection stating, 'shipped from our factory' and signed by an employee of the manufacturer was presented. The court held that there was no discrepancy as it was easy and reasonable to infer from the certificate that it was issued by the manufacturer. It is not clear if this resolution is consistent or not with Q3 ISBP 745.

### 5.3. COVID-19 related Disputes

At the dawn of the COVID-19 pandemic in 2020, government-imposed lockdowns have affected many parts of the world. That may have amounted to force majeure events which have exempted the banks from their responsibilities under the UCP. The ICC has addressed such matters in the 'Guidance paper on the impact of COVID-19 on trade finance transactions issued subject to ICC rules'[54].

Fortunately, Japanese banks did not face their own liability issue due to such delay, as they were generally open for business throughout the pandemic.

However, there was some delay in the transmission of shipping documents due to lockdowns in port cities in various parts of the world. Such delay sometimes resulted in the expiration of the date for

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[51] Tokyo High Court Decision, 26 April 1984, *Hanrei Jiho*, No. 1127, p. 145.
[52] Tokyo High Court Decision, 27 May 2003, *Kin'yu Shoji Hanrei*, No. 1178, p. 43.
[53] Tokyo District Court Decision, 26 September 2003, *Kin'yu Homu Jijo*, No. 1706, p. 40.
[54] https://iccwbo.org/content/uploads/sites/3/2020/04/2020-10-the-impact-of-covid-19.pdf. See also the 'Interpretative Paper on the correct interpretation of the first paragraph of UCP 600 article 35,' available at https://iccwbo.org/publication/interpretative-paper-on-the-correct-interpretation-of-the-first-paragraph-of-ucp-600-article-35/ .

the presentation of the letter of credit. Although that amounts to a discrepancy allowing the issuing bank to dishonor the letter of credit, the practice was to honor the letter of credit notwithstanding the expiration if there was confirmation from the applicant to keep the transaction going. This solution is in line with the approach recommended by the ICC's guidance paper. The Executive Summary (iv) of the Guidance Paper provides '[i]n order to adapt to the current extraordinary circumstances, it is quite feasible that all parties could agree to modify specific articles of the ICC rules. However, it is strongly recommended that careful attention is paid, and professional advice is sought, as to the implications of any proposed change(s) in the rules, and any such modifications should only be implemented while circumstances dictate. *It should not be forgotten that a very simple way to resolve most issues is to encourage and promote dialogue between the commercial parties, as well as between the issuing bank and the nominated/confirming bank, or the counter-guarantor and the guarantor'* (emphasis added).

## 6. Disputes relating to Fraud

### 6.1. Fraud in Relation to Documentary Credits

In principle, the 'abstract principle' found in Article 4.a UCP 600 would not allow issuing banks to dishonor the letter of credit on grounds based on the underlying sales contract. However, it is argued that the 'defense of fraud' should be available as an *exception* to the abstract principle. Nonetheless, the UCP 600 does not deal with the effect of fraud or forgery. Fraud and forgery are issues that are left to the governing national laws[55].

Fraud in letter of credit transactions may involve (i) buyer's fraud where the letter of credit is forged; (ii) seller's fraud where the seller attaches fraudulent shipping documents (which on its face comply with the letter of credit); or (iii) buyer's fraud against the issuing bank where the buyer receives a copy of the bill of exchange directly from the seller and disappears without reimbursing the issuing bank after taking over the shipped goods. The following will examine the first two scenarios since it is not clear how prevalent the third scenario is in Japan.

### 6.2. Forged Letters of Credit

In the Osaka High Court Decision of 1 February 2006[56], a negotiating bank claimed damages (in tort) against the advising bank which advised a forged letter of credit. The court held the advising bank liable on the basis of Art 7.a UCP 500, which provided that advising banks "shall take reasonable care to check the apparent authenticity of the Credit which it advises." Under UCP 600, the advising bank may be liable on the basis of Art 9.b.

Fraud involving forged letters of credit, however, is supposed to be no longer a practical issue. This is due to the operation of the SWIFT system, which began in 1977. "The issuing bank issues the credit, usually by sending a message via SWIFT to a bank in the seller's market. The bank in the seller's market then creates an operative original of the issuer's credit and delivers it under its own cover letter, an activity known as 'advising' the credit. This message arrangement is secure. The advisor knows that the SWIFT message is genuine."[57]

### 6.3. Fraudulent Shipping Documents

The typical scenario is when the bills of lading (B/L) are forged or fraudulent. Since banks deal with documents rather than the goods, services, or performance to which the document relates (Art 5

[55] Malek and Quest (2009), p.12.
[56] Osaka High Court Decision, 1 February 2006, *Kin'yu Homu Jijo*, No. 1798, p. 45.
[57] Baker and Dolan (2008), p.45. See also ibid at pp. 51-52; Malek and Quest (2009), p.5.

UCP 500), the principle is that as far as the documents are complying, the documentary credit transaction will go through, and the disputes are to be resolved between the parties to the underlying transaction. Also, as a practical matter, it is usually difficult to check on the face of the document whether they are forged or fraudulent. Thus, the question arises ex post after the bills have been negotiated.

### *6.3.1. Cooperation of the issuing bank*

In Japanese banking practice, if the applicant, who is the bank's customer, requests the issuing bank (or nominated banks) to stop payment on the letter of credit due to fraud by the beneficiary (seller), and if the bank considers that it is a reasonable request, the bank may decide to comply with the applicant's request in the following manner[58].

First, the issuing bank may decide to simply dishonor the letter of credit. In doing so, the issuing bank will acquire an indemnity agreement from the applicant regarding potential liability arising out of a refusal to honor the letter of credit.

Second, the issuing bank may refuse to pay on the pretext of discrepancies. Although minor discrepancies are usually not a reason for refusal to pay, it is not difficult to find some discrepancies.

Third, if the customer has already taken over the goods under a Letter of Guarantee (L/G), it becomes difficult to dishonor the letter of credit. However, in practice, banks may temporarily make the letter of credit 'unpaid' and see how the underlying dispute between the customers can be worked out. Often, the parties will agree on a reduction of price.

### *6.3.2. Courts or arbitral tribunals*

If the applicant cannot obtain cooperation from the issuing bank, it may also seek (i) injunctive relief against the issuing bank; or (ii) claim damages against the issuing bank that honored the letter of credit notwithstanding the seller's fraud.

Under Japanese law, an injunctive relief (injunction against honor) will have to satisfy the 'necessity' requirement under Article 23(1) Civil Provisional Remedies Act (1989)[59]. The criterion for 'necessity' is whether there is 'a likelihood that the [applicant's] exercise of right will become impossible or extremely difficult as a result of the change of the status quo.' The court has not spoken on this issue. Some commentators support the availability of injunctive relief[60], but others are skeptical[61].

Alternatively, the applicant may seek damages against the issuing bank or negotiating bank on the basis of a breach of reasonable duty of care in honoring the letter of credit. Such claim against the issuing

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[58] Interview (2021).

[59] (Necessity, etc. of an Order of Provisional Disposition)

**Article 23**

(1) An order of provisional disposition with regard to a disputed subject matter may be issued when there is a likelihood that the obligee's exercise of its right will be impossible or extremely difficult due to any changes to the existing state of such subject matter.

(2) An order of provisional disposition that determines a provisional status may be issued when such status is necessary in order to avoid any substantial detriment or imminent danger that would occur to the obligee with regard to the relationship of rights in dispute.

(3) The provisions of Article 20, paragraph (2) apply mutatis mutandis to an order of provisional disposition.

(4) An order of provisional disposition set forth in paragraph (2) may not be issued without holding oral arguments or a hearing date at which the obligor may be present; provided, however, that this does not apply when circumstances are such that the objective of the petition for an order of provisional disposition cannot be achieved if such proceedings are held.

[60] Izawa (1958), p.319.

[61] Sono, K (1963), p.76 (arguing that the applicant is not a party to the letter of credit); Kanda, (1983), p.164, fn. 1 (wary about due process for the seller if injunction is ordered without a hearing; wary about the effectiveness of the relief as well as dragging the issuing bank into a dispute between the seller and buyer).

bank would be a contract law claim, while the claim against the negotiating bank would be a tort law claim (based on Art 709 Civil Code) since there is no contractual relationship between the applicant and the negotiating bank. It is not clear if the courts will side with the buyer. One lower court decision in 1987 denied such claim[62]. The rationale was that the matter should be solved based on the underlying sales contract: i.e., the buyer's loss should be recovered from the seller, not the issuing bank.

## 7. Other Disputes outside the UCP

Some disputes that appear in court decisions relate to matters that are not provided in the UCP 600.

### 7.1. Seller's obligation to deliver the goods and buyer's obligation to open a letter of credit

The relationship between the seller and buyer of the underlying contract, i.e., the beneficiary and the applicant, is a contractual relationship separate from the letter of credit.

The buyer's obligation to open a letter of credit arises if the parties agree that the payment is to be made using documentary credits. One question that has been disputed is the time or period within which the buyer must open a letter of credit. One well-known lower court decision dealing with a CIF sale where the period for shipment was agreed held that the opening of a letter of credit is a condition precedent to shipment, and therefore, it must be opened in time to allow shipment of the goods during the period agreed by the parties[63]. This decision is criticized because it will deprive the seller of the flexible time period it had under the contract. If the time period was agreed upon for the benefit of the seller, it would have been more reasonable to require the opening of the letter of credit in a time frame that would allow the shipment of the goods anytime during the shipment period[64].

If the payment is to be made by documentary credit, another question that arises is whether the seller may withhold shipment of the goods until the letter of credit is opened or advised. In a case where it was disputed whether the seller may withhold delivery until it receives the advice of amendments, the Supreme Court held in the affirmative in 2003[65].

### 7.2. Liability of issuing banks, negotiating banks, and advising banks for breach of duty of care

Bank's failure to perform the duty of care may result in loss to the beneficiary, the applicant, or other banks in the letter of credit chain who may bring damages claim against the relevant bank. This may occur in the situation of the seller's fraud, as explained in 6.1.2.

Such disputes may occur in other situations. For example, the Supreme Court held in 1990, under the 1974 version of the UCP, that a negotiating bank is not liable against the applicant for not examining whether the bill of exchange represents the goods actually shipped[66]. It held that:

> "a letter of credit transaction, even if based on a contract of sale, is a separate transaction from the contract of sale. The bank has nothing to do with the contract of sale and is by no means bound thereby (General Provisions and Definitions d [of the UCP]), and all parties concerned are dealing in documents and not in goods (Article 8a). The bank issuing the letter of credit is obligated to pay

[62] Tokyo District Court, 27 May 1987, *Kin'yu Homu Jijo*, No. 1162, p. 47.
[63] Kobe District Court, 10 November 1962, *Kaminshu*, Vol. 13, No. 11, p. 2293.
[64] This decision is further criticized for holding that in CIF sales, time is always of essence, and therefore the contract is automatically terminated under Article 525 Commercial Code when the letter of credit was not issued by the time limit. It is not in all CIF contracts that time is of essence.
[65] Supreme Court Decision, 27 March 2003, *Kin'yu Shoji Hanrei*, No. 1169, p. 39.
[66] Supreme Court Decision, 20 March 1990, *Kin'yu Shoji Hanrei*, No. 1259, p. 36.

or undertake to pay to the bank that negotiated the export bill […] in exchange for documents that are in textual conformity with the terms specified in the letter of credit (Article 8b). The negotiating bank is not liable for the authenticity of the documents and the quality, quantity, existence, etc., of the goods indicated therein (Article 9). This is because even a letter of credit transaction is based on the relationship of trust between the seller and buyer in the export transaction. It is practically impossible for the negotiating bank, which is involved only in part of the settlement of the sales contract by negotiating the export bills at the request of its customer, to investigate and confirm the authenticity of the documents and their contents. Requiring the negotiating bank to conduct such examination and confirmation will hinder prompt and smooth letter of credit transactions, which in turn may result in hindering the facilitation and security of international trade transactions. Therefore, it is sufficient that the negotiating bank examine and confirm only that the documents attached to the letter of credit are in compliance with the conditions specified in the letter of credit. As long as the negotiating bank performs such examination and confirmation, the negotiation is justified, and any commercial claims under the sales contract should be resolved exclusively between the seller and the buyer. […]"

"Considering such nature of the letter of credit transactions and the position of the negotiating bank in such transactions, even if the buyer is forced to settle an export bill when the goods were not shipped as contracted, [a negotiating bank] shall not be liable to the buyer for damages in tort."

However, more importantly, the Supreme Court made exceptions to this general rule. It held that the negotiating bank would be liable to the buyer in tort,

"if the negotiating bank negotiated the export bill knowing that the goods as contracted have not been shipped; or if the negotiating bank overlooked that, even with the care of a bank employee who lacks expert knowledge of the description, character, quality, etc. of the various goods exported, it is obvious from the description in the export declaration [or other documents] that that export is different from the export transaction for which the bill had been drawn."

The nature of such liability can be contractual if there is a contractual relationship between the parties (e.g., issuing bank and applicant). It can be tort liability (under Art 709 Civil Code) where there is no contractual relationship between the parties (e.g., beneficiary v. issuing bank; negotiating bank v. advising bank).

## 8. Closing Remarks

In light of the wide acceptance and actual use among the international banking network, UCP 600 is one of the most effective and successful examples of international legal harmonization.

The probable and fortunate reasons for the success of UCP include, first, that none of the rules in UCP are mandatory rules, and secondly, only banks, which were already connected through an international network, needed to be involved in the rule-making process.

This allowed the banking sector to autonomously develop its own soft law rules ('contractual rules' in the case of UCP) without government intervention. If a uniform law treaty was contemplated in 1933 instead of the UCP, that would likely have been a waste of resources as there is little justification for government intervention (as can be attested by the fact that many jurisdictions to date do not have national laws addressing letters of credit). Moreover, indicative is that the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit entered into force in 2000 but is

lagging in the number of Contracting States (eight States, as of 28 November 2021). The eight Contracting States are Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama, and Tunisia.

It would also have been unwise to fix the rules at that point by a treaty. The soft law approach allowed for a progressive or incremental development of the rules related to letters of credit by gradually addressing the concerns of stakeholders (e.g., the first 1951 revision addressed concerns of US banks; the second 1962 revision addressed concerns of British banks) and thereby enlarging the number of banks that adopt the UCP.

On the other hand, from the perspective of achieving harmonization, there are limits to a 'contractual rule' such as the UCP. Most importantly, the parties are free to deviate from the UCP by agreeing on different rules. In fact, Zenginkyo's 'Agreement on Letter of Credit Transactions' provides that the letter of credit is subject to the UCP 'regarding matters not provided in this Agreement.' This may potentially disrupt the international payment network by creating non-uniform rules for letter of credit transactions. Japan's unique trade usage regarding the beneficiary's or negotiating bank's obligation to purchase back the bills, although with some justification, may be a cause of disruption.

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# The Rights of Nature in Japan: Bringing the Alternative View to Fruition

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## I. Introduction

Surrounded by ocean and adorned with lakes and rivers, respect for nature has always been part of Japanese culture. Thousands of mountains and forests have been considered to be gods incarnate since antiquity; numerous animals, including foxes, deer, and monkeys, have been enshrined and are worshipped across the country. In the city of Nara, the ancient capital, the primeval forest of Mount Kasuga, covering some 298 hectares [approximately 736 acres], sits barely touched by humans, as hunting and logging have been forbidden since the Emperor Ninmyo designated the entire mountain as a sacred area in the ninth century. Roughly sixty kilometers off the northern coast of Kyushu lies an island named Okinoshima, a UNESCO World Heritage site, which rises sheer from the sea and where no one is allowed to set foot without the permission of the landowner Munakata Taisha, a Shinto shrine. Nothing, not even a leaf of grass, may be removed from this pristine island where gods are said to dwell. Similar examples abound.

The roots of these intrinsic and fundamental beliefs in nature, in somewhat of a contrast to the adopted Western legal system, may be fertile enough to allow the concept of the Rights of Nature to bear fruit in the near future. Yet at present, one may think of it as cultivating the seeds which are just beginning to sprout. Although various creative legal theories have been crafted and asserted, the Japanese judiciary, generally disinclined to take independent innovative action, has so far adhered to a traditional formalistic approach in dealing with litigation involving environmental issues. As a result, the Rights of Nature are not currently recognized in the Japanese legal system; however, one can point to a few small but notable developments relevant thereto.

## II. Toshogu v. Minister of Construction[1]

Although there have been a few instances where judicial decisions placing emphasis on the interest of the general public in enjoying fine landscapes led to the withholding of bridge or building construction, probably the only successfully-litigated Japanese case to this day which approaches the concept of the Rights of Nature in substance, if not in form, is one involving the giant cedar tree named ‘Taro’ in the precincts of Toshogu, the location where Ieyasu Tokugawa, the founder of the Tokugawa Shogunate [the Edo period], is enshrined. It is a case, during an era of rampant environmental destruction, decided by the court of first instance in 1969 and affirmed by the Tokyo High Court in 1972.

In 1964, the Governor of Tochigi Prefecture applied to the Minister of Construction for certification of a business plan to broaden a national highway, which the Minister issued shortly thereafter, in order to accommodate the increase in tourists during the first Tokyo Olympics. The Governor then asked for a judgment of the regional administrative commission, a quasi-judicial body, to acquire a piece of land owned by Toshogu, a religious organization registered as a corporation. The commission approved the acquisition as proposed by the Governor. This public construction project was scheduled to be conducted

[1] Judgment of July 13, 1972, Tokyo Koto Saibansho [Tokyo High Court] (Japan).

pursuant to the Expropriation of Land Act.[2] However, Toshogu immediately challenged the widening of the highway in question because the work involved the logging of fifteen cedar trees, including Taro, estimated to be over five hundred years old. The plaintiff Toshogu sought revocation of the ministerial certification, maintaining that it would be unlawful to lumber these trees.

The focus of the litigation was on whether the development plan was such that it would contribute to "appropriate and reasonable use of land" as provided in the Expropriation of Land Act. The court of first instance, the Utsunomiya District Court, held that it would not, pointing out that the necessity of widening the highway was highly questionable regarding the damage to the scenic, religious, and historical value of Toshogu, which is located in the protected Nikko National Park. The cultural value of the land concerned was irreplaceable in the sense that, once it was lost, it would be impossible to restore. The intended construction project, on the other hand, was one of four possible plans to inexpensively cope with expected traffic congestion; this need could equally be met by any of the other plans, all of which the Governor himself had drawn up and examined before reaching the conclusion that the adopted plan involving the logging of Taro and other trees would be easiest to carry out. Expropriating the land and damaging its cultural value for the purpose of road widening, when in fact there were other options, could not be seen as contributing to "appropriate and reasonable use of land," the District Court concluded.

The Tokyo High Court [subordinate only to the Supreme Court of Japan] unanimously affirmed this, stating that, even when the government has discretion in making an administrative decision such as land appropriation, the exercise of its discretion is unlawful if there is an error in the decision-making process. This applies, for example, when the government disregards the most significant matters and takes into consideration inconsequential ones. Here, this was clearly the case because the Minister had unduly made light of the irreplaceable cultural value of the land in question and the preservation of the surrounding environment, while he had overestimated the importance of widening the road in dealing with the surging traffic during the Tokyo Olympics. With words of stern reproof for the Minister's inadequate decision-making, the High Court invalidated his certification of the business plan and also overturned the administrative commission's judgment allowing the acquisition to move forward, effectively sparing Taro and the other cedar trees from destruction. Due to this appellate court's unequivocal decision, the case was not taken to the Supreme Court.

## III. Amami Black Rabbits v. Governor of Kagoshima Prefecture[3]

*Toshogu v. Minister of Construction* discussed above, with all its practical importance, was, of course, not a case recognizing the Rights of Nature. The dispute being between the landowner Toshogu and the government, there was no discussion as to whether Taro should be granted legal personhood. Neither the district court nor the appellate court made any suggestion that the cedar trees could possess inherent rights distinct from those of the property owner. This was because the idea that an ecosystem or part thereof could be a holder of rights on its own, capable of suing for its own preservation, was almost unknown in legal circles at that time.

In the 1970s, however, the efforts of environmentally minded citizens and organizations started to take shape. One of the most symbolic developments was the foundation of the National Union for Conservation of Nature, a network of over seventy environmental organizations from across Japan. The Union's management was administered by the secretariats of two major conservation groups; the Nature

[2] Law No. 219 of 1951.
[3] Judgment of January 22, 2001, Kagoshima Chiho Saibansho [Kagoshima District Court] (Japan).

Conservation Society of Japan, incorporated in 1960 as the first of its kind in the nation, and the Wild Bird Society of Japan, formed in 1934 by ornithologists. The inaugural meeting of the Union in 1971 was attended by the Secretary of the Environment Agency, also created that same year [a precursor to the Ministry of Environment]. Since its inception the Union has been a zealous advocate for the Rights of Nature, raising people's awareness about the criticality of environmental conservation. Although the coalition of politically diverse groups disbanded shortly thereafter, numerous entities previously or currently under the umbrella of the Union have continued to take action to prevent nature-destructive business and government activities for the past several decades. For instance, the Nature Conservation Society of Japan held the Beech Symposium in 1985 to protect the virgin forest biosphere of the Shirakami mountain range, following which citizens' letters calling for the halt of the forest road construction therein flooded the office of the Governor of Aomori Prefecture, who ultimately decided to suspend the construction in 1987; the Shirakami Mountains were later designated as one of Japan's first UNESCO World Heritage sites in 1993. To take another example, the Nature Conservation Society of Japan has recently met with the Ministries of Environment and Defense to discuss the construction of a United States Marine Corps base in Henoko, Okinawa, which might interfere with the presence of rare marine life, discussed further in Part IV below.

Researchers in various fields began to investigate the concept of the Rights of Nature as well, put forward most notably by an American philosopher Christopher Stone, whose article, "Should Trees Have Standing?--Toward Legal Rights for Natural Objects,"[4] influenced Justice William O. Douglas to dissent in *Sierra Club v. Morton*,[5] decided by the United States Supreme Court in 1972, in which he argued for the right of "environmental objects to sue for their own preservation." Both of their arguments have been frequently cited by Japanese commentators exploring ways to overcome technical legal barriers to achieve conservationist goals. Takemichi Hatakeyama, who has pioneered the field of comparative environmental law, proposed that, in view of the effective judicial control over unbridled development as well as the high level of public participation in forest management in the United States, Japan should urgently establish procedures to incorporate "diverse voices" into environmental law and politics.[6] On a similar but different note, Hitoshi Aoki, an animal law specialist, elaborated on Jean-Pierre Marguénaud's thesis, "La personalité juridique des animaux," in which the French law professor had suggested that animals be treated as legal persons, and concluded that it is, in fact, theoretically possible to extend the concept of personhood to animals under Japanese law, although arduous to put into practice.[7]

It is then little wonder that lawsuits began to be filed by grassroots organizations on behalf of environmental proxies such as endangered species over the following decades. By far the most well-known Japanese case relating to the Rights of Nature, which was decided by the District Court in 2001 but still reflects the state of Japanese law today, is *Amami Black Rabbits v. Governor of Kagoshima Prefecture*, usually referred to as the Amami Black Rabbits case. There, environmental protection groups and local residents sued the Governor over a planned construction of two golf courses on Amami Oshima, the largest island in the Amami Archipelago in southwestern Japan, alleging that the right to life of Amami black rabbits, as well as that of Amami thrushes, Lidth's jays, and Amami woodcocks, all threatened or near threatened officially protected species native to Amami Oshima, would be infringed by the construction. The plaintiffs sought revocation of the prefectural permission to develop the parcels

[4] 45 S. CAL. L. REV. 450 (1972).
[5] 405 U.S. 727 (1972).
[6] TAKEMICHI HATAKEYAMA, AMERIKA NO KANKYO HOGO HO 309 (Hokkaido University Press, 1992).
[7] HITOSHI AOKI, DOBUTSU NO HIKAKU HO BUNKA 268 (Yuhikaku Publishing Co., 2002).

of land in question, originally in the name of these animals, but following the dismissal of the first complaint as not in compliance with the court order to enter the name and address of a specific individual or corporation, subsequently filed in their own names on behalf of the animals. They did so on the grounds that, according to the Japanese Forest Law,[8] if the development significantly degrades the environment in the area, the Governor is not authorized to accept the development application.

The Kagoshima District Court dismissed the suit, holding that the plaintiffs had no legal interest and therefore no standing to sue under the Administrative Case Litigation Act,[9] as their rights or otherwise legally protected interests were not infringed upon or on the verge of being so. Seeing the threshold question to be whether those conducting nature observation, conservation, or recreation activities on the planned golf course sites had standing to challenge the Governor's approval of the forest land development, the District Court noted that, even if the plaintiffs had interests in such activities, they could be freely conducted by any member of the public, and therefore the plaintiffs were not in any special legal relationship to the forest concerned; they were thus not in any position to contest the Governor's decision. Accordingly, the lawsuit was terminated without any examination as to the legality of the development permit for the golf course construction.

In the final statement, however, the three judges of the District Court highlighted the significance of the Rights of Nature. They admitted that the Japanese legal system limited the subjects of rights to individuals and corporations, meaning that nature itself, or animals and plants, which the plaintiffs claimed were valuable and precious to humankind, could only be the objects of rights, and reiterated that the plaintiffs were not entitled to bring this lawsuit in accordance with the existing legislation. Having said that, however, the judges clearly pointed out that the concept of the Rights of Nature raised by the plaintiffs "has presented an extremely difficult but inescapable question of whether it will continue to be acceptable to adhere to the current legal framework, which is focusing on remedies for invasions of personal and corporate interests."

This case attracted extensive media attention, particularly due to the plaintiffs' attempt to bring a lawsuit on behalf of endangered native animals. As major newspapers picked up the story, the public began to understand the momentousness of this unusual litigation. Bipartisan support began to emerge among politicians, who put pressure on the Ministry of the Environment and the Agency for Cultural Affairs. In response to all this groundswell, the Agency for Cultural Affairs ordered a reexamination of the tracts of land in question on the basis of the Law for the Protection of Cultural Properties,[10] which revealed the existence of significantly more burrows inhabited by Amami black rabbits than previously thought. Due to vehement public opposition, the development of golf courses was halted; "we have practically prevailed," commented Takaaki Kagohashi, the executive director of the plaintiffs' legal team.[11] Kagohashi emphasizes that, despite technically a defeat, the litigation was meaningful, as it played the role of a rallying point facilitating sympathizers from around the nation to gather under the flag of protecting indigenous animals.

At the same time, however, the Amami Black Rabbits case exposed the limits of Japanese law: The threshold that a plaintiff must satisfy in order to be granted standing in administrative disputes is set at a higher level than in many other countries. This has been noted by academics and practicing attorneys specializing in environmental law. Suggestions have been made to graft the American theory of standing, under which a number of threatened or endangered species have been accorded de facto standing to sue

[8] Law No. 249 of 1951.
[9] Law No. 139 of 1962.
[10] Law No. 214 of 1950.
[11] *Amami no Kuro Usagi, Henoko Dugong*, https://www.bengo4.com/c_1017/n_11754/.

in their own right, onto the existing Japanese legal system, but they have been unsuccessful so far. Numerous lawsuits have been brought by animals and plants, including pikas [whistling hares], flying squirrels, goshawks, sea turtles, sweetfish, mudskippers, fiddler crabs, and great burnets [herbs of the rose family], as well as by Isahaya Bay in western Japan, but the courts have dismissed every one of them on the grounds that the current law does not confer animals and plants, or nature itself, the capacity to be a party in court proceedings. In other words, they can neither sue nor be sued. Additionally, conservation groups and residents of areas affected by development projects have been generally denied standing to pursue relief in court because of the lack of legally cognizable interests.

*Bean Geese v. Governor of Ibaraki Prefecture*[12] is another district court decision illuminating this point. When a construction plan for a new highway connecting the outskirts of Tokyo came up in the 1990s, the population of bean geese, migratory birds that arrived on the southern coast of Lake Kasumigaura in Ibaraki Prefecture, was a meager fifty. In a lawsuit brought by bean geese, local residents, and a non-profit association, it was maintained that the Governor was unreasonable not to designate the bean geese destination as a wildlife sanctuary. The Mito District Court dismissed the bean geese's complaint as they did not have the requisite capacity to be a party to a court proceeding, while also dismissing the claims of the other plaintiffs, stating that the Governor's failure to designate the area as a wildlife sanctuary was not extremely unreasonable or unlawful. The Tokyo High Court affirmed.

However, the manner the environmental assessment was conducted in this case was found by the District Court to have "lacked adequacy," in light of the fact that a biologist, who had cautioned that bean geese would be unlikely to use alternative sites as foraging and resting areas, was refused an opportunity to be heard at the prefectural urban planning council. In addition, the District Court stressed the importance of preserving the flocks in question, pointing out that biodiversity is better ensured by maintaining local animal populations and ecosystems as a whole, rather than just looking at each individual species.

The judiciary's reluctant approval of land development affecting wildlife habitats not only vividly reveals that there remain serious technical hurdles to be crossed before the Rights of Nature can be protected in Japan, such as amending rules and procedures governing litigation practice, but also shows that a growing number of judges are skeptical of traditional legal theory which falls short of acknowledging that nature and natural objects have inherent standing to assert their rights. Reflecting on the Amami Black Rabbits case and the Bean Geese case, Tadashi Otsuka, one of the foremost authorities on Japanese environmental law, concludes that granting *locus standi*, or the capacity to bring an action to court, to nature or natural objects is almost impossible under the current law of Japan, although he hastens to add that awareness of the concept of the Rights of Nature may be strategically effective in the long run by helping environmental groups persuasively assert standing to sue, while acting as a catalyst for new environmental protection legislation.[13]

## IV. Center for Biological Diversity v. Esper[14]

In 2008, the Japanese parliament enacted the Basic Act on Biodiversity.[15] Sponsored by a cross-party group of lawmakers, the bill passed both Houses unanimously. Although there is no reference to the Rights of Nature, it is a landmark piece of legislation in that it is the first comprehensive statute

[12] Judgment of March 28, 2000, Mito Chiho Saibansho [Mito District Court] (Japan).
[13] TADASHI OTSUKA, ENVIRONMENTAL LAW 64-65 (3d ed., Yuhikaku Publishing Co., 2010).
[14] 958 F.3d 895 (9th Cir. 2020).
[15] Law No. 58 of 2008.

aimed at conserving biodiversity including wildlife, their habitats, and their connections to a variety of ecosystems. It has provisions promoting public participation both in the design and evaluation stages of environmental policies, as well as those directing the government to implement strategic environmental assessments [SEA] from the planning phase of potentially harmful development projects, earlier than in preceding environmental assessments, based on the proposals of various NGOs.

More specifically, the Basic Act on Biodiversity can serve as a vehicle to strengthen the enforcement of numerous already existing laws related to conservation, such as the Wildlife Protection and Hunting Management Law,[16] the Law for the Conservation of Endangered Species of Wild Fauna and Flora,[17] and the Invasive Alien Species Act,[18] providing citizens and organizations with a basis for requesting their revision to the government when necessary. It provides for the sustainable use of natural resources and highlights the importance of precautionary solutions before environment-threatening projects are initiated as well. Through ensuring that public opinion is taken into account, this act increases the chances of effective implementation of important policies that are widely practiced internationally but have not yet been introduced in Japan; it may well be an essential first step towards the realization of the Rights of Nature. Despite this, the Basic Act on Biodiversity remains a declaration of principles, with the exception that it obligates the national government to take measures to formulate a "National Biodiversity Strategy" and local governments to make efforts to prepare "Regional Biodiversity Strategies."

Marine life habitat destruction also illustrates the inadequacy of the present legal framework, strongly indicating that many more legislative efforts are needed before the Rights of Nature paradigm can be embraced. The circumstances are as follows: Japan's coastal ecosystems have been severely damaged by land reclamation and other development activities over the past several decades. The loss of seaweed beds and coral reefs has deprived aquatic organisms of their habitats and resources necessary for survival, reducing the self-cleansing capacity of marine environments. The Aichi Targets, agreed to at the Conference of the Parties to the Convention on Biological Diversity held in Nagoya, Japan, in 2010 and attended by 180 countries, included a commitment to minimize anthropogenic pressures on coral reefs and other vulnerable ecosystems affected by climate change or ocean acidification, but this has not yet been fully achieved, at least not in Japan.

Against this background, pursuant to a decision jointly made with the United States Department of Defense, the Japanese government is presently carrying out reclamation work on roughly 160 hectares [approximately 395 acres] in Henoko Oura Bay in Okinawa Prefecture in order to build a replacement facility for the aging U.S. Marine Corps base. Located on the coast of a subtropical island, the bay is known to be home to over 5,300 species, including 262 endangered species, one of which, the dugong, a herbivorous marine mammal similar to a manatee, is critically endangered. The reclamation plan has therefore been strongly opposed from the beginning by citizens, environmental groups, and numerous academic societies.

Amidst Japan's uninspiring judicial climate described in Part III above, conservation-minded individuals and organizations filed a unique case in the United States District Court for the Northern District of California in 2003, apparently driven by hope that American courts might be more likely to listen to their claims with open ears. They challenged the construction of aircraft runways on landfill in Henoko Oura Bay, which was likely to damage or even destroy feeding grounds and habitat for the dugong. The plaintiffs sought declaratory and injunctive reliefs based on a provision in the National

[16] Law No. 88 of 2002.
[17] Law No. 75 of 1992.
[18] Law No. 78 of 2004.

Historic Preservation Act [NHPA],[19] a U.S. statute stipulating that, prior to the approval of any federal undertaking outside the United States that may adversely affect a protected property, the head of the federal agency having jurisdiction over the undertaking must "take into account" any adverse effect on the property.

The plaintiffs' expectation turned out to be not baseless: the first stage of their litigation was a success, because, after a lengthy process involving a court order in 2008 directing the Department of Defense to comply with the NHPA and the Department of Defense's eventual report in 2014 specifying that it had discharged its NHPA obligations, the United States Court of Appeals for the Ninth Circuit, the intermediate appellate court, ultimately sided with the plaintiffs as to the justiciability of their claims. The Court of Appeals held that the plaintiffs indeed did have standing to pursue declaratory and injunctive claims and that the issues were not political questions outside the realm of judicial review. This means that they were adjudged to have met the threshold to move on to the merits, which was a result that would have been unlikely to be achieved in a Japanese court. The citizens' and organizations' wishes were fulfilled up to this point.

The plaintiffs, however, ultimately lost the case because the Department of Defense's action was judged to be within the bounds of discretion. Instead of focusing on technical procedural issues, the United States District Court proceeded to address the merits, but ruled for the Department of Defense in 2018, finding that the Department of Defense had complied with the procedural requirement to "take into account" the potential adverse effects of its proposed action on a historic property, the dugong, and that its decision was not arbitrary or capricious as there was sufficient evidence that the presence of the dugong in the area was sporadic. The Court of Appeals upheld the District Court's conclusion that the Department of Defense had adequately taken into account the environmental impact of the reclamation and runway construction project in question. According to the Court of Appeals, the Department of Defense's decision to consult with the Japanese national government, but not with the plaintiffs and local community members, was not unreasonable, as the NHPA delegates to federal agencies "the specific decisions of which organizations, individuals, and/or entities to consult (or not consult) and the manner in which such consultation occurs."

Numerous lawsuits have been filed in Japanese courts as well over the relocation of this U.S. military base, raising various issues such as whether the approval of the landfill work by the Governor of Okinawa Prefecture was duly granted or revocable by succeeding governors, but all have so far been dismissed. As of 2022, more than five years after the project began, only about thirty percent of the planned landfill area has been reclaimed. Furthermore, the discovery of soft ground on the seafloor having necessitated large-scale soil stabilization, the construction period has now been re-estimated to be twelve years instead of the original eight. The protection of dugong habitat in Henoko Oura Bay is expected to continue to be a major point of contention in every local election in Okinawa for the foreseeable future.

## V. Conclusion: Toward a Breakaway from Fossilized Jurisprudence

Let one return to the story of the Amami black rabbit, a relict species that arrived and settled in Japan millions of years ago, when it was part of the Eurasian continent. This living fossil now only lives on Japan's Amami Islands, long after its closely related species died out in mainland Asia. A phenomenon similar to this occasionally takes place in the world of law as well.

[19] 54 U.S.C.S. §307101(e) (2022).

The idea that only humans and entities with legal personhood can be subjects of rights was imported from Western jurisdictions when Japan embarked on its modernization drive in the 1860s. Also, transplanted continental doctrines that confer broad discretion to public authorities to approve or disapprove development plans, as well as related complex litigation procedures, seem to be remnants of an industrial past, embodying the essence of nineteenth-century legal formalism, disconnected from the traditional Japanese outlook on nature. It may very well be the case that the useful life of those rules and doctrines has long since passed.

In light of the recent trend that more and more countries around the world are beginning to respect the Rights of Nature, it appears to be high time for Japanese lawyers and legislators to squarely face the "inescapable question" of whether or not to continue to adhere to the existing legal framework as noted by the judges in *Amami Black Rabbits v. Governor of Kagoshima Prefecture*, for otherwise Japanese law may soon be a specimen of the archaic mindset that is becoming extinct in other jurisdictions, characterized by an inflexible dichotomy between humans and nature. Fortunately, the various litigation attempts of private individuals and organizations examined in this report seem to provide a strong indication that the underlying legal consciousness of the Japanese general public is developing towards an understanding of the Rights of Nature. There is, therefore, hope that courts will begin to entertain lawsuits brought by nature or natural objects in the not too distant future.

However, in order to actually realize the Rights of Nature, including the right to life of endangered species, the Japanese legal system should not be so outdated that it may be perceived as "relict" in the world of comparative law. A legal system that is not able to protect living fossils, let alone nature as a whole, is a system that itself must remain a living fossil.

# Global Threats and Global Emergencies: Legal Reactions

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## Introduction

This paper is Japan's National Report presented in the Panel "Global Threat and Global Emergencies: Legal Reactions" at the 2022 Congress of the International Academy of Comparative Law held in Asunción. Panelists were invited to give answers to the questions proposed by the General Rapporteur. Accordingly, the discussions in this paper correspond to the questionnaire prepared by the General Rapporteur, Prof. Dr. José Augusto Fontoura Costa, University of Sao Paulo. The questionnaire is as below.

1. Constitutional regime of derogations. a. Does the Constitution provide for exceptional regimes in the instances of unexpected and irresistible global threats and emergencies? b. Which events are covered by the normative hypotheses that allow the institution of exceptional measures? c. Which authorities hold the competence to declare and maintain these exceptional measures? d. How do the exceptional regimes provided for in the Constitution treat individual liberties and fundamental rights (e. g. freedom of movement, freedom of expression, freedom of press, freedom of assembly, isonomy, right to self-defense, right to security and integrity)? e. Are there restrictions on press, information and communications means? How do they work? f. Are there any special procedures to enact statutes in times of crisis? How do they work?

2. Private law. a. Does the domestic private law provide for measures regarding exceptional threats? b. Is there a force majeure or frustration regime? How does it work? c. Is there a regime related to excessively onerous contracts? Does it allow revision by judicial authorities? d. Is there a single regime for civil, business, labor, and consumer obligations? If there are two or more regimes, how different are such regimes? e. Are there any special rules regarding insurance contracts?

3. Public law. It is expected that a short analysis will be provided covering the dimensions described below. If the rapporteur considers it necessary, he/she is welcome to aggregate other aspects and dimensions. a. Treatment of foreigners: i. Visas' special regimes, ii. Access to public facilities, services and goods (e. g. vaccines, access to protected zones), iii. Treatment of refugees. b. Requisition of private assets for public use: i. Property, ii. Goods, iii. Intellectual property rights (patents, copyright), iv. Labor/military duties. c. Tax regimes; i. Are there taxes established for exceptional situations? ii. Is it possible to create provisional taxes? d. Criminal law: i. Are there any special procedural rules for emergency regimes? ii. Are there special imprisonment regimes? iii. Are there special crimes or situations that increase the imprisonment periods?

4. Is there any major problem that the domestic law of your country did not cope with during the COVID-19 crisis? If so, please, describe it.

## Chapter I. Constitutional Law: Absence of Exceptional Regime

Japan's current constitution, the Constitution of Japan (1946), does not provide for any exceptional regime in any emergency. Although the Constitution of the Empire of Japan (1889) had been providing for exceptional regimes, Japan amended its constitution drastically after the defeat in World War II, and the exceptional regimes were eliminated. As the Constitution of Japan has never been amended since its

adoption in 1946, the absence of exceptional regimes continues.

On the other hand, provisions of Articles 12 and 13 define the general limits of individual rights in terms of "public welfare".

> Article 12:
> The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare[1].

> Article 13:
> All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Accordingly, Article 29 (3) of the Constitution allows private property to be taken for public use upon just compensation. It holds that "[p]rivate property may be taken for public use upon just compensation therefor".

## Chapter II. Private Law and Emergencies

### 1. Force Majeure or Frustration in the Civil Code

In the Civil Code of Japan, (i) fault-based liability principle and (ii) rules related to "impossibility of performance" function as a regime that covers force majeure or frustration, although the Civil Code has only one Article (Article 419(3), see *infra*) that contains the word "force majeure".

> Article 412-2(1):
> "If the performance of an obligation is impossible in light of the contract or other sources of claims and the common sense in the transaction, the obligee may not request the performance of the obligation.

> Article 415(1):
> If an obligor fails to perform consistent with the purpose of the obligation or the performance of an obligation is impossible, the obligee may claim compensation for loss or damage arising from the failure; provided, however, that this does not apply if the failure to perform the obligation is due to grounds not attributable to the obligor in light of the contract or other sources of obligation and the common sense in the transaction.

Force majeure or frustration situation may be understood as one of the situations of failure or impossibility of performance in which the failure or impossibility is due to grounds not attributable to the debtor. Therefore, the debtor is not liable by virtue of the articles above.

However, it must be noted that if the performance becomes impossible during a period in which the obligor is liable for delay in the performance of the obligation, the impossibility of performance is

[1] Texts of Japanese laws quoted in this paper are based on English-translated versions (including tentative translation) stored in the Japanese Law Translation Database System, as far as available.
[https://www.japaneselawtranslation.go.jp/]

deemed to be due to grounds attributable to the obligor (Article 413-2(1)), and that obligation of monetary payment will not be released by force majeure (Article 419 (1) and (3)).

> Article 413-2(1):
> If the performance of an obligation becomes impossible due to grounds not attributable to either party during a period in which the obligor is liable for delay in performance of the obligation, the impossibility of performance is deemed to be due to grounds attributable to the obligor.

> Article 419:
> (1) The amount of the compensation for loss or damage for failure to perform an obligation to deliver money is determined with reference to the statutory interest rate as of the time when the obligor first assumes the responsibility for the delay; provided, however, that if the agreed-upon interest rate exceeds the statutory interest rate, the agreed-upon interest rate prevails.
> (…)
> (3) The obligor may not raise the defense of force majeure with respect to the compensation for loss or damage referred to in paragraph (1).

It might also be worth pointing out that which situation related to global threat can be understood as a force majeure or frustration situation is uncertain. No provision or jurisprudence explicitly refers to this point.

Apart from the force majeure or frustration regime discussed above, the Act on Special Measures against Novel Influenza, etc. provides a possibility of special rules on monetary payment. Pursuant to Article 58(1) of the said Act, the cabinet may enact a Cabinet Order to take necessary measures for postponement of monetary payment when economic activities stagnate and there is an urgent need to secure the national economic order and assure public welfare in the "state of emergency" caused by the rapid and wider spread of defined infectious diseases (see *infra*, Chapter IV).

**2. Excessively Onerous Contracts in the Civil Code**

Article 90 of the Civil Code states that "[a] juridical act that is against public policy is void." According to jurisprudence, an excessively onerous contract may be understood as one of the juridical acts against public policy and hence void. However, as this article is to apply to contracts that are "against public policy," it can be said that, in principle, onerous situations caused by emergencies are not likely to be within its scope.

**3. Different Regimes for Civil, Business, Labor, and Consumer Obligations**

The Civil Code provides general rules on civil matters including contracts and liability. The Commercial Code governs business and sets down special rules for merchants and commercial matters. The Labor Standards Act and other related Acts deal with working conditions, labor contracts, and special rights and duties of employees and employers. The Consumer Contract Act gives special conditions to protect consumers considering the disparity in the quality and quantity of information and negotiating power between consumers and traders. The Civil Code is the general law that governs all civil matters in principle, and the others are special laws.

There is no remarkable difference between these regimes concerning emergencies except for some minor special provisions such as Article 33(1) of the Labor Standards Act that allows an employer to extend the working hours and days if there is a temporary need to do so due to a disaster or other

unavoidable event. However, several disaster-related Acts contain provisions under which specific business entities, those involved in defined business, or the grand public may be imposed special obligations (see *infra*, Chapters III and IV).

### 4. Special Rules Regarding Insurance Contracts in the Insurance Act

The Insurance Act gives special rules for insurance contracts. Below are the provisions related to emergencies.

> Article 17(1):
> An insurer shall not be liable to compensate for any damage that occurs due to the willful act or gross negligence of a policyholder or an insured. The same shall apply to any damage that has occurred due to a war or any other social disturbance.

> Article 80:
> An insurer shall not be liable to make an insurance proceeds payment in the following cases (…) (iv)where grounds for claim payment occur due to a war or any other social disturbance. ((i-iii) omitted.)

Article 51 provides the same kind of exemption for life insurance policies.

While these special provisions in the Insurance Act explicitly cover only war or social disturbance, that is to say, man-made disasters, in practice, it is common to include disclaimer clauses in adhesive terms and conditions that cover a wider range of situations including some types of natural disasters. In any case, however, it is not sure whether a pandemic can be understood as one of the situations covered by them.

## Chapter III. Public Law and Emergencies

### 1. Treatment of Foreigners

There is no special law on the treatment of foreign residents in emergencies. In contrast, the Immigration Control and Refugee Recognition Act sets down a special rule about permission of entrance for foreigners who are with infectious diseases.

> Article 5(1) of the said Act:
> A foreign national who falls under any of the following items is denied permission to land in Japan:
> (i)a patient with category 1 infectious diseases, category 2 infectious diseases, pandemic influenza or designated infectious diseases provided for by the Act on Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases (Act No. 114 of 1998) (limited to infectious diseases to which the provisions of Article 19 or 20 of the same Act applies mutatis mutandis, pursuant to the provisions of a Cabinet Order pursuant to the provisions of Article 7 of the same Act), including a person who is deemed to be a patient of category 1 infectious diseases or category 2 infectious disease, pandemic influenza, or designated infectious diseases pursuant to the provisions of Article 8 of the same Act (including as applied mutatis mutandis pursuant to Article 7 of the same Act), or any person who has symptoms of a new infectious disease. (Paragraphs (ii)- omitted).

In this relation, it is also worth noting that the Act on Special Measures against Novel Influenza, etc. enables the Prime Minister to request carriers of sea or air transportation to limit arrival to Japan from countries in the epidemic (Article 30(2)). On the other hand, the Quarantine Act stipulates that a quarantine station chief may isolate a patient with any of the defined infectious diseases and detain a person who is likely to be infected with pathogens of the disease (Article 14(1)). A person who has been subjected to an isolation or detention order and has run away while the order was in effect is to be punished by imprisonment with work for not more than one year or a fine of not more than one million yen (approx. 7,700 US dollars) (Article 35(2)). These provisions apply to all persons including Japanese nationals arriving on Japanese soil from overseas.

To the patients of any of the defined infectious diseases who are already in Japanese territory, the Act on Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases applies regardless of their nationality. According to the act, a prefectural governor may, if finds it necessary to prevent the spread of any of the defined infectious diseases, recommend the patients to be hospitalized or make the patients be hospitalized, for no longer than 72 hours (Article 19(1), (3) and (4)). A person who has run away from the hospital is subject to a non-penal fine of not more than 500,000 yen (approx. 3,850 US dollars) (Article 80).

**2. Requisition of Private Assets for Public Use**

a. Expropriation or use of private assets

Article 29 of the Constitution of Japan allows private property to be taken for public use upon just compensation (see *supra* Chapter I). Accordingly, the Expropriation of Land Act sets down requirements and procedures for land expropriation as well as compensation. Article 2 of the said Act provides that "[i]f land is needed for the purpose of undertakings for public interest, and it is appropriate and reasonable to use that land for such a purpose, the land may be expropriated or used under the provisions of the Act". Article 3 of the same Act gives an exhaustive list of the undertakings for which the land may be expropriated or used. The list includes undertakings for facilities related to disaster prevention or disaster redaction, among others: dams; erosion control facilities; landslide prevention facilities; cableway facilities; railways or rail tracks; tsunami defense facilities; navigation aids facilities; facilities used by telecommunications carriers; broadcasting equipment; electric, gas, or water supply facilities; facilities for firefighting; hospitals; crematoria; waste disposal centers; facilities for contaminated waste under the Act on Special Measures Concerning the Handling of Environmental Pollution by Radioactive Materials Discharged by the Nuclear Power Plant Accident Associated with the Tohoku District Off the Pacific Ocean Earthquake That Occurred on 11 March 2011 (Act No. 110 of 2011); facilities used by the Japan Atomic Energy Agency for the operations set forth in Article 17, paragraph (1), items (i) through (iii) of the Japan Atomic Energy Agency Act (Act No. 155 of 2004). As for urgent procedure in an emergency, Article 122(1) of the Expropriation of Land Act stipulates that in case of extraordinary disasters and if it is necessary to implement any of the undertakings provided in Article 3 (above mentioned), an expropriator may, with the permission of the mayor of the municipality, immediately use the land of others.

While the Expropriation of Land Act discussed above covers only land and land-related properties, e. g., buildings, trees or stones fixed or attached to the land, and rights related to the land such as the right of superficies, farming, mining, etc., several Acts for disaster management or relief provide for emergency expropriation or use of land, land-related properties, and other assets such as goods as well. Below are the examples.

Article 64(1) of the Basic Act on Disaster Management:
In cases where a disaster involving an area of a municipality has occurred or is imminent, when the mayor of a municipality finds it urgently necessary for implementing Emergency Measures, the mayor may use temporarily the land, building, or any other structure belonging to other person within the area of the municipality, use or expropriate stone, bamboo and wood, or other object, as provided for by Cabinet Order.

Article 5(1) of the Disaster Relief Act:
When finding it particularly necessary in order to provide relief, the head of a designated government organization (...) and the head of a designated local government organization (...) may, pursuant to the provisions of a disaster management operation plan (...), order persons engaging in the business of production, etc. of goods (...) to store the goods they handle, or expropriate the goods as are necessary for providing relief.

Article 9(1) of the same Act:
When finding it particularly necessary in order to provide relief, or finding it necessary in order to implement the instructions of the Prime Minister based on the provisions of Article 14[2], a prefectural governor, etc. may (...) use land, buildings, or goods, order persons engaging in the business of production, etc. of goods to store the goods they handle, or expropriate the goods.

Other Acts specialized in water disasters (the Flood Control Act), earthquakes (the Act on Special Measures against Large-Scale Earthquake), and new influenza (the Act on Special Measures against Novel Influenza, etc.) have similar provisions on the use or expropriation of assets and goods in an emergency (e. g., Articles 28(1) and (2) of the Flood Control Act, Article 27(1) of the Act on Special Measures against Large-Scale Earthquake, Articles 29(5), 49, 55(2), 55 (3) of the Act on Special Measures against Novel Influenza, etc.). The losses caused or would generally be caused by the disposition under the provisions mentioned above are to be compensated for (Article 5(3) of the Disaster Relief Act, Article 28(3) of the Flood Control Act, etc.).

As for telecommunications, there is a provision in the Flood Control Act (Article 27(2)) that allows the Minister of Land, Infrastructure, Transport and Tourism, a prefectural governor, or another person responsible for flood control to use telecommunications and information facilities in priority. In addition, the Radio Act, the Telecommunications Business Act, and the Wired Telecommunications Act set down provisions under which the authority can order any radio station, telecommunication carrier, or owner of information facilities to prioritize emergency-related communications (Article 74 of the Radio Act, Article 8(1) and (2) of the Telecommunications Business Act, Article 8(1) of the Wired Telecommunications Act). These provisions are not precisely on the requisition of private assets but are expected to perform a similar function.

b. Labor duties

Some of the disaster-related Acts mentioned above provide for special labor duties as below.

Article 65(1) of the Basic Act on Disaster Management:

[2] Article 14 sets down that "[w]ith regard to relief provided by a prefectural governor, etc., the Prime Minister may instruct other prefectural governors, etc. to provide support in providing relief."

In cases where a disaster involving an area of a municipality has occurred or is imminent, when the mayor of a municipality finds it urgently necessary for implementing Emergency Measures, that mayor may cause any residents of the area of the municipality or any persons who are on the site where Emergency Measures should be taken to engage in operations under the relevant Emergency Measures.

Article 7(1) of the Disaster Relief Act:
A prefectural governor, etc. may have persons related to medical care, civil engineering and construction, or transportation engage in the operations for relief when finding it particularly necessary in order to provide relief, and have persons related to medical care or civil engineering and construction engage in the operations for relief when finding it necessary in order to implement the instruction of the Prime Minister (…).

Article 7(2) of the latter Act allows The Director-General of a District Transport Bureau to have persons related to transportation engage in the operations for relief when a prefectural governor, etc. finds it necessary and requests to do so. Article 8 stipulates that a prefectural governor, etc. may have persons in the neighborhood cooperate in the operations for relief.

The Flood Control Act and the Act on Special Measures against Large-Scale Earthquake also have similar provisions. Article 24 of the Flood Control Act defines the obligation of residents to engage in flood control operations, and Article 27(1) sets down the obligation of the grand public to cooperate to ensure the quickest urgent communication required in flood control. Article 22 of the Act on Special Measures against Large-Scale Earthquake holds the obligation of residents to engage in disaster prevention and redaction activities and to cooperate.

In addition, the Act on Special Measures against Novel Influenza, etc. provides for similar kinds of obligations of the grand public or those involved in defined types of business (see *infra*, Chapter IV).

c. Tax regimes

There are special taxes established for the exceptional situation after Great East Japan Earthquake to secure funds for reconstruction. In 2011, the Act on Special Measures for Securing Financial Resources Necessary for Implementing Measures for Recovery from the Great East Japan Earthquake was enacted. Under this Act, special income taxes are added for a limited period of time. The longest one is for 25 years from 2013. For the moment there is no special tax related to COVID-19.

d. Criminal law

The Act on Penal Institutions and Treatment of Inmates holds in Article 83(1) and (2) that the warden of a penal institution must escort inmates to a suitable place in the event of an earthquake, fire, or other disasters, and that if the escort is impossible, the chief of the penal institution may release the inmates. Persons released pursuant to these provisions must appear at the penal institution or the place designated by the warden of the penal institution immediately after the situation which requires evacuation disappears (Article 83(3)).

## Chapter IV. “Request” and “Order” Pursuant to the Act on Special Measures against Novel Influenza, etc. amended in 2021

The COVID-19 crisis led to amendments to existing Acts on infectious diseases. Before COVID-

19 appeared, in 2012, the Act on Special Measures against Novel Influenza, etc. was enacted in order to cope with the MERS crisis. In 2021, the Act Partially Amending the Act on Special Measures against Novel Influenza, etc. was passed to update the former Act to make it applicable to the new coronavirus disease[3]. However, except for the requisition of private assets and goods for public use and the related measures that are compulsory (Articles 29(5), 49, 55(2), 55 (3)), and limited kinds of "order" that may be given to a person involved in certain types of business, the rest of the measures provided by the amended Act remains non-enforceable. Consequently, the main action taken by authorities in Japan was to "request" the grand public or those involved in specific kinds of business to cooperate to prevent infection. The modality of "request", "order" and expropriation or public use of private assets and goods stipulated in the Act is as below.

According to the Act, the Prime Minister may designate specific areas affected by the defined infectious diseases for "Intensive Measures for Prevention of the Spread of Infection" and, when recognizes that residents' lives and the national economy are gravely affected or are likely to be gravely affected by the total and rapid spread of the disease, declare the "State of Emergency" and apply "Measures under the State of Emergency" (Articles 31-4, 32(1)).

Under the "Intensive Measures for Prevention of the Spread of Infection", a prefectural governor may "request" those who are involved in defined business to take measures to prevent infection, including change of business hours and others (Article 31-6(1)). A prefectural governor may also "request" the residents to cooperate and refrain from going to a place where the defined business hour is not respected (Article 31-6(2)). If a person involved in business does not respond to the request without reasonable grounds, the prefectural governor may "order" the person to take the said measures, only when the particular necessity is found (Article 31-6(3)). A person who ignores the order is subject to a non-penal fine of not more than two hundred thousand yen (approx. 1,540 US dollars) (Article 80(1)).

Under the "Measures under the State of Emergency", a prefectural governor may "request" the residents to refrain from non-essential outings for a defined period of time and to cooperate in preventing infection (Article 45 (1)). A prefectural governor may also "request" those who are managing facilities such as schools, social welfare facilities, or entertainment places to limit or suspend holding events or to take other measures (Article 45 (2)). If a facility manager does not respond to the request without reasonable grounds, the governor may "order" the facility manager to take the said measures (Articles 45 (3)), and when the former fails to obey the order, subject to a non-penal fine of not more than three hundred thousand yen (approx. 2,300 US dollars) (Article 79).

A prefectural governor may, when finds it necessary to ensure the state of emergency measures work, "request" owners of specific materials such as medicines, food, etc., to sell the materials (Article 55(1)). If an owner does not respond to the request without reasonable grounds, the materials may be expropriated when found particularly necessary (Article 55(2))[4]. In addition, a prefectural governor may "order" those who are involved in a business dealing with specific materials to stock them if finds it urgently necessary (Article 55(3)). A person who ignores the order and conceals, damages, discards, or carries out the materials is punished by imprisonment for not more than six months or a penal fine of not more than 300,000 yen (approx. 2,300 USD) (Article 76).

A prefectural governor or other authority may also "request" transportation carriers and pharmaceutical distributors to transport emergency materials or pharmaceuticals (Article 54 (1) and (2)), and if a carrier or distributor does not respond to the request without reasonable grounds, the governor

[3] The Act on Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases and the Quarantine Act were amended in the same year. For the provisions of these Acts, see *supra* section 1 of Chapter III.
[4] As for other expropriation Articles 29 and 49 provide compulsory use of hospitals and land.

or other authority may “instruct” the carrier or the distributor to undertake the transportation (Article 54(3)). This instruction is not mandatory.

According to Article 47 of the Act, under the “State of Emergency”, hospitals and pharmaceutical distributors shall take necessary measures to ensure medical service and medicine supply, without any request or order from the part of authorities (Article 47). The same kind of duty is imposed on transportation carriers, telecommunication carriers, and postal carriers to assure transportation, telecommunication, and postal services (Article 53). However, the Act does not carry any penalty for failure of these duties. Likewise, Article 4 entitled “Responsibility of Business Entities and Citizens” stipulates that business entities and citizens must endeavor to prevent infection and to offer cooperation with measures against the disease (Article 4 (1)), without providing a penalty clause for failure.

## Conclusion

One of the main characteristics of Japanese law is the lack of constitutional legal ground pursuant to which the authority may impose strong constraints on individual rights. As discussed in Chapter I, the Constitution of Japan does not explicitly contain any clause that allows exceptional regimes. On the other hand, because of its abundant experiences with natural disasters, Japan has lots of special legislation that sets down measures to be taken in disaster situations caused by an earthquake, a flood, and so on, with minimum constraints on individual rights. As discussed in Chapter IV, the same kind of reaction was chosen to cope with COVID-19. For the moment, the amendment of the Constitution is not probable, and the existing way to deal with emergencies is likely to continue.

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# L'impact de la force majeure sur les obligations contractuelles au Japon

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## Introduction

Le Japon, qui est un archipel situé dans une zone particulièrement sismique, est régulièrement – voire souvent – exposé aux catastrophes naturelles telles que les séismes ou les typhons. Pourtant, son Code civil prévoit peu de règles sur la force majeure[1]. En effet, le Livre III relatif aux droits de créances n'en contient que seulement trois articles[2]. Il s'agit des articles 419, 609 et 610. Le premier, qui concerne les obligations ayant pour objet une somme d'argent, dispose que le débiteur de l'obligation inexécutée n'est pas admis à invoquer la force majeure pour repousser la demande de dommages et intérêts du créancier. Les deux autres, relatifs au bail, attribuent au preneur d'un fond de terre dédié au labourage ou à l'élevage de demander la réduction du loyer (art. 609) ou la résolution du contrat (art. 610) lorsque celui-ci, par suite de force majeure, retire de son activité un revenu inférieur au loyer[3]. Il semble donc naturel qu'au Japon, la jurisprudence sur la notion de force majeure est loin d'être abondante, et que la doctrine s'y intéresse peu.

Pourtant, cela ne signifie guère que les obligations contractuelles restent intactes malgré la survenance d'un évènement de force majeure. Pour clarifier l'impact de la force majeure sur les obligations contractuelles, examinons d'abord les dispositions législatives ainsi que les solutions jurisprudentielles applicables en la matière, avant de nous intéresser aux clauses contractuelles qui lui sont afférentes.

## I. La force majeure dans le Code civil

En parlant de l'impact de la force majeure sur les obligations contractuelles, nous pouvons théoriquement distinguer entre deux questions: celle concernant l'impact de la force majeure sur l'obligation elle-même, et celle concernant l'impact de la force majeure sur le contrat.

### 1. L'impact de la force majeure sur l'obligation du débiteur

Lorsque l'exécution d'une obligation contractuelle est entravée par un évènement de force majeure, il est question de savoir si le débiteur reste contraint de l'exécuter, en d'autres termes, s'il est possible d'envisager une limite au droit à l'exécution en nature du créancier, et si le débiteur sera condamné au

[1] Le Code de commerce japonais compte quatre articles faisant référence à la force majeure. Il s'agit de l'article 596, al. 1 sur la responsabilité de dépositaire des hôteliers et restaurateurs, qui sont responsables de la perte ou de la détérioration des objets déposés par leurs clients, sauf s'ils démontrent la survenance d'un cas de force majeure; l'article 748, alinéa 2 et l'article 752, alinéa 2 sur le délai d'embarquement ou de débarquement dans les contrats d'affrètement ne prévoyant pas le point de départ, qui ne comprend pas le délai pendant lequel l'embarquement ou le débarquement n'a pu être effectué pour cause de force majeure; et enfin l'article 828 sur la responsabilité de l'assureur maritime en cas de vente par force majeure de la marchandise.

[2] Dans le Livre II sur les droits réels, les articles 274 et 275 concernant l'emphytéose ainsi que l'article 348 concernant le droit de gage en font mention. Selon les deux premiers, l'emphytéote ne peut demander la remise totale ou partielle du fermage même s'il subit une perte de revenus par suite de cas de force majeure, mais peut renoncer à son droit s'il perçoit aucun revenu pendant plus de deux années consécutives ou ne perçoit que des revenus inférieurs au fermage pendant plus de cinq ans. Le dernier dispose que le gagiste ayant sous-engagé la chose est responsable des dommages qui ne se seraient pas produits s'il ne l'avait pas sous-engagé, même en cas de force majeure.

[3] Il s'agit d'une protection spéciale pour les fermiers. *A contrario*, le preneur ne peut en principe demander la réduction du prix du bail en raison de l'arrêt ou la stagnation de son activité.

paiement des dommages-intérêts, autrement dit, si l'exonération de responsabilité aura lieu.

**A. La limite au droit à l'exécution en nature**

En droit japonais, le créancier d'une obligation peut en poursuivre l'exécution en nature, sauf en cas d'impossibilité (art. 412-2, al. 1 du Code civil[4]). C'est au débiteur de prouver l'impossibilité pour se dérober à la demande d'exécution. Cette impossibilité, qui peut être précontractuelle [5] ou postcontractuelle, est appréciée en tenant compte du contrat et du « sens commun (*shakaï-tsûnen*) des transaction ». Il est unanimement admis que l'impossibilité comprend non seulement l'impossibilité matérielle mais aussi « l'impossibilité juridique », c'est-à-dire les situations dans lesquelles le débiteur ne peut juridiquement exécuter son obligation. Il y aurait ainsi impossibilité lorsque la prestation est devenue illégale après la conclusion du contrat[6].

La question qui reste est de savoir si une difficulté extraordinaire pourrait aussi être qualifiée d'impossible, et si oui dans quelles conditions. Lors des travaux préparatoires de la réforme de 2017, la clarification de la notion d'impossibilité fut débattue au sein de la Commission de Législation auprès du ministère de la Justice (ci-après « Commission de Législation »), qui a proposé dans son rapport intermédiaire (*Chûkan-shian*) d'inclure, à côté de l'impossibilité matérielle, le cas où « le coût nécessaire pour l'exécution serait excessivement élevé par rapport à l'intérêt qu'obtient le créancier » comme une limite au droit à l'exécution en nature[7]. Cette proposition n'a pas vu le jour, mais la notion de l'impossibilité est suffisamment large pour accueillir une interprétation en ce sens[8]. Ainsi, une difficulté extraordinaire pourrait être qualifiée d'impossible. Pourtant, il est à noter que l'impossibilité en raison d'un coût excessif serait admise seulement si le coût d'exécution pour le débiteur dépasse l'intérêt de son exécution pour le créancier. Autrement dit, le débiteur reste tenu d'exécuter son obligation, même si le coût d'exécution dépasse l'intérêt de son exécution pour lui-même. Dans ce cas, saurait-il invoquer la théorie de changement de circonstances? C'est ici une autre question (→2.B.).

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[4] Aux termes de l'article 412-2, alinéa 1, « lorsque l'exécution d'une obligation est impossible compte tenu du contrat ou d'autres faits générateurs de l'obligation, ou encore du sens commun (*shakaï-tsûnen*) des transactions, le créancier ne peut demander son exécution. »

[5] L'impossibilité précontractuelle n'entraine pas la nullité du contrat, contrairement à ce qu'enseignait la doctrine traditionnelle avant la réforme du droit des obligations adoptée le 26 mai 2017 (entrée en vigueur à partir du 1 avril 2020). Le Code civil précise désormais que « le fait que l'exécution d'une obligation contractuelle était impossible au moment de la formation du contrat ne fait pas obstacle à la demande de dommages-intérêts en raison de l'impossibilité d'exécution, en application de l'article 415 » (art. 412-2, al. 2).

[6] L'obligation de délivrance du vendeur du tabac devient impossible lorsque la loi sur le monopole de la vente des tabacs est venue interdire la vente des feuilles du tabac après la conclusion du contrat (Haute Cour, le 29 oct. 1906, *Minroku*, vol. 12, p. 1358). V. aussi, même s'il ne se réfère pas à la notion d'impossibilité, Cour suprême, 18 avril 2003, *Minshû*, vol. 57, nº 4, p. 366, qui a débouté la demande d'exécution d'un contrat garantissant la réalisation d'un profit par le placement de fonds, pour la raison qu'une nouvelle loi est venue interdire non seulement la conclusion du contrat de dédommagement ou de garantie de profit mais aussi son exécution.

[7] L'un et l'autre étaient énumérés comme une « cause justifiant qu'il n'est pas approprié de demander au débiteur l'exécution de l'obligation d'après l'esprit du contrat » (*Chûkan-shian*, nº 9, 2).

[8] La raison de l'abrogation de l'ancien article 634, alinéa 1 sur la responsabilité de l'entrepreneur pour les défauts de l'ouvrage fournit des indications utiles sur le sujet. En effet, cette disposition prévoyait que le maître d'ouvrage pouvait demander à l'entrepreneur d'y remédier, à moins que les défauts n'aient été légers et que leur réparation n'aurait exigé des dépenses excessives. Cette disposition a été abrogée afin d'éviter des redondances superfétatoires, puisque les règles relatives aux sanctions en cas de défaut de la chose vendue (art. 562 et s.) pourraient bien s'appliquer au contrat d'entreprise (v. art. 559). L'ancien article 634, al. 1 a été de ce fait en quelque sorte absorbé par les règles de principe, et la limite du droit à la réparation du défaut est désormais précisée par l'article 412-2, al. 1, donc par l'impossibilité. Le fait que le coût de la réparation est excessivement élevé serait dès lors qualifié comme un cas d'impossibilité (v. en ce sens, T. TSUTSUI et H. MURAMATSU, *Ichimon-Ittô Minpô (Saïken-kankei) Kaïsei*, Shôji-Hômu, 2018, p. 341.

**B. L'exonération de la responsabilité contractuelle**

Si l'impossibilité dispense le débiteur d'exécuter son obligation, ce dernier ne sera pas exonéré de la responsabilité pour inexécution, à moins qu'elle ne soit due à une cause qui ne lui est pas imputable (art. 415, al. 1 du Code civil[9]). Le débiteur devrait alors invoquer un évènement de force majeure en tant que cause non-imputable[10], pour ne pas être tenu au paiement des dommages-intérêts. Il est pourtant des cas où le bénéfice d'exonération ne saurait accordé au débiteur. C'est le cas lorsque l'obligation du débiteur consiste en une somme d'argent. Dans ce cas, celui-ci n'est pas admis à invoquer la force majeure (art. 419, al. 3[11]). D'autre part, il n'y a point d'exonération lorsque le débiteur est déjà en demeure au moment de la survenance de l'évènement de force majeure[12], puisque l'impossibilité qui en résulte est considérée *ex lege* comme étant due à une cause qui lui est imputable (art. 413-2, al. 1[13]).

L'articulation entre la cause non-imputable au débiteur (art. 415, al. 1) et la force majeure (art. 419, al. 3) n'est pas toujours claire. D'abord, pour la doctrine traditionnelle qui assimilait la cause imputable au débiteur à une faute de celui-ci, la controverse portait sur le point de savoir s'il fallait assimiler la force majeure à l'absence de la faute du débiteur[14]. La doctrine contemporaine, qui considère que la responsabilité contractuelle est fondée non pas sur la faute du débiteur mais sur la force obligatoire du contrat, voit dans « la cause non-imputable au débiteur » la répartition des risques par le contrat. La force majeure serait alors l'une des causes exonératoires qui résulte d'un risque n'étant pas réparti au débiteur.

L'existence d'une cause non-imputable au débiteur est appréciée au cas par cas, en tenant compte du contrat ou du « sens commun (*shakaï-tsûnen*) des transactions » (art. 415, al. 1). En fait, même si la force majeure est considérée comme étant l'illustration typique de la cause non-imputable au débiteur[15], ni les catastrophes naturelles comme le séisme[16] ou le typhon[17], ni les situations graves ou de crises

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[9] Aux termes de l'article 415, alinéa 1, « lorsque le débiteur manque à l'exécution de son obligation de manière conforme à sa teneur, ou lorsque l'exécution de l'obligation est impossible, le créancier peut demander la réparation du dommage qui lui est causé, à moins que l'inexécution de l'obligation ne soit due à une cause qui ne peut être imputée au débiteur, compte tenu du contrat ou d'autres faits générateurs de l'obligation, ou encore le sens commun (*shakaï-tsûnen*) des transactions. »

[10] C'est au débiteur de prouver que l'inexécution est due à une cause qui ne lui est pas imputable.

[11] L'article 419 du Code civil prévoit un régime spécial relatif à l'inexécution de l'obligation pécuniaire. Les traits caractéristiques de ce régime consistent à ce que le montant des dommages-intérêts est défini légalement d'après le taux des intérêts (al. 1), que le créancier n'a pas à établir le préjudice pour demander les dommages-intérêts (al. 2), et que le débiteur n'est pas admis à invoquer la force majeure contre cette demande (al. 3).

[12] Néanmoins, concernant le préjudice résultant de circonstances particulières, le créancier peut demander sa réparation seulement si le débiteur avait prévu ou devait prévoir ces circonstances (v. Cour suprême, 16 févr. 1984, *Shûmin*, nº 141, p. 201).

[13] Aux termes de l'article 413-2, al. 1, « lorsque l'exécution d'une obligation est devenue impossible par suite d'une cause qui ne peut être imputée à aucune des parties alors que le débiteur est en demeure, l'impossibilité d'exécution est considérée comme provenant d'une cause imputable au débiteur. »

[14] Il est pourtant à noter qu'il existait des arguments divergents dans chacun des deux camps. Par exemple, parmi les auteurs affirmant l'assimilation, il y avait ceux qui distinguaient la « force majeure » au sens de l'article 419, alinéa 3 de la force majeure *stricto sensu*, c'est-à-dire « un cas fortuit extraordinaire, considéré comme étant la cause exonératoire en cas de responsabilité sans faute » (v. F. OHO, *Saïken-sôron*, nouv. éd., Yûhikaku, 1972, pp. 93, 96). Cette doctrine s'approche en substance de celle, qui, tout en niant l'assimilation, considère que la force majeure, étant une cause exonératoire de la responsabilité sans faute, ne comprend pas tous les cas où la faute du débiteur serait niée, par exemple le cas du fait d'un tiers (T. MAEDA, *Kôjutsu Saïken-sôron*, 3e éd., Seibundô, 1993, p. 154).

[15] Y. SHIOMI, *Shin Saïken-sôron I*, Shinzansha, 2017, p. 383; H. NAKATA, *Saïken-sôron*, 4e éd., Iwanami-Shoten, 2020, p. 160.

[16] Dans une affaire, des marchandises gardées dans un entrepôt ont été consumées par le feu suite au grand séisme « *Hanshin-Awaji* » de 1995. Le tribunal de district de Tokyo a exonéré l'entrepositaire en considérant que la survenance d'un tremblement de terre de cette ampleur était imprévisible et inévitable (Tribunal de district de Tokyo, 22 juin 1999, *Hanrei-Times*, nº 1008, p. 288).

[17] Dans une affaire, un maître d'ouvrage a demandé à l'entrepreneur l'indemnisation des dommages causés par l'infiltration des eaux de pluie dans l'entrepôt bâti par ce dernier. Le tribunal de district de Tokyo a refusé

telles que la guerre ou l'accident nucléaire, ni la décision des autorités publics[18] ne sont en soi des causes non-imputables au débiteur.

**2. L'impact de la force majeure sur le contrat**

Comme il est exposé plus haut, dans le cas où l'exécution d'une obligation contractuelle est entravée par un évènement de force majeure, le débiteur est dispensé d'executer ladite obligation si cet évènement engendre l'impossibilité d'exécution, et lorsque cet évènement constitue une cause non-imputable au débiteur, ce dernier est exonéré du paiement des dommages-intérêts. Mais dans ce cas, quel serait le sort du contrat ? Autrement dit, le créancier est-il toujours tenu à exécuter la contre-prestation ?

**A. Le sort du contrat en cas de force majeure**

Le Code civil japonais reste muet sur le sort du contrat en cas de force majeure. Le contrat ne sera pas résolu de plein droit, même lorsque l'exécution d'une obligation contractuelle est devenue définitivement impossible suite à une cause non-imputable au débiteur. Dans ce cas, le créancier peut non seulement refuser l'exécution de la contre-prestation (art. 536, al. 1), mais aussi résoudre le contrat[19]. En effet, lorsqu'il est clair que l'exécution suffisante pour que le but en vue duquel le contrat a été conclu ne puisse se réaliser, par exemple en cas d'impossibilité totale d'exécution, le créancier peut résoudre le contrat sans sommation (art. 542, al. 1)[20], sauf si l'inexécution est due à une cause qui lui est imputable (art. 543). Il en résulte que la résolution est admise si l'un des contractant ne peut exécuter son obligation, non seulement lorsque l'inexécution est due à une cause imputable au débiteur mais aussi lorsque l'inexécution est due à un évènement de force majeure, non-imputable à chacune des parties[21].

Si tel est le principe, des règles spéciales sont prévues pour certains types de contrats spéciaux. Par exemple, le contrat de bail prend fin lorsque la jouissance de la chose louée est devenue totalement impossible (art. 616-2), et si la jouissance de la chose louée devient partiellement impossible, le loyer est proportionnellement réduit (art. 611, al. 1)[22]. Ces effets se produisent de plein droit. D'ailleurs, puisque les créances de loyer ne naissent qu'au fur et à mesure du déroulement du contrat[23], il n'en sera

l'exonération de l'entrepreneur tout en rejetant l'argument de celui-ci, selon lequel l'infiltration des eaux a été causée par le passage d'un typhon et que cela correspondait à un cas de force majeure (Tribunal de district de Tokyo, 12 mars 2008, *Hanrei-Times*, nº 1295, p. 242). Par contre, dans une autre affaire, où une voiture en dépôt a été endommagée suite à une inondation causée par une pluie diluvienne localisée, le tribunal de district de Nagoya a accepté l'exonération du garagiste, en considérant que l'inondation en cause a été provoquée par un débordement imprévisible et inévitable du fleuve (Tribunal de district de Nagoya, 22 janv. 2003, *LEX/DB* nº 28081613).

[18] Dans une affaire, une entreprise commerciale avait vendu des céréales qu'elle importait des Etats-Unis, mais l'exportation n'a pas été autorisée par le gouvernement américain suite au renforcement de la réglementation en la matière. Le tribunal de district de Tokyo a rejeté l'exonération de l'entreprise. Pour le tribunal, l'exonération pour force majeure n'est admise seulement si une cause extérieure entrainant une impossibilité générale d'exécuter l'obligation ait été survenue, ou que l'exécution de l'obligation ait été devenue impossible par la survenance de circonstances spéciales qui n'auraient pu être empêchées par les meilleures moyens auxquelles auraient pu s'attendre le débiteur (Tribunal de district de Tokyo, 12 oct. 1954, *Hôsô-Shinbun*, nº 95, p. 16).

[19] Le créancier peut résoudre le contrat par voie d'une déclaration de volonté adressée au débiteur (art. 540, al. 1).

[20] Si l'exécution d'une obligation contractuelle n'est empêchée que temporairement, c'est-à-dire dans le cas du retard d'exécution, le créancier peut résoudre le contrat après sommation, sauf si l'inexécution est considérée comme légère en tenant compte du contrat ou du « sens commun (*shakaï-tsûnen*) des transaction » (art. 541).

[21] Cette solution résulte de la réforme de 2017. L'ancien article 543 n'attribuait pas de droit de résolution au créancier si l'inexécution résultait d'un fait non-imputable au débiteur.

[22] Le preneur peut résilier le contrat si le but en vue duquel le bail a été conclu ne peut être atteint avec la portion qui subsiste (art. 611, al. 2).

[23] Pour être précis, s'il est opportun de penser que les créances concrètes de loyer correspondant à chaque période naissent au fur et à mesure, nous pouvons en même temps penser que la créance de loyer en sens abstrait qui forme la base de chaque créance est née au moment de la conclusion du contrat de bail. Sur cette question, v. H. MORITA, *Saïkenhö-kaïsei wo Fukameru*, Yûhikaku, 2013, pp. 107 et s.

pas le cas pour les loyers relatifs à la période durant laquelle le bailleur n'a pas pu faire jouir le preneur du local loué[24]. Sous la pandémie de la Covid-19, la fermeture de certains sites étant demandée par les gouverneurs régionaux[25], certains bailleurs ont été amenés à suspendre leurs activités commerciales exercées dans les locaux qu'ils ont loués. La question qui se pose est alors de savoir s'ils doivent continuer à payer le loyer. S'il est possible de penser que le bailleur est dans l'impossibilité d'exécuter son obligation de faire jouir le preneur du local loué[26], le preneur pourrait refuser de payer le loyer tant que la jouissance du local reste impossible[27], mais le tribunal de district de Tokyo a rejeté cet argument[28]. Quant à la doctrine, elle semble être divisée. Un auteur propose de distinguer entre le cas où c'est le local qui est visé par la demande de fermeture, du cas où c'est l'activité du preneur qui est visée: dans le premier cas, le bailleur serait dans l'impossibilité de faire jouir le preneur du local loué, tandis que dans le deuxième, le bailleur aurait mis le local à disposition du preneur, qui est interdit de son activité[29].

**B. La théorie du changement de circonstances**

Lorsque l'exécution d'une obligation contractuelle reste possible malgré la survenance d'un évènement inattendu, le contractant sur qui en pèse la charge n'en sera pas dispensé, et si l'exécution est accomplie, l'autre partie ne peut refuser l'exécution de la contre-prestation. La théorie du changement de circonstances fait une exception à ce principe. Elle viendrait au secours du débiteur qui se trouve dans l'impossibilité économique, ou du créancier qui ne peut accomplir l'objectif poursuivi, en octroyant à l'une et à l'autre des parties le droit de résolution ou le droit de demander la révision du contrat.

Si la théorie du changement de circonstances ne se trouve pas consacrée par le Code civil japonais, elle est néanmoins admise par la jurisprudence, du moins sur le plan des principes. En effet, un arrêt fondateur rendu en 1944 avait admis qu'un contrat de vente d'immeuble pouvait être résolu dans le cas où l'exécution dudit contrat était devenue incertaine à cause de la réglementation des prix introduite après sa conclusion[30]. Selon la doctrine courante, les conditions de la théorie sont les suivantes: 1) qu'il y ait un changement dans les circonstances qui étaient à la base du contrat après sa conclusion, 2) que le changement de circonstances soit imprévisible pour les parties, 3) que le changement de circonstances soit dû à un évènement non-imputable aux parties, et 4) qu'il soit extrêmement injuste, conformément au principe de bonne foi, que les parties restent liées au contrat initial[31].

Pourtant, en ce qui concerne la mise en œuvre du principe, la haute juridiction s'est montrée

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[24] Le preneur n'aura donc pas à payer le loyer tant que le bailleur ne délivre pas la chose louée (Cour suprême, 21 juill. 1961, *Minshû*, vol. 15, nº 7, p. 1952) ou que cette chose ne soit pas dans un état apte à l'usage et à la jouissance (Haute Cour, 11 déc. 1915, *Minroku*, vol. 21, p. 2058). Par contre, si la chose louée est dans un état apte à l'usage et à la jouissance, le preneur doit payer le loyer même s'il ne l' a pas utilisée (Haute Cour, 29 sept. 1904, *Minroku*, vol. 10. p. 1196).

[25] V. art. 24, al. 9 de la loi sur les mesures spéciales contre les nouveaux types de grippes; art. 31-6 (en cas de situation nécessitant des mesures de « freinage renforcé ») et art. 45 al. 2 et al.3 (en cas de déclaration d'« état d'urgence ») de la même loi modifiée en février 2021.

[26] Le bailleur est obligé non seulement de délivrer au preneur la chose louée mais aussi d'en faire jouir ce dernier (v. art. 601).

[27] Par contre, s'il faut penser que le bailleur a bel et bien exécuté son obligation, ou du moins en avait offert l'accomplissement en mettant le local à la disposition du preneur, mais que celui-ci n'a pas pu en prendre possession ou en tirer profit, le preneur serait tenu de continuer à payer le loyer.

[28] Tribunal de district de Tokyo, 20 juill. 2021, *The financial and business law precedents*, nº 1629, p. 52.

[29] En effet, si les risques liés au local doivent être pris en charge par le bailleur, les risques concernant l'activité du preneur doivent être assumés par celui-ci (T. YOSHIMASA, Shingata Corona Virus Kansenshô to Hô no Yakuwari, *Hôgaku-Kyôshitsu*, nº 486 (2021), p. 19). Les questions-réponses élaborées par le ministère de la Justice semble aller dans le même sens (https://www.moj.go.jp/MINJI/minji07_00050.html, Q3).

[30] Haute Cour, 6 déc. 1944, *Minshû*, vol. 23, p. 613.

[31] T. TANIGUCHI et K. IGARASHI (dir.), *Shinban Chûshaku Minpô (13)*, Yûhikaku, 1996, pp. 69 et s.

rigoureuse notamment dans l'appréciation des conditions de son application. En effet, la Cour suprême n'en a fait application dans aucun des 14 cas dans lesquels elle s'était saisie de la question[32]. Cette réticence affichée ainsi que la mise à l'écart de la théorie lors de la réforme de 2017[33] pourraient être vus comme une affirmation du principe d'intangibilité des contrats, qui exige le respect strict de la parole donnée. Aussi vrai qu'une telle observation pourrait l'être, il se peut aussi qu'un tel état des choses soit l'écho des pratiques contractuelles « à la japonaise » qui laissent suffisamment place aux parties de modifier leur engagement de manière autonome en fonction de l'évolution de la situation, au lieu de faire appel à la théorie du changement de circonstances, qui n'en leurs reste pas moins disponible en tant qu'ultime recours[34]. En effet, il est fréquent qu'une clause dite de « concertation de bonne foi » soit stipulée dans les contrats conclus entre les entreprises japonaises, alors que les clauses dites « d'intégralité » ne sont que rarement utilisées.

## II. La force majeure dans le contrat

Il n'est pas rare que les parties insèrent dans leurs contrats des clauses de force majeure ou de hardship, pour gérer l'imprévu. Les clauses de responsabilité, prévoyant les conditions ou les conséquences de la mise en jeu de la responsabilité du débiteur, peuvent aussi être stipulées. Les parties peuvent ainsi, par voie contractuelle, modeler les règles législatives ou jurisprudentielles susvisées.

### 1. Les clauses de force majeure ou de *hardship*

Les clauses de force majeure ont pour objet d'envisager les conséquences de la survenance d'un évènement de force majeure en cours d'exécution du contrat, tandis que les clauses de *hardship* visent le déséquilibre contractuel en raison de l'évolution de la situation.

#### A. Les clauses de force majeure

Les clauses de force majeure précisent en principe les conditions et les effets de la force majeure. Par exemple, dans le modèle des conditions générales des contrats d'entreprise de construction élaboré par le Conseil National de Construction, la force majeure est définie comme « un évènement naturel ou artificiel comme les calamités naturelles qui ne peut être imputé ni au maître d'ouvrage ni à l'entrepreneur »[35]. Ledit modèle contient certaines clauses-types concernant les effets de la force majeure, comme la prise en charge des dommages sur les travaux déjà effectués, les matériaux ou les machines sur le lieu des travaux causés par la survenance d'un évènement de force majeure[36], ou le report du

[32] L'arrêt le plus récent portait sur le sort des privilèges réservés aux membres d'un club de golf, lorsque le club a dû effectuer de grands travaux de réfection suite à l'effondrement du talus sur le terrain. Le club soutenait que les privilèges des demandeurs, qui ont refusé de payer un supplément, n'ont plus lieu d'être, en application de la théorie de changement de circonstances. Toutefois, l'arrêt a rejeté l'argument du club estimant que l'effondrement du talus n'était pas imprévisible pour le club et lui était donc imputable (Cour suprême, 1 juill. 1997, *Minshû*, vol. 51, nº 6, p. 2452).

[33] Lors des travaux préparatoires de la réforme de 2017, l'introduction de cette théorie dans le Code civil a été débattue au sein de la Commission de Législation, dont le rapport intermédiaire proposait de continuer d'examiner la possibilité de son introduction (*Chûkan-shian*, nº 32).

[34] V. l'analyse de H. ISHIKAWA, Keiyaku jô no Kiki to Jijôhenkô no Hôri, Tôdaï-Shaken et al. (dir.), *Kiki Taïô no Shakaï-Kagaku*, vol. 2, Tôdai-Shuppankaï, 2019, pp. 38 et s.

[35] Art. 21 du modèle des conditions générales des contrats d'entreprise de construction pour les grands travaux (https://www.mlit.go.jp/totikensangyo/const/content/001499465.pdf); art. 14 du modèle des conditions générales des contrats d'entreprise de construction pour les petits travaux (https://www.mlit.go.jp/totikensangyo/const/content/001331104.pdf).

[36] Selon le modèle pour les grands travaux, les dommages considérés par les parties comme étant graves sont pris en charge par le maître d'ouvrage lorsque l'entrepreneur agit avec autant de soin que ne l'aurait fait une personne raisonnable (art. 21, al. 2). Le modèle pour les petits travaux propose le choix entre 3 versions: la première fixe la

délai[37].

Lorsqu'une clause de force majeure est insérée dans le contrat, l'applicabilité et le contenu des règles seront définies par l'interprétation de ladite clause, ce qui sera fait au cas par cas[38]. Le tribunal de district de Tokyo a été amené à se prononcer sur l'interprétation d'une clause de force majeure insérée dans un contrat d'organisation de cérémonie de mariage et du repas de noces. La clause prévoyait que le contrat s'anéantira au cas où la cérémonie ne peut plus être exécutée par suite d'un évènement de force majeure (calamité naturelle, accident par un tiers ou toute autre cause non-imputable à l'organisateur), et que dans ce cas l'organisateur procèdera au remboursement de tous les frais reçus mais pas aux dommages-intérêts. Le couple ayant annulé la cérémonie et le repas en raison de la propagation de la Covid-19 avait invoqué cette clause pour demander le remboursement des sommes payés. La demande a été débouté, le tribunal ayant considéré que la situation ne constituait pas un cas de force majeure, en niant l'impossibilité d'exécution vu les consignes de la préfecture de Tokyo ainsi que la forme de la salle où la cérémonie et le repas étaient prévue d'avoir lieu[39].

**B. Les clauses de *hardship***

Les clauses de *hardship* prévoient les conditions rendant possibles l'adaptation du contrat à l'aune de l'évolution des circonstances qui l'entourent, ainsi que les modalités d'une telle adaptation. Par exemple, le modèle des conditions générales des contrats d'entreprise de construction susvisé prévoit la possibilité pour les parties de demander la modification du prix, si le changement de circonstances, comme l'adoption, la modification ou l'abrogation des lois, ou bien le changement subit de situation économique, qui ne pouvait être prévu, est survenu pendant la durée du contrat, et que le prix est par suite devenu manifestement injuste[40].

**2. Les clauses de responsabilité**

Les clauses de responsabilité peuvent porter non seulement sur les conséquences de la responsabilité, en particulier sur le montant des dommages-intérêts[41], mais aussi sur ses conditions. S'il est fréquent d'insérer dans le contrat une clause exonératoire de responsabilité excluant ou limitant la responsabilité du débiteur, l'inclusion dans le contrat d'une clause excluant toute exonération du débiteur

même règle que celle du modèle pour les grands travaux (art. 14 (A), al. 2); la deuxième laisse aux parties le soin de se concerter sur le montant et la prise en charge des dommages lorsque l'entrepreneur agit avec autant de soin que l'aurait fait une personne raisonnable (art. 14 (B), al. 2); et la troisième prévoit que le dommage est pris en charge par l'entrepreneur (art. 14 (C)).

[37] L'entrepreneur peut demander au maître d'ouvrage la prolongation du délai en invoquant la cause (art. 30, al. 5 du modèle pour les grands travaux; art. 21 du modèle pour les petits travaux). Lorsque la prolongation du délai est admise, la modification du prix pourrait aussi être demandée (art. 31, al. 1 du modèle pour les grands travaux ; art. 22, al. 1 du modèle pour les petits travaux.).

[38] En ce qui concerne l'interprétation de la « force majeure » dans le modèle susvisé, le ministère de l'Aménagement du territoire, de l'Equipement et des Transports a présenté une interprétation suivant laquel les conséquence de la Covid-19 – comme la difficulté de fournir les matériaux ou l'apparition des personnes contaminées – correspondent à une situation de force majeure, sauf si les travaux ne peuvent être entrepris par la faute de l'une des parties (v. par exemple, la communication du 8 avril 2020 (https://www.mlit.go.jp/common/001341802.pdf)). Cette interprétation n'a pas de force obligatoire, mais constitue une référence pour les acteurs du secteur.

[39] Tribunal de district de Tokyo, 27 sept. 2021, *Hanrei-jihô*, nº 2534, p. 70. Le tribunal a aussi exclu l'application de la théorie de changement de circonstances.

[40] Art. 31, al. 1, 5 du modèle pour les grands travaux; art. 22, al. 1, 3 du modèle pour les petits travaux.

[41] Les parties peuvent fixer, par avance, le montant des dommages-intérêts qu'entraînera l'inexécution (art. 420, al. 1). Cependant, les clauses prévoyant la somme que le consommateur paiera à titre des dommages-intérêts en cas de résolution du contrat n'est valable que partiellement, la partie dépassant le montant du dommage moyen que devrait subir le professionnel étant nulle. De même, les clauses fixant le taux d'intérêt compensatoire en cas d'inexécution d'une obligation pécuniaire est nulles pour la partie dépassant 14.6% (art. 9 de la loi sur le contrat de consommation).

est aussi envisageable.

**A. Les clauses exonératoires de responsabilité**

Les clauses exonératoires de responsabilité sont en principe valables. Il s'agit ici d'une simple application de la liberté contractuelle qui permet aux parties de déterminer librement le contenu de leur contrat (art. 521, al. 2). Toutefois, en plus de l'éventuelle intervention de l'article 90 du Code civil, prévoyant la nullité des actes juridiques contraire à l'ordre public ou aux bonnes mœurs, la validité desdites clauses est soumise à un nombre de conditions en matière du contrat de consommation. De telles clauses peuvent aussi être réputées non consenties dans les contrats d'adhésion.

En ce qui concerne le contrat de consommation, la loi sur le contrat de consommation prévoit la nullité des clauses exonérant le professionnel de toute responsabilité contractuelle ou délictuelle, ainsi que celles exonérant le professionnel dolosif ou gravement fautif d'une partie de sa responsabilité contractuelle ou délictuelle (art. 8, al. 1)[42].

En ce qui concerne le contrat d'adhésion[43], les clauses insérées dans les conditions générales[44] qui limitent le droit de l'adhérant ou qui aggravent ses obligations seront réputés non consenties lorsqu'elles portent atteinte unilatéralement à l'intérêt de celle-ci en violant le principe de bonne foi, compte tenu des modalités et des circonstances de la transaction standardisée et du « sens commun (*shakaï-tsûnen*) des transaction » (art. 548-2, al. 2 du Code civil). Dans ces conditions, les clauses exonérant de sa responsabilité la partie qui a élaboré les conditions générales et en faveur de qui celles-ci avaient été stipulées peuvent être écartées et ne pas être inclues dans le contenu du contrat.

**B. Les clauses excluant l'exonération du débiteur**

Il se peut que le contrat prévoie la prise en charge de tout risque par le débiteur. Celui-ci ne pourrait pas alors être dispensé de son obligation même en cas de force majeure. Si cette clause est a priori valable en principe, il n'en reste pas moins qu'elle peut être annulée en l'application de l'article 90 du Code civil ou en application de l'article 10 de la loi sur le contrat de consommation. Ce dernier prévoit à cet égard qu'est nulle toute clause limitant le droit du consommateur ou aggravant ses obligations par rapport à ceux prévus par les dispositions supplétives du Code civil, du Code commercial ou toute autre loi, en portant unilatéralement atteinte à l'intérêt du consommateur en violant le principe de bonne foi. De même, de telles clauses peuvent être réputées non consenties en matière du contrat d'adhésion, en application de l'article 548-2, al. 2 du Code civil.

## Conclusion

A la lumière de ce qui vient d'être exposé, on pourrait soutenir que, dans le système juridique japonais, ce n'est pas la notion de force majeure en soi qui délimite le droit à l'exécution en nature du créancier mais celle d'impossibilité. De même, c'est la notion de cause non-imputable au débiteur qui exonère celui-ci du paiement des dommages-intérêts en cas d'inexécution. De surcroît, l'appréciation de l'impossibilité ou de la cause non-imputable au débiteur sera effectutée au cas par cas en tenant compte du contrat ou du « sens commun (*shakaï-tsûnen*) des transaction ». Tout cela rend difficile voire même superflu de définir la notion de force majeure.

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[42] Les clauses qui font renoncer aux consommateurs le droit de résolution sont aussi nulles (art. 8-2 de la loi).

[43] Pour être précis, il s'agit d'un accord portant sur des transactions standardisées (*teikei-torihiki*), c'est-à-dire une transaction passée entre une personne déterminée et un grand nombre de personnes non déterminées dont l'uniformité du tout ou d'une partie de son contenu est raisonnable pour les parties (art. 548-2, al. 1).

[44] Pour être précis, il s'agit d'un ensemble des clauses préparées par la personne déterminée pour être intégrées dans le contenu du contrat portant sur des transaction standardisées (art. 548-2, al. 1).

L'insuffisance de clarté au tour de la notion de force majeur pourrait conduire les parties à préciser par eux-mêmes les conditions et les conséquences de sa mise en compte. Cependant, comme il n'est possible ni d'énumérer tous les évènements qui configurent la force majeure, ni de prévoir toutes les mesures pour faire face à un évènement inattendu, ce serait finalement au juge d'interpréter le contrat pour trouver la solution adéquate lorsque les parties ne peuvent pas se mettre d'accord à l'issue d'une éventuelle renégociation de leurs obligations réciproques.

# ACCESS TO JAPANESE CIVIL JUSTICE: FROM A FINANCIAL VIEWPOINT

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## 1. INTRODUCTION

This work will examine the basic structure of cost allocation in Japanese civil litigations after minimal introduction of the country and its civil justice system. To the outside eye, the Japanese system appears be quite complicated. The complexity is partly the result of the unique development of modern Japanese law in the 150 years since the end of Shogunate era.

In short, Japan's civil law system transformed substantially over the course of Meiji Restoration as part of the country's drastic social and political modernization in late 19th century. During this time, Japan's original code of civil procedure was enacted in 1890. It was modeled after the German code. While Japan is regarded as a civil law county today, it was extensively impacted after World War II by the United States, a common law country. Since that time, the legal principles and approaches underlying the U.S. system have had significant influence on the Japanese legal and judicial system. As a result, it turned the present-day Japanese legal system into a mixed system incorporating both civil law and common law principles. Moreover, it should not be forgotten Japan regularly imports and customizes legal and judicial resources from abroad into Japanese culture, society, and the law. Sometimes you might find difficulty in identifying from where such customized resources originally came.

In this work, I would like to untangle Japan's civil dispute resolution system as plainly as possible. Also, it is beneficial to examine the aspects of the civil justice system that raise financial obstacles to accessing justice.

### 1.1. BASIC PROFILE OF THE COUNTRY

Japan, which has a population of approximately 125 million, consists of some 7,000 islands located in the Far East. Only 416 of those islands are inhabited with the vast majority of people living on the four main islands: Hokkaido, Honshu, Shikoku and Kyushu. In fact, more than half of Japan's population is concentrated in three major metropolitan areas in Honshu—Tokyo, Osaka, Nagoya and their surrounding suburbs.

Once known as the most prosperous economy on the earth, Japan has experienced prolonged economic stagnancy for over 20 years. In 2020, the average annual salary paid by private companies was around ¥4.33 million (roughly equal to €33,300), according to National Tax Agency.[1]

### 1.2. LEGAL AND JUDICIAL SYSTEM

#### 1.2.1. Constitution and Judicial System

Under the Constitution of Japan enacted in 1947, Japan maintains a single, pyramidal judicial system. The Constitution does not allow the establishment of special or ad-hoc courts outside the standard court hierarchy. The court system consists of the Supreme Court at the top of the pyramid, 8 High Courts (located in the eight major cities across the country), 50 District Courts as well as Family Courts (both are, in principle, established in each 47 prefectural capital cities and 3 other cities in

[1] https://www.nta.go.jp/publication/statistics/kokuzeicho/minkan2020/pdf/002.pdf.

Hokkaido, the largest prefecture in terms land mass, respectively). There are 438 Summary Courts[2] at the bottom of the pyramid.

With respect to civil and commercial cases, with minimal exceptions, the Summary and District Courts have original jurisdiction dependent on the size of claims. The threshold amount in controversy is ¥1.4 million. Depending on where the case is first adjudicated, the High Courts or District Courts will assume jurisdiction as intermediate appellate courts. Based on the dispute, the Supreme Court or High Courts will sit as the second and final appellate court. Appeals to the Supreme Court are more limited. In 2020, a total of 133,427 new civil lawsuits were brought before District Courts, while Summary Courts received 309,362 new complaints.

### 1.2.2. Legal profession in Japan

Judges and lawyers in Japan are trained through a unified process. Firstly, candidates can seek licensure by either (i) attending a graduate law school, obtaining a juris doctor degree, and take National Legal Examination (NLE), or (ii) take and pass the Preliminary Exam as an alternative to the J.D degree and then take the NLE bar exam. Successful applicants of the NLE bar exam, in principle, must participate in the mandatory national training program and then pass its final exam before receiving an appointment as a judge or registering as an attorney.

Most lower court judges are so-called “career” judges meaning that they work as judges throughout their professional career. Originally assigned as an assistant judge soon after completing the mandatory national training, all lower court judges are appointed to 10-year terms. Nearly automatic and repetitive re-appointments are anticipated until the mandatory 65-year-old retirement age.

Judges are inevitably ordered to move from one court to another (typically different cities) once every few years. The judge hiring and rotation system has largely been left intact, even though customary life-time employment practices in Japanese businesses have been changing. Having said that, one notable exception involves summary court judge appointments. Instead of NLE passers, experienced court clerks are appointed as summary court judge.

Most lawyers in Japan work at small law firms. While there are several major law firms with hundreds of lawyers and the size of such law firms continues to enlarge, the smaller law firms remain the norm. All lawyers must belong to a local bar association and the nationwide Japan Federation of Bar Associations (JFBA). Bar dues are comparatively expensive.

Japan has fewer lawyers per capita than other major countries. Recognizing the issues associated with too few lawyers, Japan increased the number of licensed lawyers from 17,126 in 2000 to 42,164 in 2020. Due to fewer Japanese attending law school and passing the bar exam in recent years though, the pace of this increase has slowed considerably. Some rural areas have critically few lawyers despite the increase in active lawyers over the past two decades. There are still some areas in which you have trouble finding a lawyer around the local courthouses.

## 1.3. CONSTITUTIONAL FRAMEWORK OF ACCESS TO JUSTICE

Article 32 of the Constitution of Japan stipulates that “No person shall be denied the right of access to the courts.” Although it is believed, based on the article, that the Constitution guarantees all people the access to justice both in criminal and civil contexts, the right to financial assistance using public

[2] Some courts have branches, which are usually located in remote areas away from the main court office. Branches are, in legal sense, extensions of the main court office. For example, the main office of the Tokyo District Court is located in Chiyoda Ward in the center of Tokyo. The same district courts maintain its Tachikawa branch office in western suburban area of Tokyo. They are part of the same court.

funds is written in the Constitution only for the defendants in criminal cases (Art. 37, Sections 2, 3). For civil litigants with financial hardships, the Constitution does not provide assistance. Consequently, whether a civil indigent litigant can receive assistance is established solely by legislative acts, such as the Comprehensive Legal Support Act (CLSA), enacted in 2004. Institutions established by CLSA will be introduced later in Section 3.2 after discussing the relevant civil litigation costs.

## 2. CIVIL LITIGATION COSTS IN JAPANESE COURTS

### 2.1. BASIC STRUCTURE

#### 2.1.1. Applicable rules

Drawing upon the civil law culture established during the Meiji Restoration, Japanese civil litigation is largely regulated by statutory acts and rules including the Code of Civil Procedure (COCP)[3] and Rules of Civil Procedure (ROCP). With respect to costs, the Act on the Costs of Civil Proceedings (ACCP) also has significant importance.

#### 2.1.2. Loser-pay provisions and its scope

Although there has been a long debate, Japan keeps the "American rule" that involves civil litigants bearing the cost of their own attorneys' fees in litigation, regardless of whether they win or lose.

This rule is embedded in Article 61 of the COCP, which states that the losing party in civil litigation shall bear all "court costs" unless the court rules differently in exceptional cases. The scope of "court costs" is specified in Article 2 of the ACCP, and the list is interpreted as an exhaustive listing. In short, court costs are fees associated directly with the court. Any other financial costs incurred by the prevailing litigants cannot be passed onto the losing party. Consistent with the so-called American Rule, the most important item omitted from the list is attorneys' fees.

It is important to distinguish "court costs" from attorney's fees to explore the civil litigation costs or its arguable effects to access to justice of Japanese people. Court costs are narrowly defined and involve only costs in the context of Article 61 of the COCP. As discussed below, winning litigants may claim the reimbursement of such costs from the opponent. Conversely, costs outside of the scope of the statute, basically any money expended by the litigants including lawyers' fees, are not passed onto the opposing party.

As an exception, plaintiffs raising tort or similar claims may allege that the damages to be recovered include the attorney costs because, had it not been for the defendants' tortious conducts, they would have not to attain the lawyer to pursue their cases. To put these costs in context, it is helpful to look in a narrow and broad sense in the sections below.

### 2.2. COSTS IN NARROWER SENSE

#### 2.2.1. Items

As explained above, the expenditures subject to the loser-pay principle are specified in and limited to those listed in Article 2 of the ACCP. Expenditures include court filing fees; litigation-related expenses such as traveling costs of the parties, attorneys or witnesses; expert testimony fees; document preparation costs, and so on. Of note, courts never pay out of pocket expenses, even temporarily, unless litigants have been granted legal aid as described in Section 2.2.3 below. Accordingly, most litigants are required

[3] All references in this article to Code of Civil Procedure of Japan are translated by Masatoshi Kasai, Andrew Thorson, Kym Tamara Bavcevich, and Satoko Niiya, and included as end material in Takaaki Hattori and Dan Fenno Henderson, Civil Procedure in Japan (Yasuhei Taniguchi, Pauline C. Reich, and Hiroto Miyake, eds., 3d ed., 2017.)

to prepay the costs necessary to conduct certain proceedings, such as expert testimony fees, postal expenses, service of process fees, and other document costs. On occasions, the prepayment requirement may stand as a significant financial barrier for access to justice.

On the other hand, Article 2 of the ACCP also specifies calculation methods for each assessable cost. According to this provision, the winning party usually may receive not their actual expenses. Importantly, for most items, this article sets caps and fixes the amount of awardable costs. In short, the amounts awarded are too modest for some winning parties so they may not seriously pursue cost reimbursement claims. There are, still, a few exceptions. One is expert testimony fees, which can be relatively high so that litigants and courts often avoid expert testimony even when some specialized knowledge would be helpful and seem necessary in resolving a case.[4] Another is court filing fees. As explained below, these amounts are miniscule when you bring big claims.

### 2.2.2. Filing fees

All plaintiffs must pay initial filing fees when submitting a civil complaint in accordance with Article 3 of the ACPP. Roughly, the filing fees correlate with the asserted claims. The filing fees for a civil lawsuit seeking ¥130,000 (approx. €1,000[5]) in damages is ¥2,000 (approx. €15). For a lawsuit seeking ¥1,300,000 (approx. €10,000) in damages, the filing fee is ¥11,000 (approx. €84). For a lawsuit seeking ¥13,000,000 (approx. €100,000) in damages, the filing fee is ¥59,000 (approx. €452) and for ¥130,000,000 (approx. €1,000,000) in damages, the filing fee is ¥410,000 (approx. €3,141). For litigants without sufficient resources, it can be serious concern for those bringing high value claims even if you can force the defendant to reimburse the filing fees at the successful conclusion of the litigation.

Of note, in the event that it is extremely difficult to value claims in the litigation, the filing fees may be set at ¥1,600,000 (approx. €12,307). By way of illustration, shareholder derivative suits are deemed to be such cases in Article 847-4, Section 1 of Companies Act.

### 2.2.3. Legal Aid under CCOP

Art. 82 of the CCOP allows Japanese courts to assist indigent civil litigants to a degree. For those who do not possess the means to pay costs necessary for preparation and conduct of a lawsuit (including filing fees), or for those who will incur extreme financial hardship by paying such costs, the court may render a ruling to grant aid in litigation so long as it cannot be stated that there is no prospect of success in the suit. With these rulings, a court may defer filing fees and other costs until the conclusion of the case[6] when the court determines who will bear the costs. At that point, the court can assess costs.

## 3. COSTS IN BROADER SENSE-ATTONEYS' FEE

[4] Partly because of the costs, it is not uncommon to seek less expensive alternatives to acquiring expertise. One illustration is so-called "private expert testimony," which involves a litigant privately asking experts for specialized information in writing. The party then submits this to the court as documentary evidence. Another approach is engaging a specialist according to Art.82-2 of the CCOP. Parties basically will not pay a specialist, such as medical doctor, for *Senmon-Iin* fees except for traveling expense etc., on the ground that the expert is hired as adjunct court employees independently for specific cases. Their salaries are covered by general court budget. Because of the approach, *Senmon-Iin* has become common today. At the same time, what such specialists can do or cannot do compared to traditional expert testimony has been somewhat unclear.

[5] Here and below, the formula of €1 equals ¥130 is used, roughly reflecting the exchange rate when first drafted in Autumn 2021.

[6] To be correct, the grant must be given in each instance. In other word, if you get aid in the first instance of the case, you have to apply for the aid in appellate stages again.

## 3.1. BASICS

### 3.1.1. Framework

Court costs assessed to the losing parties in the context of Art. 61 of the CCOP are limited to what is delineated in Art. 2 of the ACCP. As detailed above, attorneys' fees and the other litigants' expenses omitted from the list are borne by respective litigants regardless of the result of the case.

This raises the question about how the lawyer's fee in each case will be determined. In Japan, attorneys' fees are a matter of negotiation and contract between a litigant and the lawyer. Corporate lawyers in larger firms may prefer hourly charges. Attorneys at smaller firms may charge on an hourly or per case basis. Contingency fee arrangements are not prohibited.

However, some footnotes about attorneys' fees are useful. Firstly, there were significant changes in 2004 to the attorney fee structure. Until then, attorney fee charges were more strictly controlled. In fact, both the JFBA and local bar associations had specific standards and fee schedules. Secondly, although these standards and fee schedules were abolished, they still remain influential on the practice of law even today, more than decade after the liberalization of attorneys' fees.[7] Additionally, anecdotal evidence shows that Japanese lawyers will take their clients' economic status into account when setting fees.

### 3.1.2. Level of Fees

Without an in-depth study, it is impossible how much Japanese lawyers charge their clients. Even with such a study, it would be difficult to assess because each case and client differ. However, it is helpful to highlight the information provided by the Daini Tokyo Bar Association[8] on its website,[9] as non-binding standards for lawyers providing legal advice through its legal consultation centers.

According to the standards, attorney fee amounts progressively correlate to the significance of the case. Lawyers essentially receive money from their clients at two point in time. The first payment (2-8% of case value) occurs at the point of assignment (mobilization costs) and the second payment (4-16% of the clients' award) comes from what the client is awarded at the conclusion of the case (contingent reward). For example, if a plaintiff claims ¥10,000,000 and ultimately receives ¥5,000,000 from the defendant, the plaintiff's lawyer may ask for ¥590,000 up-front as mobilization costs and ¥680,000 as a contingent reward. Interestingly, these numbers appear to be essentially mirror the JFBA attorney fee standards that were repealed in 2004.

### 3.1.3. Lawyer Involvement Rate and *Pro Se* litigation

It is important to note that Japanese courts generally allow *pro se* litigants. According to the Supreme Court of Japan[10], among all new civil lawsuits filed in district courts in 2020, 44.5% of cases involved lawyers representing both sides. Only 47.3% of defendants hired counsel to represent them. In contrast, 89.1% of plaintiffs hired lawyers. In recent years, the rate of lawyer involvement in civil litigation has been increasing.

## 3.2. CIVIL LEGAL AID AND JLSC (HOU-TERRACE)

### 3.2.1. Basics

Pursuant to the Comprehensive Legal Support Act (CLSA) enacted in 2004, the country established

[7] In 2008, albeit in a limited sense, the JFBA surveyed lawyers and about attorneys' fees https://www.nichibenren.or.jp/legal_advice/cost/legal_aid.html.
[8] One of the three local bar associations in Tokyo metropolitan area.
[9] https://niben.jp/service/soudan/guide/hiyou.html.
[10] https://www.courts.go.jp/app/files/toukei/029/012029.pdf

the Japan Legal Support Center (JLSC), also known by its nickname, Hou-Terrace. The JLSC was established as an administrative agency. Sponsored and supervised by the government, more specifically the Ministry of Justice (MOJ), JLSC's mission is to provide for 'comprehensive' or one-stop legal support to the public.

As one of CLSA's goals, the JLSC was expected to function as a hub of projects related to the access to justice. Previously, such responsibilities had been dispersed among separate bodies including the JFBA, local bar associations, MOJ, local governments, and others. From its inception, the JLSC assumed the responsibility of running the civil legal aid component of the Japan Legal Aid Association, which was dissolved and integrated into the JLSC.

Aside from civil legal aid, the JLSC operates several other projects. By way of illustration, the JLSC opens and operates a call center intended to inform people who encounter legal trouble 'where to go' to seek assistance (e.g.: lawyers, certain local or national administrative offices, and/or courts[11]), establishes law offices in areas where limited numbers of lawyers available, and dispatches lawyers to work at such offices.

### 3.2.2. Civil Legal Aid run by JLSC

JLSC's civil legal aid operation, which differs from legal aid in the sense described in Art. 82 of the CCOP introduced above (Section 2.2.3), offers qualifying individuals the opportunity to obtain free legal consultation (up to three times per case) from lawyers and may provide some attorneys' fees assistance for court proceedings.[12] Money paid by the JLSC for attorneys' fees will have to be reimbursed later unless the exemption is granted.[13]

Applicants for JLSC assistance need to meet three requirements: financial need, measurable likelihood of success, and compatibility with the JLSC's mission. The financial need requirement involves monthly income and available assets. These must be less than established threshold amounts,[14] which fluctuate depending on number of household members, ownership of property (paying rent versus home mortgage payments), and whether the applicants reside in large cities like Tokyo. By way of illustration, an applicant living in a rented apartment with partner and a child (3 persons) in Tokyo, may be eligible for JLSC assistance if their monthly income does not exceed the sum total of ¥299,200 (approx. €2,290) and their monthly rent or ¥85,000 (approx. €651) if the rent exceeds the amount, and, if they do not have more than ¥2,700,000 (approx. €20,682) in liquid assets.

The likelihood of success requirement means the legal aid could be granted unless it cannot be stated that there is no prospect of success on the merits. This standard appears to be similar to Art. 82 of the CCOP, which establishes the legal aid requirement. However, the JLSC, and not the courts, will make a decision about the availability of legal aid. As a result, the considerations and practical application may differ between the courts and the JLSC. The compatibility with the JLSC's mission requirement is a kind of "catch-all" requirement to prevent from abusive uses.

Of note, JLSC has its own attorney fee table, which generally specifies smaller amounts than what lawyers would receive in similar cases if the JLSC was not involved. In essence, recipients of JLSC civil legal aid can expect to pay less to their lawyers than when finding lawyers on their own. In 2020, the

[11] Japanese courts generally allow non-lawyer persons to conduct proceedings by themselves.
[12] Certain types of non-judicial proceedings are also covered.
[13] The requirements and limitations of the exemption from reimbursement are stricter than those of the initial support.
[14] Victims from major natural disasters designated by Cabinet Orders are exempted from financial requirements.

JLSC reported in its annual report that 109,106 people were granted civil legal aid.[15]

### 3.3. LIMITED FEE SHIFTING IN TORT CASES

Even though Japan does not have any explicit fee-shifting clauses in its codes, Japanese case law involving torts has developed a limited practice of awarding lawyer's fees to tort victims when the plaintiff victim prevails on the merits. More specifically, Supreme Court precedents[16] have established that courts may award tort victims compensation for their lawyers' fees as a part of the damages caused by the defendants. Courts typically order losing defendants to pay 10-15% of the awarded damages for the attorneys' fees. The damages can include treatment costs, lost earnings, pain and sufferings, and other relevant damages. The courts can calculate fee awards regardless of how much the plaintiffs actually pay their legal counsel.

The cases in which Japanese courts have awarded fees has been limited to the context of torts. In sum, where plaintiffs' claims are based on other areas of law other than torts, such as seeking performance of contractual obligations, they may not benefit from the practice of the courts.

### 3.4. INSURANCE TO COVER LEGAL COSTS

Since 2000, based on agreements with the JFBA, some insurance companies began to sell a kind of insurance policies covering the insureds' lawyers' costs. Now such insurance has become so popular that companies sold 28,073,201 policies in 2019[17]. While most of such policies are sold as incidentals to auto insurance,[18] a greater variety of products, including independent insurance policies designed solely to cover legal costs, have emerged. One feature of Japan's new legal fees insurance includes the JFBA's lawyer referral service through its Legal Access Center (LAC). Some insurance policies prohibit the insured from finding their lawyer on their own, while others are more flexible.

Now, the significance of legal insurance is quite high. It is reported that around 40,000 cases (40,879 in 2019) per year are handled by the LAC, and more than ¥300,000,000 were paid as benefits in 2016.[19] Of note, there has been some criticism that the popularization of legal insurance might cause redundant litigation or wasteful use of judicial resources[20].

## 4. CLAIM AGGREGATION & NEW CONSUMER LAW ACT

### 4.1. CONVENTIONAL AGGREGATION

For those seeking to file a lawsuit, there are other ways to cut or disperse legal costs if they fall into an aggrieved group of similarly situated people. By aggregating the claims of those who are similarly situated into a single suit, it is possible to achieve merit of scale in various aspects such as saving duplicative work or simply sharing the costs among all.

Identical to most civil law countries, Japan does not have American-style class action system. Claim aggregation though has been one of the common ways of overcoming financial problems for some claimants, typically mass tort victims. In many cases in Japan, multiple claimants are supported by a group of lawyers, called *Bengo-dan*. Even though *Bengo-dan* lawyers often work for the claimants on

[15] https://www.houterasu.or.jp/houterasu_gaiyou/kouhyou_jikou/jouhoukoukai/hyoka_iinkai.files/2020gyoumujisseki siryou.pdf
[16] Supreme Court, Judgement on 1969/02/27, *Minshu,* 23-2-441.
[17] https://www.nichibenren.or.jp/activity/resolution/lac.html
[18] LAC Kenkyukai (Ed.), *Kenri-Hogo-Hoken-no-Subete* 52 (Shoji-Houmu, 2017).
[19] Hisashi Nagira, *Bengoshi-Hoken-to-Legal-Access-Center*, Niben Frontier, July 2018 issue, 22.
[20] *Id.,*23.

pro-bono basis, they often need financial resources to, for example, collect information or evidence, or even lobby or appeal to the public about their allegations so as to make their often not-so-strong claims more persuasive for the courts. It has been common that claimants and their lawyers solicit donations to cover costs for mass tort litigation on streets or in public squares.

In recent years, tort victims and their lawyers have begun called for donations in cyberspace. It is not hard to locate plaintiff groups and *Bengo-dan* solicitating donations for litigation-related costs on their own websites or crowd-funding platforms.

### 4.2. New Consumer law ACT

Enacted in 2013, the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers allows non-governmental consumer agencies, which meet the requirements of the Act and certified by Prime Minister, to bring pedal actions for declaratory judgment on behalf of consumers who allegedly have certain kinds of similar or identical claims. If the agency wins the judgment declaring that the defendants have common obligations to the claimants, then each claimant may ask and authorize the agency to pursue their individual claims through further proceedings. Only those who authorize the agency are bound by the judgment it won.

In terms of claim aggregation, the above scheme might enable the claimants to achieve the merits of scale by saving duplicative work and sharing the costs. On the other hand, the Act does not fully prohibit the agencies from charging the costs and fees ex-post to plaintiffs pursuing their claims. Interestingly, the first judgment[21] involving the consumer agencies' action brought pursuant to the Act that found the defendant liable to the claimants, ruled that the defendants should incur the costs and fees that the consumers would be charged by the agency. This was likely grounded in the same theory that has enabled successful tort plaintiffs to claim attorneys' costs from losing defendants as part of the damages, as referred in Section 3.3. above.

In October 2021, the Consumer Affairs Agency's review committee of the Act released a report,[22] in which multiple ideas were raised with relation to enhancing the effectiveness of the scheme. One idea is allowing certified agencies to pursue a greater variety of consumer claims including, for example, compensation for pain and suffering. Whatever the future result may be, the report will fuel intense discussions about possible amendments of the Act in coming years[23].

## 5. CLOSING THOUGHTS

### 5.1. HOW COSTLY IS LITIGATING IN JAPAN?

While the overall financial costs associated with litigating before Japanese courts do not seem

[21] The first judgment based on the Act (Tokyo District Court, Judgement, 2020/03/06, Consumer Law News, 124, 308) involved a case where the defendant, a private medical school, had discriminated against female applicants with respect to its entrance exam for years and the plaintiff, a consumer agency, sued for damages on behalf of past female applicants for the examination fees. Two subsequent judgments by district courts (Saitama District Court, Judgment, 2021/02/26, LEX/DB 25590956, Tokyo District Court, Judgement, 2021/09/17, LEX/DB 25571863) also granted similar cost and fee claims.

[22] https://www.caa.go.jp/policies/policy/consumer_system/meeting_materials/review_meeting_003/assets/consumer_system_cms201_211008_01.pdf.

[23] In May 2022, Japanese Diet passed the law amending the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (Act No. 59, 2022). The amended Act will enable the agencies to pursue pain and sufferings on behalf of consumers when they are claimed together with economic losses or caused intentionally by defendants, make them easier to negotiate settlement with defendants in earlier stages of the proceedings, oblige defendant businesses to notify the affected consumers individually, and so on. The amended Act are scheduled to be put in effect, in installments, within year 2023.

significantly higher than other countries, at least in those countries with similar levels of living standards, this does not mean that Japan's system does not have problems related to litigation costs. According to a 2016 survey of civil litigants in district courts,[24] 41.5% felt that the overall litigation cost was significantly or relatively expensive, while 7.6% said that it was significantly or relatively low. 31.2% of respondent answered neither. From these numbers, it is difficult to draw concrete conclusions. However, there are a sizable number of people in Japan without adequate financial resources to litigate. The survey respondents managed to access to the court system, but many felt that litigation costs were still expensive. It can be assumed that there is a sizable number of citizens who abandon their plans of bringing actionable claims before the courts based on lack of financial resources.

### 5.2. FINANCIAL OBSTACLES AS PART OF THE TANGLED WEB

The problems related to access to civil justice in Japan are complex such that you cannot easily to separate the financial challenges from many of the other obstacles. For example, the shortage of lawyers – particularly in rural areas – has been regarded as one of the major challenges that Japan needs to address in order to guarantee universal access to legal services. It has one reason why the citizenry has been forced to allow such a high degree of *pro se* litigation despite the fact some civil law countries adopts, even partly, a policy mandating that litigants use licensed lawyers in litigation. The lack of lawyers, however, may be connected to financial or economic aspects. More specifically, Japan's attempt to increase lawyers throughout the country as mentioned earlier (Section 1.2.2.) has not been fully successful, possibly, partly because there was not sufficient demand to populate lawyer offices in rural areas on a semipermanent basis. In turn, it was because these areas are not so economically prosperous that the residents are often not so wealthy to afford attaining lawyers, even when they face potentially serious legal disputes.

Also, informational barriers to litigation might be difficult to separate from financial ones. According to the survey mentioned above,[25] 41.8% of all respondents answered that the cost of their lawsuits had been highly unpredictable. Uncertainty of costs might be as problematic as the expensiveness of the litigation. When both obstacles exist, it would be almost impossible to detect which factor is a bigger obstacle. Above all, in Japan and possibly in other areas of the world, access to civil justice need to be discussed and dealt with holistically. Without question, financial obstacles to the civil justice system pose dangers to the citizenry[26].

### 5.3. DIGITALIZATION AND FUTURE

After the discussion in the midst of pandemic, in May 2022[27], the law amending COCP[28] has finally

[24] Minji-Sosho-Seido-Kenkyu-kai (Ed.), 2016-nen Minji-Sosho-Riyousha-Chousa, (Shouji-Houmu, 2017), 244.
[25] *Id*., 243.
[26] SLAPP, as discussed by Prof. Hess in Asuncion, is to some extent problematic for access to justice also in Japan. You may find a book by a journarist, partly based on his own troubling experience as a defendant in a defamation suit he alledges SLAPP (Hiromichi Torigaya, SLAPP *Sosho-Toha-Nanika* (What Is SLAPP), Gendai Jimbunsha (2015)) and a few articles by law scholars on the topic. These introduce tens of past cases possibly classified as SLAPP in Japan. Additionally, as a timely matter, a well-known religious group is now called out by some lawyers as filing SLAPP-like litigations against its ex-believers and their supporters who criticize it for economic exploitations of its believers and their families. *See,* https://www.tokyo-np.co.jp/article/211488. However, there has not been realistic movement toward making acceptable definition of SLAPP or specific regulation to deter SLAPPs, so far. To note, Japanese law is in trend toward more strict prohibition of defamation or insulting comments on others. It may conflict with potential regulation of SLAPP, which some may believe prevent victims of insultation from seeking insulters' responsibilities.
[27] It is after original version of this report was submitted.
[28] Act No. 48, 2022.

been passed. The amendment is mainly intended to the digital transformation of civil litigation proceedings in various aspects. Particularly it has three pillars, 'e-filing', 'e-case management', and 'e-courts'. Roughly, e-filing means enabling electric or on-line submission[29] and sharing of documents and other materials, e-case management means implementation of digital case dockets and some other facilities such as on-line notification from/to the courts, and e-courts basically stands for more flexible use of teleconference or videoconferences as way of holding oral proceedings.

While it cannot be said what exactly will happen under the new law before the full rollout, planned within 4 years, at least two issues related to access have been raised. One is digital divide. Some, particularly economically underprivileged people might be blocked from justice because of not having essential tools to be involved in digitalized proceedings, such as PCs or quiet places with stable internet connection. It could be more serious challenge especially if, in near future, online involvement will become responsibility, not right, of lay people[30], although the amended COCP, so far, does not take such position. It only mandates lawyers, in principle, to file and receive documents electrically. Another is, the facilitation of online appearance[31] may lead the lawyers in metropolitan areas to represent clients in remote areas more frequently. While it could be an upside of the reform with respect to access to justice, other side of the coin is it might cut down already limited demand of local law offices further.

[29] As a matter of fact, electrical documental application for courts had been valid since the former amendment of COCP in 2014, which in principle set up, in Article 132-10, documental application can be made electrically according to the rules promulgated by Supreme Court. The aftermath was, however, with few exceptions, little or no electrical filing have been used for more than 15 years. At last, in April 2022, Supreme Court released working platform for document submission via internet, *mints*, *Minji-Saibann-Shorui-Denshi-Teishutu-System*. Lawyers with *mints* accounts can share variety of documents with courts and opposite parties' lawyers, only when the case is before the courts designated by Supreme Court and the lawyers of both sides are consent to use *mints*. Designated courts are increasing. *See*, the following *mints* website: https://www.courts.go.jp/saiban/online/mints/index.html.

[30] Both Houses of the Diet accompanied with the amendment resolutions (House of Representatives (*Shugiin)*: https://www.shugiin.go.jp/internet/itdb_rchome.nsf/html/rchome/Futai/houmu43F98F291A2C23594925882B002FF1D9.htm., House of Councilors *(Sangiin)*:
https://www.sangiin.go.jp/japanese/gianjoho/ketsugi/208/f065_051701.pdf.) including solicitation to related actors, in their collaboration, for establishing effective supports for lay litigants to utilize digitalized proceedings.

[31] It has been believed at least one party must be present face-to-face, to validly hold oral proceedings, even when they are closed, for preparation for argument proceedings, which are commonly held before formal oral arguments and/or witness examination at open court. The amended COCP authorizes, in Article 170 Section 3, courts to allow both parties to join above-mentioned, casual proceedings for preparation, as well as in Section 1 of Article 87-2 to appear formal oral proceedings, through videoconference screen, when the courts determine proper (put differently, without specific prerequisites).

# CONTRACTUALISATION OF CIVIL LITIGATION
## Current Situation of Japanese Law

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## 1. Background

Before discussing the current regulation of Japanese law concerning parties' agreement dealing with procedural matters, it would be helpful for foreign readers to have some basic overview of the historical background of Japanese law of civil procedure.

Until the second half of the 19th century, Japan had its own legal system which, though influenced strongly by Chinese law at its origin in the 8th century, developed with minimal external influence up to the era of the Tokugawa Shogunate (1603-1868). The question of how far this traditional Japanese system was different from the European system is still a subject of debate. For the purpose of this report, however, it would be sufficient to note the following points. (i) One of the tasks of the new imperial government, which succeeded the Shogunate in 1868, was to achieve equal political footing with the western powers, especially by eliminating unequal clauses (e.g., clause of extraterritoriality) in treaties concluded by its predecessor. This task made it necessary for the Japanese government to persuade European diplomats that Japan had a legal system in conformity with the "principles received by Western Nations". Thus, the major codes, civil and criminal, substantive and procedural, had to be drafted following some of the latest French or German example. (ii) Most legal technical terms and concepts now familiar to Japanese lawyers were products of this complete reception of the European legal system. Many new words were then created to translate legal concepts which had no equivalents in traditional Japanese language. (iii) Correspondingly, the conventional legal education system, if such had ever existed, was replaced by newly founded national and private universities whose professors were at first foreign scholars, and later some privileged Japanese educated at European universities. Therefore, put briefly, the legal system of Western countries was transplanted to modern Japan through a top-down, rather than a bottom-up process.

In the case of the law of civil procedure, it was the German Code of Civil Procedure of 1877 (*Civilprozessordnung*: CPO), the newest civil procedure code in Europe at the time, that provided the model. A Prussian lawyer Herrmann Techow[1] was asked to make a draft based on the German Code, which was submitted in 1886. The draft was discussed and modified in a commission composed of Japanese officials and foreign experts including a German lawyer Albert Mosse[2] and the first modern civil procedure law in Japan was enacted in 1890. It should be added that after the enactment of the Code, German civil procedure doctrine was eagerly referred to for its interpretation. As a result, the Japanese civil procedure system was modelled on the German one, both in its legal institutions and in its basic terminology.

Although the Civil Procedure Code of 1890 was comprehensively revised in 1926 and amended partially after World War II to introduce some common law features such as cross-examination of

[1] Eduard Herrmann Robert Techow (1838-1909). He stayed in Japan from 1884-86.
[2] Albert Mosse (1864-1925). He stayed in Japan from 1886-90.

witnesses, its basic framework has been maintained and was incorporated into the current Code of Civil Procedure (hereafter: CCP), which was enacted in 1996[3].

## 2. OVERVIEW OF CURRENT REGULATION CONCERNING PROCEDURAL CONTRACTS

### 2.1. PROVISIONS OF CODE OF CIVIL PROCEDURE

There is no explicit provision in CCP stipulating in a general way as to the permissibility of agreements on procedural matters, the conditions required or the effect of such agreements. However, CCP includes several articles providing for agreements related to specific procedural matters, namely agreements on jurisdiction (art. 3-7 and art. 11), contracts on the manner of providing security (art. 76), contracts on substitution of security (art. 80), agreements on change of initial court date for oral argument or preparatory proceedings (art. 93 (3)), settlements (art. 267) and agreements not to appeal to the court of second instance (art. 281)[4] as shown below.

**Article 3-7** (Agreement on Jurisdiction) (1) **Parties may establish, by agreement, the country in which they are permitted to file an action with the courts.**
(2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.

**Article 11**(Agreement on Jurisdiction) (1) **The parties may determine the court of jurisdiction by agreement, but only in the first instance.**
(2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.

**Article 76** (Manner of Providing Security) In providing security, money or securities (including book-entry transfer company bonds, etc. prescribed in Article 129, paragraph (1) of the Act on Book-Entry Transfer of Company Bonds, etc. (Act No. 75 of 2001); the same applies in the following Article) that the court considers appropriate shall be de-posited with an official depository within the territorial jurisdiction of the district court of jurisdiction in the locality of the court that orders the security to be provided, or shall be provided by a specified by the Rules of the Supreme Court; **provided, however, that if the parties have entered into a special contract, such contract prevails.**

**Article 80** (Substitution of Security) At the petition of a person providing the security, the court may issue a ruling ordering the substitution of that security; **provided, however, that this does not preclude other security from being substituted for that security pursuant to a contract.**

**Article 93** (Designation and Change of Court Dates) (1) Court dates are designated by the presiding judge upon petition or sua sponte.

[3] Law No. 109 of 1996. Its English translation is available at: https://www.japaneselawtranslation.go.jp/ja/laws/view/2834.
[4] In addition to these agreements, the Code of Civil Procedure of 1890 admitted agreements to reduce or extend a period (art. 170 (1)) and agreements on stay of proceedings (art. 188 (1)). These provisions were removed by the 1926 amendments.

(2) A court date may be designated for a Sunday or any other general holiday, but only when this is unavoidable.
(3) A change of date for oral arguments or preparatory proceedings is only allowed if there are clear grounds for doing so; **provided, however, that a change of the initial court date is also allowed if agreed upon by the parties.**
(4) Notwithstanding the provisions of the preceding paragraph, a change of date for oral arguments following preparatory proceedings may only be allowed if there are una-voidable grounds for doing so.

**Article 267** (Effect of a Record of Settlement) When a settlement or a waiver or an acknowledgement of a claim is entered in the record, that entry has the same effect as a final and binding judgment.

**Article 281** (Judgments That Are Appealable to the Court of Second Instance) (1) An appeal to the court of second instance may be filed against a final judgment that a district court has entered as the court of first instance, or against a final judgment entered by a summary court; **provided, however, that this does not apply if, after the final judgment is entered, both parties agree not to appeal to the court of second instance, though reserving the right to file a final appeal.**
(2) The provisions of Article 11, paragraphs (2) and (3) apply mutatis mutandis to the agreement as referred to in the preceding paragraph.

In addition to these agreements, arbitration agreement is defined by Arbitration Act[5] (art. 2(1)) along with its condition of validity and procedural effect (art. 13 and art. 14) as indicated below.

**Article 2** (Definitions) (1) The term "Arbitration Agreement" as used in this Act means an agreement to refer the resolution of all or certain civil disputes which have already arisen or which may arise in the future in respect of a certain legal relationship (irrespective of whether contractual or not) to one or more arbitrators, and to accept the award made therefor (hereinafter referred to as an "Arbitral Award").

**Article 13** (Validity of Arbitration Agreement) (1) Except as otherwise provided for in laws and regulations, an Arbitration Agreement shall be effective only when the subject thereof is a civil dispute (excluding disputes of divorce or dissolution of adoptive relation) which can be settled between the parties.
(2)An Arbitration Agreement shall be in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication measures for parties at a distance which provides the recipient with a written record of the communicated content), or other documents.
(3)If a document containing a clause of an Arbitration Agreement is quoted in a contract concluded in writing as constituting part of said contract, such Arbitration Agreement shall be in writing.

[5] Arbitration Act, Law No. 138 of 2003 (English translation is available at: https://www.japaneselawtranslation.go.jp/en/laws/view/2784). This law is based on the UNCITRAL Model Law and with its enactment, Japan became the 45th country to adopt the Model Law. See also M. Kondô et al., *Arbitration Law of Japan*, Shôjihômu, Tokyo 2004 as its English explanation.

(4)If an Arbitration Agreement is made in an electromagnetic record (meaning a record used computerized information processing which is created in electronic form, magnetic form, or any other form that cannot be perceived by the human senses) recording the contents thereof, such Arbitration Agreement shall be in writing.
(5)In an arbitration procedure, if a Written Allegation submitted by either party contains the contents of an Arbitration Agreement, and a Written Allegation submitted in response by the other party does not contain anything to dispute it, such Arbitration Agreement shall be deemed to be made in writing.
(6)In regard to a single contract containing an Arbitration Agreement, even if the clauses of the contract other than that of the Arbitration Agreement are not valid due to nullity, rescission or for any other reasons, the validity of the Arbitration Agreement shall not be impaired automatically.

**Article 14** (Arbitration Agreement and Suit on the Merits) (1) If an action is filed for a civil dispute which is subject to an Arbitration Agreement, the court in charge of the case must dismiss the action without prejudice, upon the petition of the defendant; provided, however, that this shall not apply to the following cases:
(i) if the Arbitration Agreement is not valid due to nullity, rescission or for any other reasons;
(ii) if it is impossible to carry out an arbitration procedure based on an Arbitration Agreement; and
(iii) if said petition was filed after the defendant presented oral arguments on the merits or made statements on the merits in preparatory proceedings.
(2) Even while a suit pertaining to the action set forth in the preceding paragraph is pending in the court, an Arbitral Tribunal may commence or continue the arbitration procedure, and make an Arbitral Award.

As a result of the existence of these explicit provisions, there is no controversy in the academic literature as to the validity of these types of agreements.

It should be also noted that CCP contains some other provisions aiming to respect the common intention of both parties, though not referring to their agreements. This is the case, for example, with the provision for mandatory transfers (art. 19) and for revocation of a decision referring a case to preparatory proceedings (art. 172).

**Article 19** (Mandatory Transfer) (1) **If a party petitions and the adverse party consents, the court of first instance shall transfer the whole or part of litigation to the district court or summary court under that petition**, even if the litigation is subject to its jurisdiction; provided, however, that this does not apply if the transfer would substantially delay litigation proceedings or if the petition is filed after the defendant has presented an oral argument on the merits of the case or entered a statement in preparatory proceedings, and if the petition is not for a transfer from the summary court to the district court of jurisdiction in that locality.

**Article 172** (Revocation of a Judicial Decision to Refer a Case to Preparatory Proceedings) If the court finds it to be appropriate, it may revoke a judicial decision to refer a case to preparatory proceedings, upon petition or sua sponte; **provided, however, that the court shall revoke such a judicial decision if both parties so petition.**

Further, CCP contains a number of provisions requiring the court to hear the opinions of the parties

beforehand when deciding on procedural matters. For example, when the court refer a case to written preparatory proceedings, it needs to hear the parties' opinion in advance (art. 175). Provisions of this type were introduced when the current CCP was enacted in 1996 and show the legislator's consideration to respect parties' intention to a reasonable extent, if it is not binding[6].

## 2.2. PERMISSIBILITY OF PROCEDURAL AGREEMENTS NOT EXPLICITLY PROVIDED FOR BY THE CODE OF CIVIL PROCEDURE

### *2.2.1. Validity of Certain Agreements*

For procedural agreement that are not explicitly provided for in CCP, their permissibility and effect are left to interpretation. The traditional starting point for the discussion was the so-called "prohibition of arbitrary procedure" principle ("*Verbot des Konventionalprozesses*"), according to which all forms of legal proceedings are uniformly defined by law and cannot be arbitrarily changed by the parties for individual cases. A strict interpretation of this principle leads to the conclusion that procedural agreements not provided for in CCP are not permissible at all.

However, this strict position is not supported in Japan today. A classical work on this issue is Professor H. Kaneko's article published in 1935[7], which has since become the prevailing theory in Japan. This article argued that the principle of prohibition of arbitrary procedure is justified in so far as it is necessary to standardise the procedure and prohibit parties from deviating from it in individual cases, so that the civil justice can handle a large number of cases in a smooth and efficient manner. This is why the external course of the proceedings is left to ex officio control of the court (*Amtsbetrieb*), which cannot be bound by parties' agreements. Therefore, agreements related to the external conduct of the proceedings are admitted only to the extent that the law expressly allows them. In contrast, however, at least as far as litigation governed by the principle of party presentation (*Verhandlungsgrundsatz*) is concerned, agreements between the parties to undertake or not to undertake certain procedural acts are not prohibited, since the parties are in principle left free to decide whether or not to undertake such procedural acts[8].

Thus, according to this theory, agreements on procedural matter such as (a) agreements promising not to bring an action before a court in relation to a specific right or legal relationship[9], (b) agreements to withdraw of the claim, (c) agreements to admit certain facts, (d) agreements to change the distribution of the burden of proof are all valid.

Today's prevailing opinion, while accepting basically Prof. Kaneko's view, recognizes the validity of several other types of agreements. An example is agreements not to introduce certain evidence. Prof. Kaneko had argued that such agreements were not admitted because they are inconsistent not only with

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[6] See also 3.4.2 below.

[7] H. Kaneko, 'Soshô ni kansuru Gôi ni tsuite' [On Agreements relating to Legal Proceedings], *Hôgaku Kyôkai Zasshi* (1935) 53, 2277. This article was subsequently included in a book collecting Prof. Kaneko's writings. H. Kaneko, *Minji Hô Kenkyû* [Studies on Civil Law], vol. 1, Kôbundô, Tokyo 1940, pp. 239ff.

[8] However, this does not mean that any procedural rights can be waived without limitation. For example, Prof. Kaneko argued that an agreement to waive in advance the right to object to an irregularity of the procedure (art. 90 CCP) is not permitted because it would change the form of the proceedings in advance and would violate the aforementioned principle of prohibition of arbitrary procedure. H. Kaneko, 'Soshô ni kansuru Gôi ni tsuite', *Hôgaku Kyôkai Zasshi* (1935) 53, 2288.

[9] However, an agreement to waive the right to sue in general, without limiting the subject matter, is not permitted as contrary to public order. H. Kaneko, 'Soshô ni kansuru Gôi ni tsuite', *Hôgaku Kyôkai Zasshi* (1935) 53, 2288.

the judges' freedom with respect to fact-finding (*Freiheit richterlicher Würdigung*)(art. 247 CCP), but also with the provision of CCP at the time, which generally allows for the examination of evidence ex officio (former art. 261 CCP). However, today's prevailing view admits the validity of such agreements, as long as they are made prior to the examination of the evidence in question[10]. This understanding reflects the fact that the former Article 261 was deleted by the 1948 amendment, and that today, as a general rule, ex officio examination of evidence is not permitted.

#### *2.2.2. Effect of Agreements*

As regards the effect of agreements, the question of the legal nature of such agreements and their effect has been debated.

The prevailing opinion, again relying on Prof. Kaneko's view, understands that agreements that are not expressly stipulated in CCP do not directly produce effects of a procedural nature, but only produce effects of a private substantive law nature, i.e., an obligation to or not to perform a procedural act. Thus, for example, an agreement promising not to bring an action before a court in relation to a specific right has no direct effect of extinguishing the procedural right of filing a lawsuit itself. However, Prof. Kaneko argued that if such an agreement is invoked by the defendant, the court should dismiss the legal action for lack of legitimate necessity or interest to take legal action (*Rechtsschutzbedürfnis bzw. Interesse*). The same applies to an agreement to withdraw of the claim, so that it produces no direct procedural effect of withdrawal (termination of litigation without judgment), but the court should dismiss the legal action as inadmissible for lack of legitimate interest[11].

While there is criticism as to the theoretical consistency of this explanation, this position has been adopted in the case law of the Supreme Court[12] and has been regarded as the prevailing view until today[13].

As for agreements to admit certain facts, agreements to change the distribution of the burden of proof and agreements not to introduce certain evidence, today's prevailing view holds that they bind the court[14]. Thus, for example, an offer of evidence, the examination of which is excluded by an agreement, should be dismissed by the court as inadmissible (see also 3.5 and 3.6 below)[15].

## 3. VALIDITY AND EFFECT OF VARIOUS TYPES OF AGREEMENTS

In the following, the validity and effect of each of the various agreements included in the following scenario will be discussed: A has sued B concerning a general (non-family) civil claim, e.g. breach of

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[10] See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô* [Commentary on the Code of Civil Procedure], vol. IV, 2nd ed., Nihon Hyôron Sha, Tokyo 2019, pp. 51-52; K. Shindô, *Minji Soshô Hô* [Law of Civil Procedure], Kôbundô, Tokyo 2019, p. 603; M. Itô, *Minji Soshô Hô* [Law of Civil Procedure], 7th ed., Yûhikaku, Tokyo 2020, pp. 376-377.

[11] H. Kaneko, 'Soshô ni kansuru Gôi ni tsuite', *Hôgaku Kyôkai Zasshi* (1935) 53, 2309, 2314.

[12] Supreme Court, Judgment, October 17, 1969, 23 *Minshû* (10) 1825.

[13] See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. II, 3rd ed., Nihon Hyôron Sha, Tokyo 2022, p. 170.

[14] See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. IV, 2nd ed., Nihon Hyôron Sha, Tokyo 2019, pp. 51-52.

[15] See for example K. Shindô, *Minji Soshô Hô*, Kôbundô, Tokyo 2019, p. 603; M. Itô, *Minji Soshô Hô*, 7th ed., Yûhikaku, Tokyo 2020, pp. 376-377.

contract or tort, before court C. During the early stages of the court proceedings, A or B presents a contract where A and B agree one of the following.

### 3.1. PRE-LITIGATION MEDIATION CLAUSE

There is no explicit provision of law dealing with agreements where the parties agree that the right to sue is contingent on the parties having attended mediation. However, there is an article in Act on Promotion of Use of Alternative Dispute Resolution[16], which provides the following:

> **Article 26** (Suspension of Litigation Proceedings) (1) Where a lawsuit is pending between the parties to a civil dispute which may be settled, the court in charge of the case may, upon the joint request of the parties to the dispute, make a decision that the litigation proceedings may be suspended for a period of not more than four months, in any of the following cases:
> (i) a certified dispute resolution procedure is being carried out for the dispute between the parties to the dispute; or
> (ii) in addition to the case prescribed in the preceding item, the parties to the dispute have reached an agreement to achieve a resolution of the dispute through certified dispute resolution.
> (2) The court in charge of the case may at any time rescind the decision under the preceding paragraph.
> (3) An appeal may not be made against a decision to dismiss the request under paragraph (1) and a decision to rescind the suspension decision under paragraph (1) in accordance with the preceding paragraph.

The "certified dispute resolution" referred to in this article means mediation procedures certified by the Minister of Justice under this Act. Thus, according to this article, the court may "upon the joint request of the parties" order that "the litigation proceedings may be suspended for a period of not more than four months" if "the parties to the dispute have reached an agreement to achieve a resolution of the dispute through certified dispute resolution", which is certified mediation service.

Considering this provision, it can be argued that even if there is a pre-litigation mediation agreement, the court is not allowed to dismiss a legal action, but only to suspend the proceedings as long as both parties so request. Indeed, although there is no Supreme Court decision yet in this regard, Tokyo High Court, in a 2011 case, following this line of consideration, held that a first instance judgment, which dismissed the legal action filed despite such an agreement, violated the law and must be reversed[17]. According to this judgment, this type of agreement has no procedural effect and the court may only, under certain circumstances, suspend the proceedings by application or analogous application of the aforementioned article.

Although most of the literature is critical of this judgment's general rejection of the procedural law

[16] Law No. 151 of 2004.

[17] Tokyo High Court, Judgment, June 22, 2011, 2116 *Hanrei Jihô* 64. In the case, the contract between the plaintiff and defendant contained the following clause: "To the extent that any Party disagrees about how to allocate a Shared Resolution Amount … under this Agreement, the Parties shall conduct good faith negotiations concerning any such dispute. If such negotiations do not fully resolve the dispute within sixty (60) days of the commencement of such good faith negotiations, any Party may then submit the matter to a neutral Japanese mediator. … If mediation does not fully resolve the dispute, the Parties agree that any legal action to resolve any remaining issues shall be commenced in the courts of Japan."

effect of such an agreement, many agree that if any procedural law effect is to be admitted, it should not be a dismissal of the legal action but, as a general rule, a temporary stay of proceedings[18].

### 3.2. AGREEMENT ON JURISDICTION

As mentioned in 2.1 above, article 11 CCP provides that the parties may agree on the jurisdiction of the court of first instance. Such an agreement needs to be made in writing (art. 11 (2) CCP). As a general rule, an agreement by which the parties determine the exclusive jurisdiction of a court has the effect of excluding the jurisdiction of other originally competent courts[19]. Thus, if the court Y finds a valid agreement of the parties determining that court X has sole jurisdiction over the case, the court Y has to transfer it upon petition of a party or sua sponte to the court X (art. 16 (1) CCP).

However, certain restrictions are imposed on the effect of such exclusive jurisdiction agreements. First, according to the common understanding, such an agreement does not exclude the application of the provision on jurisdiction by appearance (art. 12 CCP)[20]. Thus, if a defendant presents an oral argument on the merits before the court Y without entering a defence of lack of jurisdiction, the court Y has jurisdiction notwithstanding the above-mentioned agreement. Moreover, according to the case law, even if jurisdiction by appearance has not been established, the court Y may dismiss a motion to transfer if it considers that the transfer should be avoided to prevent a substantial delay in litigation or to ensure equity between the parties[21].

### 3.3. AGREEMENT ON INTERIM MEASURES

There is no explicit provision of law concerning agreements excluding or limiting the availability of interim measures. However, since the validity of promising not to bring an action before a court has been admitted, as seen in 2.2.1 above, it is logical to assume that such agreements are also valid. The fact that the validity of agreements to refrain from compulsory execution of certain claim is generally recognized[22] also supports this conclusion, because interim measures generally aim to preserve the possibility of compulsory execution of a claim in the future.

Based on this understanding, a petition for an interim measure that is contrary to an agreement should be dismissed as inadmissible as long as the existence of such an agreement is proven.

### 3.4. AGREEMENT ON PROCEDURAL FORMAT

The validity of agreements as to the formats of the proceedings is quite questionable, as it appears to be in direct conflict with the principle of prohibition of arbitrary procedure.

#### *3.4.1 Agreement that the proceedings should be fully written*

For example, article 87 (1) CCP provides that the parties shall conduct oral arguments before the

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[18] See for example K. Yamamoto, 'ADR Gôi no Kôryoku [The Effect of ADR Agreements]' in K. Yamamoto, *ADR Hôsei no Gendai teki Kadai* [Contemporary Issues in ADR Law], Yûhikaku, Tokyo 2018, p. 217; T. Kawashima, 'ADR Zenchi Gôi no Kôryoku ni kansuru Ichi Kôsatsu' in S. Katô et al. (eds), *Gendai Minji Tetsuzuki Hô no Kadai* [Actual Issues in Civil Procedure Law], Shinzansha, Tokyo 2019, p. 32.

[19] See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. I, 3rd ed., Nihon Hyôron Sha, Tokyo 2021, p. 282.

[20] Grand Court of Judicature, Judgment, May 18, 1921, 27 *Taishin in Minji Hanketsu Roku* 939. See also M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. I, 3rd ed., Nihon Hyôron Sha, Tokyo 2021, p. 287.

[21] See for example Nagoya High Court, Ruling, August 2, 2016, 1431 *Hanrei Times* 105.

[22] Supreme Court Judgment, Nov. 11, 1993, 47 *Minshû* (9) 5255.

court, provided, however, that for a case to be concluded by a ruling[23], the court determines whether or not oral arguments should be conducted. This provision expresses the principle of orality in Japanese civil procedure and has also constitutional value because article 82 of the Constitution provides that trials shall be conducted publicly, and the "trial" referred to in this article is understood to mean the hearing for oral arguments in the case of civil procedure.

Thus, an agreement that the proceedings should be fully written would be contrary to this provision and would have no effect of preventing the court from designating a hearing date for oral arguments. Of course, it is possible for the parties to submit only written documents and not to appear on the hearing date for oral argument. In this case, however, there is a risk that the action will be deemed to have been withdrawn (art. 263 CCP)[24].

### *3.4.2. Agreement to bypass a particular stage of proceedings*

Civil procedure in Japan typically proceeds as follows:

(i) Filing of a complaint by the plaintiff
(ii) Service of the complaint to the defendant
(iii) First hearing date for oral arguments
(iv) Proceedings for arranging issues and evidence
(v) Examination of witnesses and/or parties, which is conducted generally in a hearing date for oral arguments[25]
(vi) Closing of oral arguments
(vii) Rendition of the judgment

Among these procedural steps, it is unthinkable to omit (i), (ii), (vi) and (vii). Further, as explained in 3.4.1 above, in principle, it is not permissible not to conduct oral argument ((iii) and (v)) at all.

As regards proceedings for arranging issues and evidence ((iv) above), which are aimed mainly at preparing examination of witnesses in a concentrated manner, the current CCP provides for three types of proceedings, that are (a) preliminary oral arguments (art. 164 CCP), (b) preparatory proceedings (art. 168 CCP) and (c) written preparatory proceedings (art. 175 CCP). Whether or not to conduct one of these proceedings is left to the discretionary decision of the court. Although the court is expected to hear the opinions of the parties in this regard before deciding how to proceed (see also 2.1 above)[26], it is not

[23] A "ruling" is a form of court decision that follows a simpler procedure than a "judgment". The distinction between ruling and judgment corresponds to the distinction between "*Beschluss*" and "*Urteil*" in German law.

[24] According to article 263 CCP, if both parties are absent for two consecutive dates for oral argument, the action is deemed to have been withdrawn. It should be noted in this regard that another provision of CCP, article 158, provides that if a party does not appear on the first date for oral arguments, the court may deem that party to have stated orally the content of briefs she/he has submitted. However, according to the general understanding, the latter article is not applicable when both parties do not appear. See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. III, 2nd ed., Nihon Hyôron Sha, Tokyo 2018, pp. 395-396.

[25] Article 182 CCP provides that the examination of witnesses and the parties themselves shall be conducted in as focused a manner as possible after the arrangement of issues and evidence is completed.

[26] This is explicitly required for preparatory proceedings and written preparatory proceedings (art. 168 and 175 CCP), which corresponds to the exceptional nature of these proceedings in relation to the form of oral argument. In contrast, concerning preliminary oral arguments, there is no explicit legal requirement to hear the parties' opinions in advance. In court practice, however, this procedure is used only exceptionally and when the parties have a strong intention to do so.

bound by their opinions[27].

However, if both parties indicate that they do not want either of these procedures, it is possible that the court will de facto respect their wishes. In such a case, the issues to be examined will be determined through the process of ordinary oral arguments, rather than in any of the procedures listed in (a) through (c) above. In any event, even if both parties agree to omit the process of organizing the issues entirely, the court is not bound by such agreement, and it would be difficult for the court, which shall ensure that civil litigation is conducted fairly and expeditiously[28], to respect such intention of the parties, except in cases where the issues and witnesses to be examined have been sufficiently determined in advance.

The question of whether the parties can agree to omit the examination of witnesses (step (v) mentioned above) will be discussed later in 3.6.1 as a type of agreement concerning the examination of evidence.

## 3.5. AGREEMENT ON BURDEN OF PROOF

As already mentioned in 2.2.1 above, the validity of agreements to change the burden of proof has been generally admitted[29], although there is some uncertainty as to their legal nature[30]. Thus, in a case where A and B agree that B has the burden of proof for the fact P, if B does not succeed in proving fact P and it remains undetermined whether fact P is true or false (*non liquet*), the court cannot accept B's argument based on fact P and the judgment will be against B.

The validity of this type of agreements has also been recognized in several court decisions[31].

## 3.6. AGREEMENT CONCERNING EVIDENCE

### *3.6.1. Agreement to exclude certain types of evidence*

As seen in 2.2.1 above, today's prevailing view admits the validity of agreements not to introduce certain evidence, as long as such agreements are made prior to the examination of the evidence in question. Thus, if the parties have agreed that witness evidence will not be allowed and a party duly invoke such an agreement, the court should dismiss an offer of a witness as inadmissible[32].

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[27] It should also be noted that concerning the preparatory proceedings, article 172 CCP provides that the court shall revoke a ruling referring the case tot his procedure if both parties so petition, which means that parties jointly retain a kind of veto.

[28] Article 2 CCP provides that The courts shall endeavor to ensure that civil litigation is conducted fairly and expeditiously, and the parties shall conduct that litigation in good faith.

[29] See H. Kaneko, 'Soshô ni kansuru Gôi ni tsuite', *Hôgaku Kyôkai Zasshi* (1935) 53, 2319. As more recent literature, see also M. Kasai, 'Tôjisha shugi to Shokken shugi'[Party Principle and Ex Officio Principle], in M. Monguchi (ed), *Minji Shôko hô Taikei* [A Systematic Explanation of the Law of Evidence in Civil Matters], vol. 1, Seirin Shoin, Tokyo 2007, p. 16; M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. IV, 2nd ed., Nihon Hyôron Sha, Tokyo 2019, p. 51.

[30] Prof. Kaneko initially held that the rule on the burden of proof belongs to procedural law, but later came to the view that it is an issue of a substantive law nature.

[31] See for example Osaka Distrikt Court, Judgment, Nov. 30, 2001, 1802 *Hanrei Jihô* 95 and Osaka High Court, Judgment, Oct. 28, 2003, 1856 *Hanrei Jihô* 108.

[32] According to the general understanding, the effect of an agreement to exclude certain evidence is that the evidence loses its admissibility. See M. Kasai, 'Tôjisha shugi to Shokken shugi', in M. Monguchi (ed), *Minji Shôko hô Taikei*, vol. 1, Seirin Shoin, Tokyo 2007, p. 16; K. Uchibori, 'Shôko Nôryoku to Shôko Kachi: Sôron' [Asmissibility and Probative Value of Evidence: General Issues], in M. Monguchi (ed), *Minji Shôko hô Taikei*, vol. 2, Seirin Shoin, Tokyo 2004, p. 81.

This also means that the phase of witness examination may be bypassed by a parties' agreement to exclude witness evidence[33].

#### *3.6.2. Agreement to designate an expert*

According to article 213 CCP, an expert shall be designated by the court. Although former Code of Civil Procedure of 1890 originally contained a provision admitting parties' agreements to select an expert (art. 324 (3)[34]), this provision was eliminated by the 1926 amendment and according to the general understanding under the current law, such agreements are not considered to bind the court[35].

Thus, even if the parties have agreed that the expert will be Dr. S, the court is not obliged to designate Dr. S as expert. In practice, however, unless there are some circumstances showing that the agreed person is inappropriate, it is often the case that (s)he is designated by the court[36].

#### *3.6.3. Agreement on evidentiary value*

As mentioned in 2.2.1 above, article 247 CCP declares the principle of fact-finding based on free evaluation of evidence by judge. According to the common understanding, agreement to give certain evidence a specific evidentiary value is incompatible with this principle and has no effect[37].

Thus, even if the parties have agreed for example that two concurring witness statements equals full proof, the court is not bound by this agreement and should decide the value of the statements based on her/his own evaluation. It should be noted, however, that, since an agreement to admit certain facts has been considered valid[38], there seems to be a possibility to recognize the validity of such an agreement as an agreement to admit a fact on the condition that two witnesses unanimously testify the fact.

### 3.7. AGREEMENT ON COSTS OF PROCEEDINGS

In principle, the losing party has to bear the costs of proceedings (art. 61 CCP). In some cases, however, the prevailing party may be required to bear a portion of the costs (art. 62 and 63 CCP). The proportion of costs to be borne by each party in each individual case is determined by the court in its final judgment (art. 67 CCP).

These costs include the so-called court costs and party costs. For example, travel expenses and daily allowances paid to witnesses are included in the court costs and borne entirely or partially by the losing party. However, the lawyer's fees are not considered to be part of these costs, which means that the so-called American rule applies in this regard[39]. Consequently, each party must bear its own attorney's fees

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[33] However, as the court may examine the parties themselves sua sponte (art. 207 (1) CCP), if the court considers that the examination of a party is necessary, this procedural step can't be bypassed by a party agreement.

[34] The former article 324 (3) was identical to article 404 (4) of the current German Code of Civil Procedure.

[35] See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. IV, 2nd ed., Nihon Hyôron Sha, Tokyo 2019, p. 320.

[36] See M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. IV, 2nd ed., Nihon Hyôron Sha, Tokyo 2019, p. 320.

[37] See for example A. Mikazuki, *Minji Soshô Hô* [Law of Civil Procedure], Yûhikaku, Tokyo 1959, p. 404; M. Itô, *Minji Soshô Hô*, 7th ed., Yûhikaku, Tokyo 2020, p. 373.

[38] See 2.2.1 above.

[39] In 2004, a bill introducing limited responsibility of the losing party for lawyer fees was submitted to the Diet. However, this bill encountered strong opposition and was abandonned. The central argument against it was that such a responsibility would put an additional obstacle to some litigants intending to sue large organizations such as major enterprises or public agencies.

and, as a general rule, cannot claim reimbursement of such fees from the opposing party[40].

According to the today's prevailing view, how costs are to be borne between the parties is a matter of obligation of a substantive law nature, which can be disposed of by the parties. Therefore, it is understood that the court is bound by the parties' agreement in this regard and has to determine the allocation of costs in accordance with the agreement[41].

As for an agreement to decide who will bear lawyer's fees, although, as noted above, this is not a question of costs of proceedings, but there seems to be no reason to deny such an agreement as a contract of a substantive law nature.

### 3.8. AGREEMENT NOT TO APPEAL

As mentioned in 2.1 above, article 281 CCP admits explicitly that an agreement not to appeal to the court of second instance, while reserving the right to file a final appeal[42]. While CCP makes no mention of agreements not to appeal without reserving the right to final appeal, the prevailing view admits the validity of such agreements as well[43]. Such an agreement can be made either before or after the delivery of the judgment, but in the case of a prior agreement, it is understood that both parties must waive their right to appeal, and an agreement to the effect that only one party waives its right is invalid because of a lack of fairness between the parties[44]. Additionally, article 281 (2) CCP provides that article 11 (2) CCP regarding the requirement of written form for agreements on jurisdiction apply mutatis mutandis to agreements not to appeal. The prevailing view holds that this applies also to agreements not to appeal without reserving the right to final appeal[45].

As to its effect, according to the prevailing view, an appeal filed despite this agreement should be dismissed as inadmissible and the court shall consider its inadmissibility also ex officio[46]. This understanding assumes that the agreement has an immediate procedural law effect of precluding or extinguishing the right of appeal, which appears to be different from the effect of an agreement not to bring legal action before a court mentioned in 2.2.2 above. This difference may be explained by the fact that the agreement not to appeal has its legal basis in an explicit provision of CCP (art. 281), albeit an incomplete one[47].

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[40] An exception to this rule is found in tort cases in which the winning plaintiff can recover attorney's fees as part of damage caused by the defendant. See Supreme Court, Judgment, Feb. 27, 1969, 23 *Minshû* (2) 441.

[41] See for example T. Ueda & H. Inoue (eds.), *Chûshaku Minji Soshô Hô* [Commentary on the Code of Civil Procedure], Yûhikaku, Tokyo 1992, p. 428; M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. II, 3rd ed., Nihon Hyôron Sha, Tokyo 2022, p. 15. See also Mito District Court, Judgment, Dec. 4, 1965, 202 *Hanrei Times* 186.

[42] Final appeal corresponds to *Revision* (appeal on points of law) in German law.

[43] See for example H. Kaneko, *Minji Soshô Hô Taikei* [System of Law of Civil Procedure], revised ed., Sakai Shoten, Tokyo 1965, pp. 441-442; M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. VI, Nihon Hyôron Sha, Tokyo 2014, pp. 46, 48.

[44] Grand Court of Judicature, Judgment, Feb. 26, 1934, 13 *Minshû* 271. See also M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. VI, Nihon Hyôron Sha, Tokyo 2014, p. 49.

[45] See for example M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. VI, Nihon Hyôron Sha, Tokyo 2014, p. 50.

[46] See for example H. Kaneko et al., *Jôkai Minji Soshô Hô* [Commentary of the Code of Civil Procedure], 2nd ed., Kôbundô, Tokyo 2011, p. 1533; M. Akiyama et al., *Konmentâru Minji Soshô Hô*, vol. VI, Nihon Hyôron Sha, Tokyo 2014, p. 49. From a practical point of view, however, it is difficult for the court to recognize the existence of such an agreement unless one of the parties invokes it. Therefore, it is unthinkable that the court would dismiss an appeal ex officio without any request from a party.

[47] It may be added that former article 366 CCP (before the 1948 amendment) admitted explicitly agreements not to appeal in general.

## 4. PROCEDURAL ISSUES REGARDING PROCEDURAL CONTRACTS

The effects of major litigation agreements are as described in 2.2.2 and 3 above. When such effects are at issue in a specific lawsuit, the court hearing the case will determine the validity and effect of the agreement to the extent necessary in that case. In other words, the procedural treatment regarding procedural agreements follows the rules applicable to the procedural matter, e.g., admissibility of legal action, admissibility of a specific evidence, etc.

As regards the standards for determining whether an individual agreement satisfies the requirements for its validity or is null and void are generally considered to depend on the legal nature of the agreement. As most procedural agreements that are not expressly provided for in CCP are considered to be of a substantive law nature[48], the requirements for their validity are subject to the provisions of the Civil Code and other substantive law rules. These include rules on capacities (mental capacity (art. 3-2 Civil Code) and capacity to act (art. 4ff. Civil Code)), public policy (art. 90 Civil Code), valid manifestation of intention (art. 93ff. Civil Code). Thus, as grounds for nullity of legal acts, the Civil Code provides, for example, the lack of mental capacity (art. 3-2), violation of public order (art. 90) false manifestation of intention (art. 94) and lack of authority to represent (art. 113). Similarly, the Civil Code admits several grounds for rescission of a legal act such as lack of capacity to act (art. 5 (2), 9 and 13 (4)), mistake (art. 95), fraud or duress (art. 96).

The procedural agreements are effective as long as they satisfy these conditions and they don't need approval or ratification by the judge.

There is no specific rule concerning the intensity of court control. However, with regard to agreements not to bring an action before a court, it is often argued that the scope of their effect should be determined in a reasonable manner so as not to be overly broad and that the right of the parties is not excessively undermined (See also 5 below)[49].

## 5. CONTEXT OF PROCEDURAL CONTRACTS

Among procedural agreements explicitly regulated by law, arbitration agreements are subject to relatively detailed rules because of their significant impact on the parties' access to justice. Thus, an arbitration agreement shall be in writing (art. 13 (2) Arbitration Act) and is effective only when its subject matter is as civil dispute which can be settled between the parties (art. 13 (1) Arbitration Act). Further, Arbitration Act, in its "Supplementary Provisions", provides two exceptional cases in which the validity of arbitration agreements is denied or limited: (i) arbitration agreements concluded between a consumer and a business, the subject of which constitutes civil disputes that may arise between them in the future, may be cancelled by the consumer side unless the consumer her/himself requests to initiate the arbitral

[48] See 2.2.2 above.

[49] See for example K. Shindô, *Minji Soshô Hô*, 6th ed., Kôbundô, Tokyo 2019, p. 260, arguing that the scope of their effect should be cautiously limited considering the subject matter, the manner in which the agreement was made, the purpose of the agreement and the circumstances based on which the agreement was made. See also S. Kakiuchi, 'Kaisha Kabunushi kan Keiyaku: Minji Tetsuzuki Hôgaku no Shiten kara' [Corporate/Shareholder Agreements: From Procedural Law Perspective]in W. Tanaka et al. (eds.), *Kaisha Kabunushi kan Keiyaku no Riron to Jitsumu* [Theory and Practice of Corporate/Shareholder Agreements], Yûhikaku, Tokyo 2021, p. 428.

proceedings (art. 3) and (ii) arbitration agreements, the subject of which constitutes individual labour-related disputes that may arise in the future, shall be null and void (art. 4). These rules are applicable "for the time being until otherwise enacted" (art. 3 and 4).

These rules illustrate the Japanese legislator's approach to procedural agreements, in particular those imposing restrictions on access to justice. On the one hand, the rule concerning consumer arbitration agreements focuses on who the parties to the agreement are and when the agreement is made. The rule concerning labour arbitration agreements, on the other, focused on the subject matter, but they are both based on substantially similar concerns, namely the caution against imprudent agreements between parties with disparities in bargaining power. They also share the same concern for agreements made in advance, before a concrete dispute has arisen[50].

In addition, similar rules were introduced for agreements on international jurisdiction by the 2011 amendment (art. 3-7 (5) and (6) CCP). Theoretically, similar considerations would apply to agreements not to bring an action before a court in general, since the restrictions on parties' access to justice imposed by them are no less serious than in the case of arbitration agreements or international jurisdiction agreements. However, as there is no comparable explicit provisions for them, their validity and scope of effect need to be checked on a case-by-case basis, as discussed in 4 above.

It should also be noted that concerning agreements between a consumer and a business, the Consumer Contract Act[51] contains general provisions and according to its article 10, a clause in a consumer contract[52] is null and void if it unilaterally prejudices the interests of the consumer in violation of the principle provided in article 1 (2) of the Civil Code[53], restricting the consumer's rights or expanding her/his obligation as compared to provisions of law that are not of a mandatory nature. Thus, a clause in a consumer contract that is more disadvantageous in comparison with the default rules provided by the Civil Code and other laws may, in some cases, be regarded as invalid and this rule is also applicable to procedural agreements concluded within consumer contracts.

## 6. REMEDIES FOR NON-COMPLIANCE WITH PROCEDURAL CONTRACTS

Concerning procedural agreements explicitly provided for in CCP (see 2.1 above), they produce directly the procedural effect as determined by the law. For example, an agreement on jurisdiction may have the effect of attributing jurisdiction to one court and/or of depriving another of its jurisdiction. Thus, as seen in 3.2 above, if the court Y finds a valid agreement of the parties determining that court X has sole jurisdiction over the case, the court Y has to transfer it to the court X (art. 16 (1) CCP). The effect of the agreement consists exclusively in this point, and it is not usually considered that issues of specific performance or compensation for damages may arise[54].

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[50] The attention to the timing of the agreement is also found in the case of agreements not to appeal. See 3.8 above.
[51] Law No. 61 of 2000. Its English translation is available at:
https://www.japaneselawtranslation.go.jp/en/laws/view/3578#je_ch2sc2at5
[52] The term "consumer contract" means a contract entered into between a consumer and a trader (art. 2 (3) Consumer Contract Act).
[53] Article 1 (2) Civil Code provides that the exercise of rights and performance of duties must be done in good faith.
[54] In relation to the allocation of procedural costs, however, it is possible that the plaintiff's filing of action in breach of a jurisdiction agreement results in her/his disadvantage, as long as it incurred additional costs that would have been otherwise unnecessary (art. 62 CCP).

As for agreements which are not explicitly admitted by the law, the prevailing opinion understands that they produce no direct procedural law effects, but create only obligations to perform or not to perform certain acts (see 2.2.2 above). However, as already explained in 2.2.2 and 3 above, it is admitted that most of such agreements bring about certain procedural outcomes in accordance with the content of the agreement, even if not directly. Therefore, there is no need for the parties to bring another legal action to enforce the specific performance of the agreed obligation. Of course, it is theoretically possible to claim compensation for damages caused by non-performance of the obligation in the same manner as in the case of non-performance of a contract in general[55], but it seems usually difficult to prove the damages and their amount[56].

## 7. PROCEDURAL AGREEMENT AND CONSTITUTIONAL LAW

The Constitution of Japan[57] contains several provisions relating to civil proceedings and access to justice. The most important of them, as indicated below, are those providing principles concerning the right to a trial (art. 32), independence of judges (art. 76 (3)) and publicity of trials and rendition of judgments (art. 82 (1)).

**Article 32.** No person shall be denied the right of access to the courts.

**Article 76.** The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.
(2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.
(3) All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

**Article 82.** Trials shall be conducted and judgment declared publicly.
(2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

Since these provisions constitute a fundamental part of the public order, they cannot be changed by an agreement of the parties. For example, from the viewpoint of the right of access to the courts, an agreement to waive the right to bring an action before a court in a general manner without any limitation would be denied its validity due to a breach of public order[58]. However, as already discussed, an agreement not to bring an action before a court can be valid as far as its effect is reasonably limited to a

[55] Article 415 (1) Civil Code provides that if an obligor fails to perform consistent with the purpose of the obligation or the performance of an obligation is impossible, the obligee may claim compensation for loss or damage arising from the failure.
[56] It is possible for the parties to agree in advance to pay a certain penalty in the event of non-performance.
[57] Constitution of Nov. 3, 1946. Its English translation is available at:
https://www.japaneselawtranslation.go.jp/en/laws/view/174/en
[58] See for example K. Shindô, *Minji Soshô Hô*, 6th ed., Kôbundô, Tokyo 2019, p. 260 and M. Itô, *Minji Soshô Hô*, 7th ed., Yûhikaku, Tokyo 2020, p. 181. See also note 9 above.

specific right or legal relationship. Thus, the validity of such an agreement needs to be checked on a case-by-case basis[59].

In contrast, article 82 of the Constitution concerning the principle of publicity is more specific and precise, and any agreement to change it is not permissible. Thus, even if the parties have agreed that the trials should be conducted in private in their case, that agreement can't produce any effect and the court must conduct the trials publicly. Further, a breach of the publicity principle constitutes a ground for final appeal (art. 312 (2)(v) CCP) and the final appeal court should consider it ex officio (art. 322 CCP), which means that the compliance with this principle is not subject to parties' disposition.

## 8. ATTITUDES TOWARDS PROCEDURAL CONTRACTS

The respective roles of parties and judges in civil procedure is a topic that has often been discussed in Japan. In Japanese court practice, it has been often criticised that the parties (and the lawyers representing them) are overly dependent on the court's direction of the proceedings and are not sufficiently active in the proceedings.

As a way to improve this situation and to realise more speedy and effective justice, some authors have argued that procedural agreements between the parties and eventually tripartite agreements between the parties and the court would be beneficial[60]. At present, however, this approach is not generally accepted and has not been adopted in court practice.

It is also worth mentioning that recently, a bill to amend CCP has been submitted to the Diet with the aim of introducing information technology in civil procedure. This bill contains, in addition to provisions relating to IT, the creation of a new expedited procedure. Under this procedure, the date of closing of oral arguments and delivery of the judgment, which must be within six and seven months respectively, shall be determined in advance at the initial stage of the proceedings, so that the case can be handled expeditiously and in a predictable manner. According to the bill, this procedure applies only when both parties have made a request to that effect and in so far, it is based on the intention of both parties. However, some lawyers and consumer organisations object strongly to the introduction of this procedure on the ground that it undermines the right to a fair trial, even if, as the bill provides, actions concerning consumer contracts and individual labour-related disputes are excluded from its scope[61].

Although the amendment is currently being debated in the Diet and it remains to be seen whether it will be passed as originally proposed, this controversy suggests that there is a strong reluctance in society to utilise parties' procedural agreements to achieve a speedy trial [*NOTE:* The draft was subsequently passed in May 2022 and enacted as Law No. 48 of 2022].

As for impact of the Covid-19 pandemic, it is true that it significantly affected the court practice

[59] See 2.2.2, 4 and 5 above.
[60] See K. Yamamoto, *Minji Soshô Shinri Kôzô Ron* [On the Structure of Proceedings of Civil Trial], Shinzansha, Tokyo 1995, pp. 335ff. This author had been inspired by French practice of the procedural contracts (*contrat de procédure*).
[61] This exclusion is similar to that for arbitration agreements. See 5 above.

and has been promoting the use of information technology in civil justice[62]. However, so far there is no sign that the pandemic has had any effect on attitudes towards procedural contracts.

[62] See S. Kakiuchi, 'Impact of Covid-19 on Japanese Civil Justice' in B. Krans & A. Nylund (eds.), *Civil Courts Coping with Covid-19*, Eleven International Publishing, The Hague 2021, pp. 113ff.

# Social Enterprise in Japan

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## 1. What is Social Enterprise?

### 1.1. Absence of Specific Rules or Regulations on Social Enterprises in Japan

What is Social Enterprise? Looking at examples of mechanisms called social enterprise overseas, the following four types of mechanisms may be included therein. The first example is a benefit corporation in some states of the US, which is a specialized for-profit legal form, is allowed to distribute its profit to investors, and is simultaneously required to pursue social purposes. The second example is a community interest company (CIC), available in the UK, which is a specialized for-profit legal form that can only distribute a limited ratio of profit. The third example is work integration social enterprises (WISE), that are required to hire vulnerable people. The fourth example is a firm certified under a system that allows firms pursuing social missions to identify themselves: an example of this is B Corp certification provided by B Lab.[1]

In Japan, there are no mechanisms that correspond to these four types. There are no special legal forms or certification systems for so-called social enterprises. Moreover, the concept of social enterprise itself is not widely known in Japan.

### 1.2. Japanese Corporate Culture Finds Significance in Contributing to Society

The fact that there is no special legal infrastructure for social enterprises does not imply that Japanese society does not accept the idea of businesses with social aims. On the contrary, Japanese for-profit corporations have found great significance in tackling social problems. According to the Cabinet Office's 2015 research that surveyed small-to-medium for-profit business corporations in the service industry (real estate, restaurants, hotels, medical service, welfare service, education, etc.), 62.5% companies answered either "very well applicable" (17.6%) or "applicable" (44.9%) to the question whether their main business purpose was to solve social issues rather than pursuing profits.[2] One of the reasons why the idea of social enterprises does not attract much focus in Japan might be because it is natural for Japanese business corporations to involve themselves with social issues; accordingly, people does not recognize the necessity to prepare special legal infrastructure for social enterprise.[3]

In Japan, businesses with social mission use for-profit corporate or nonprofit corporate forms. As these traditional legal forms are not specifically designed for social enterprises, there is a certain inconvenience in using them for this purpose, as described below.[4] As Japan has no fixed definition of

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[1] https://usca.bcorporation.net/certification.

[2] Wagakuni-ni-okeru-syakaiteki-kigyou-no-katsudoukibo-ni-kansuru-chousa-houkokusyo [Report on Scale of Social Enterprises in Japan], March 2015, hereinafter "Cabinet Office's 2015 research", https://www.npo-homepage.go.jp/uploads/kigyou-chousa-houkoku.pdf.

[3] See N. Matsumoto, 'Corporations with Social Aims in the Japanese Legal system' in H. Peter, C. Vasserot and J. Silva (eds), *The International Handbook of Social Enterprise Law*, Springer 2023, pp. 676-680.

[4] See also N. Matsumoto, 'Recent Changes in Laws Regarding Nonprofit Corporations and Charitable Trusts in Japan' [2018] *Zeitschrift fur Japanisches Recht* (45) 129, and N. Matsumoto, 'Corporations with Social Aims in the

social enterprise,[5] this report will use the term to refer to companies whose main purpose is to solve social problems through engagement in business activities.

## 2. Legal Forms and Lifecycle of Social Enterprises

### 2.1. What Legal Forms of Organization are Typically Adopted by Social Enterprises?

As mentioned above, in Japan, there is no specialized legal form designed for social enterprises. One can engage in business for social purposes using both for-profit corporations and nonprofit corporations, although the fit is imperfect. When one engages in business for social purposes using a for-profit corporation, there are insufficient mechanisms to compel the firm to pursue and preserve its social mission. The question further remains whether for-profit corporate directors are allowed to prioritize social objectives over making a profit (see 2.2. below). Alternatively, when one uses a nonprofit corporate form, a social enterprise cannot raise money through investment, making it difficult to expand the size of the businesses.

The appendix at the end of this report shows some characteristics of each legal form. In Japan, the most popular traditional forms for for-profit business are: i) share corporations (kabushiki-gaisya), and ii) one-person-managed unincorporated businesses (kojin-jigyo), which are an option for sole proprietors.[6] In general, these forms seem suitable for social enterprises considering that Japanese for-profit businesses have a culture of pursuing social interests (see 1.2. above). There are, however, some challenges, as described more fully in 2.2. below.

Social enterprises can take the form of nonprofit corporations in Japan as well. Nonprofit corporations are generally understood to be prohibited or restricted from distributing profit to their

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Japanese Legal system' in H. Peter, C. Vasserot and J. Silva (eds), *The International Handbook of Social Enterprise Law*, Springer 2023, especially pp. 681-690.

[5] The Cabinet Office's 2015 research determines whether a company is a social enterprise based on seven requirements. 1) It works to solve social issues through business. 2) The main purpose of its business is not to pursue profit but to solve social issues. 3) Its profit is used mainly in the reinvestment to the business, not in new investment or distribution to shareholders. 4) The ratio of profit distributed to shareholders is 50% or less. 5) A revenue of 50% or more is earned through business. 6) The ratio of revenue earned through public insurance is 50% or less. 7) Among the revenue excluding subsidies, membership fee, and contributions, the ratio of revenue of businesses entrusted by the government is 50% or less.

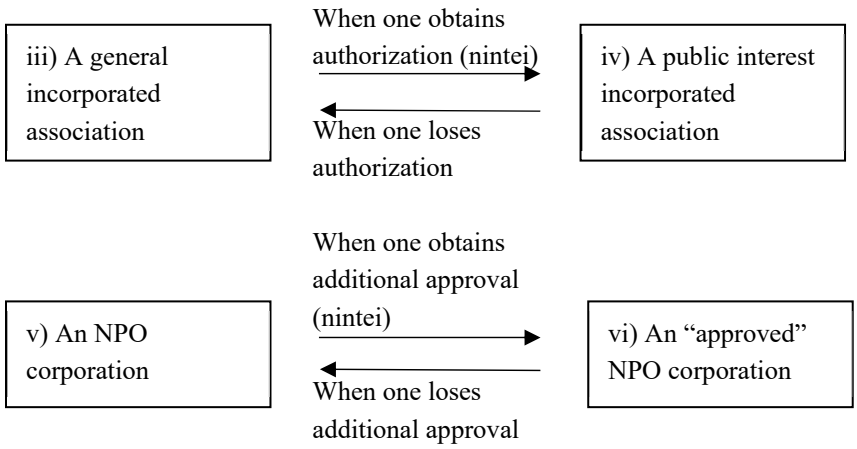
There seems to be some problems in this definition. As mentioned in the text, under the Japanese culture, corporations are expected not only to pursue the profit but also to solve social issues. Therefore, it seems that many corporations tend to answer "Yes" to the question No. 2. Moreover, it is said that Japanese small- or medium-sized family corporation tend not to make distribution to shareholders. That is to say, family members who are shareholders and directors of the corporation tend to be paid not in the form of distribution but in the form of remuneration as a director. As a result, many family corporations tend to answer "Yes" to question No. 3 and 4. Therefore, using these seven requirements, it is probable that more corporations are determined as social enterprises than they really are.

[6] Other than share corporations and one-person-managed unincorporated business, there is a form of an unincorporated association (kumiai), based on the Civil Code (minpo, Act No. 89/1896). However, one tends to not choose a form of an unincorporated association, because the form is not very popular, the form does not provide limited liability, and the incorporation of share corporations is quite easy.

Moreover, there exists a legal form of a consumer cooperative (syouhi-seikatsu-kyoudo-kumiai), based on Consumer Cooperatives Act (syouhi-seikatsu-kyoudo-kumiai-ho, Act No. 200/1948). Consumer cooperatives are often used in the area of retail sales and they have a nature of mutual-benefit corporations (For "mutual benefit corporation," see D. P. Lee, 'The business Judgment rule: Should It protect Nonprofit Directors?' [2003] 103 *COLUM. L. REV.* 925, 931 and G. A. Mann, 'Agency Costs and the Oversight of Charitable Organizations', [1999] 1999 *WIS. L. REV.* 227, 242). The Consumer Cooperative Act provides that their purpose should be to promote its members' cultural and economic life (section 2.1(2)) and to serve its members through its business (section 9).

members. While they can earn profit, they cannot distribute it to members. Nonprofit corporation forms include: iii) general incorporated associations (ippan-syadan-houjin), iv) public interest incorporated associations (koueki-syadan-houjin), v) NPO (an abbreviation of nonprofit organizations) corporations (tokutei-hieiri-katsudou-houjin), and vi) "approved (nintei)" NPO corporations (nintei-tokutei-hieiri-katsudou-houjin). Among them, the general incorporated association and NPO corporation are most suitable for social enterprises, although some of their characteristics can be incompatible for certain social enterprise, especially those seeking equity investment. Figure 1 shows the relationship between these forms with respect to public authorizations or approvals (nintei)[7].

**[Figure 1: Relationships between each nonprofit corporation]**




### 2.2. Share Corporations

Share Corporations (kabushiki-gaisya), as per the Companies Act,[8] are the most popular legal form for business enterprises in Japan. Japanese culture focuses on the interests of employees and other stakeholders, which makes it easier to run a social enterprise using the structure of a share corporation. However, two issues arise when a social enterprise organizes itself as a share corporation. First, whether directors of a share corporation are allowed to prioritize social objectives over profit making is unclear. Second, it is not guaranteed a share corporation will pursue and preserve its social objectives.

Certainly, in Japan, directors of a share corporation are understood to have wide discretion when considering stakeholder interests or making donations.[9] Moreover, the Japanese version of business judgment rule—which provides that "unless the process or content of the decision-making is extremely unreasonable, a director who does this [makes the decision in question] does not breach his duty of care

[7] Although unofficial English translation of the act on public interest incorporated associations uses the term "authorization" and that on NPO corporations uses the term "approval", the Japanese original term is "nintei" for both.

[8] Kaisya-ho, Act No. 86/2005. Unofficial English translation is available at http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=01.

[9] Yahata-Seitetsu case (1970), in which a large steel company made a political donation to Liberal Democratic Party and its shareholder brought a derivative suit to pursue directors' liability, the Japanese supreme court stated "If they donate an amount that unreasonably exceeds the appropriate scale, they breach their duty of loyalty as directors." (Judgment of the Supreme Court of Japan, June 24, 1970, *Minshu* 24(6) 625. English translation is from J. M. Ramseyer & M. Iwakura, *Casebook Mergers & Acquisitions*, Shoji-Homu 2015, p. 140.)

as a prudent manager"[10] reduces the likelihood that directors will be held liable for breach of fiduciary duty. It remains questionable, however, whether it constitutes a breach of fiduciary duty when directors clearly state that they prioritize pursuing social objectives over profit making.

Regarding the second issue, there are insufficient mechanism to compel share corporations to pursue their social objectives (see also 6. below). A social enterprise structured as a share corporation is subject only to rules for a regular share corporation, and no rule requires a share corporation to pursue a social objective. One might come up with the idea of stipulating in the articles of incorporation that the firm prioritizes social objectives over shareholders' profit by using most of its profit to address social issues. In cases where every shareholder agreed with the specific provision and the share is transferred only to person who agrees with the provision, there seems to be no need to void the provision. The provision, however, may be deleted or amended in the future when the shareholders change their mind.[11]

### 2.3. General Incorporated Associations

#### 2.3.1. Characteristics

A general incorporated association (ippan-syadan-houjin), incorporated as per the Act on General Incorporated Associations and General Incorporated Foundations (hereinafter the "General Corporation Act"),[12] is a nonprofit corporation and an association-type corporation in the sense that it has members. A general incorporated association is a good option for a business with social purposes because it can pursue any objective and requirements for its incorporation and management are easy to meet. Some of the characteristics, however, might be problematic for some aspects of social enterprises.

Most critical concerns are regarding its peculiar rules on limitations on distributions. General incorporated associations cannot make distributions to members while they continue to exist. Also, they cannot provide in their articles of incorporation that they will distribute their residual assets on dissolution to members. In other words, they cannot promise, in advance, to distribute their residual assets to members.[13] These entities, however, are not fully subject to non-distribution constraints. In a case where its articles of incorporation does not have any provision regarding to whom its residual assets shall be distributed, a general incorporated association can distribute its residual assets to members in accordance with the resolutions of its member meetings on its dissolution.[14] This nature may make general incorporated associations less suitable as a format for social enterprise in two ways. First, they cannot get funding through investment. Second, potential consumers and contributors to the corporation who prefer to deal with corporations that surely pursue social objectives might feel anxious that the money they pay or give will not be used to tackle social problems but will be distributed to members of the company in the end.[15]

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[10] Judgment of the Supreme Court of Japan, July 15, 2010, *Hanrei-Jiho* (2091) 90. English translation is from J. M. Ramseyer, in J. M. Ramseyer et al., *An American Perspective on Japanese Law*, Yuhikaku 2019, p. 235. The bracket is inserted by the reporter.

[11] See N. Matsumoto, 'Corporations with Social Aims in the Japanese Legal system' in H. Peter, C. Vasserot and J. Silva (eds), *The International Handbook of Social Enterprise Law*, Springer 2023, pp. 684-685 note 29 and its text.

[12] Ippan-syadan-houjin-oyobi-ippan-zaidan-houjin-ni-kansuru-houritsu, Act No. 48/2006. Unofficial English translation is available at http://www.japaneselawtranslation.go.jp/law/detail/?id=3202&vm=04&re=01.

[13] The General Corporation Act section 11.2.

[14] The General Corporation Act section 239.1.

[15] Regarding the role of non-distribution constraint, see H. B. Hansmann, The Role of Nonprofit Enterprise, [1980] 89 *Yale Law Journal* 835, 844.

A second possible concern is whether a general incorporated association would permanently pursue its social objectives. The objective of each general incorporated association is provided in the articles of incorporation and directors must pursue that objective. However, members can freely change the objectives with resolutions of member meetings. Therefore, a general incorporated association with the purpose of promoting public interest might change its objectives and begin working as an organization promoting only the mutual benefit of its members.

#### 2.3.2. Formation

One can easily incorporate a general incorporated association by entering it at a registry. No authentication, authorization or approval is needed. There is no special requirement concerning the independence of directors.

#### 2.3.3. Conversion

Share corporations cannot convert into general incorporated associations or vice versa. As mentioned in 2.4. below, once general incorporated associations are authorized in accordance with the Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations, they become public interest incorporated associations; when they lose the authorization, they again become general incorporated associations.

#### 2.3.4. Maintenance

Basic financial statements must be publicly disclosed and whole financial statements must be disclosed to members and creditors,[16] though they need not include disclosure or self-assessment regarding social activities or social impact. General incorporated associations are not subject to any governmental supervision.

#### 2.3.5. Exit

A general incorporated association can be dissolved by the resolution of member meeting.[17] Approval from governmental agencies is not necessary. If its articles of incorporation do not provide for the ownership of remaining assets, member meetings can decide to whom the remaining assets should be given.[18] As explained in 2.1.3. above, at the point of dissolvement, member meetings can decide to distribute remaining assets to members.

### 2.4. Public Interest Incorporated Associations

#### 2.4.1. Characteristics

When a general incorporated association applies for the status of a public interest incorporated association under the Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations (hereinafter the "Act on Authorization")[19] and obtains authorization, it becomes a public interest incorporated association (koueki-syadan-houjin). As public interest incorporated associations are fully subject to the nondistribution constraint, they cannot raise fund through investment. To be authorized, a general incorporated association must meet strict criteria, some

[16] The General Corporation Act section 128–129.
[17] The General Corporation Act section 148(3).
[18] The General Corporation Act section 239.2.
[19] Koueki-syadan-houjin-oyobi-koueki-zaidan-houjin-no-nintei-ni-kansuru-houritsu, Act No. 49/2006. Unofficial English translation is available at http://www.japaneselawtranslation.go.jp/law/detail/?id=145&vm=04&re=01.

of which may be inconvenient for social enterprises. First, its principal objective must be to operate the "business for public interest purposes", which must fall into any of the 22 categories of businesses listed in the Act.[20] If the business of a social enterprise does not fall into one of these categories, a public interest incorporated association cannot be used. Second, with respect to the "business for public interest purposes", the revenue is expected to not exceed the amount compensating the reasonable cost of its operation.[21] This requirement may make it difficult for a public interest incorporated association to run a social enterprise, as it limits their profit making, and thus may make its survival difficult.

Other requirements include the following. If it operates any business other than one for public interest purposes ("profit-making business"), the operation of the profit-making business should not hamper the operation of the business for public interest purposes, and the ratio of expenditures for the business for public interest purposes should exceed 50% of all money spent.[22] Family members cannot exceed one third of the directors.[23] Public interest incorporated associations must provide in their articles of incorporation that in case of liquidation, they shall cause the remaining assets to be attributed to certain parties, such as public interest corporations and national or local governments.[24] This requirement means that a public interest incorporated association is completely prohibited from distributing its assets to its members.

### 2.4.2. Formation

See 2.4.1. above.

### 2.4.3. Maintenance

In addition to the mandatory disclosure required to general incorporated associations, as to public interest incorporated associations, detailed financial statements and other documents must be reported to the governmental agency (the prime minister or the prefectural governor) and publicly disclosed.[25] This requirement may be burdensome for small organizations. These documents must include explanation of its social activities and its ratio of expenditures for the "business for public interest purposes". There is no third-party standard for an assessment of whether a corporation has achieved its

[20] The Act on Authorization section 5(1), 2(4), and its appendix. The 22 categories include businesses (i) to promote academism and scientific technology, (ii) to promote culture and art, (iii) to support persons with disability or needy persons or victims of accident, disaster or crime, (iv) to promote the welfare of senior citizens, (v) to support persons having the will to work and seeking the opportunity of employment, (vi) to enhance public health, (vii) to seek the sound nurturing of children and youths, (viii) business to enhance the welfare of workers, (ix) to contribute to the sound development of mind and body of citizens or to cultivate abundant human nature through education and sports, etc., (x) to prevent crimes or to maintain security, (xi) to prevent accident or disaster, (xii) to prevent and eliminate unreasonable discrimination and prejudice by reason of race, gender or others, (xiii) to respect and protect the freedom of ideology and conscience, the freedom of religion or of expression, (xiv) to promote the creation of a gender-equal society or other better society, (xv) to promote international mutual understanding and for economic cooperation to overseas developing regions, (xvi) to preserve the global environment or protect and maintain the natural environment, (xvii) to utilize, maintain or preserve the national land, (xviii) to contribute to the sound operation of national politics, (xix) to develop a sound local community, (xx) to secure and promote fair and free opportunities for economic activity and to stabilize and enhance the lives of the citizenry by way of activating the economy, (xxi) to secure a stable supply of goods and energy indispensable for the lives of the citizenry, and (xxii) to protect and promote the interests of general consumers.

[21] The Act on Authorization section 5(6).

[22] The Act on Authorization section 5(8).

[23] The Act on Authorization section 5(10).

[24] The Act on Authorization section 5(18).

[25] The Act on Authorization section 21–22.

social goals.

Governmental agencies (the prime minister or the prefectural governor) supervise public interest incorporated associations,[26] and when they fail to meet the requirements, they may lose the authorization and become again general incorporated associations.[27]

### 2.4.4. Exit

A public interest incorporated association can be dissolved by the resolution of member meeting. Approval from any governmental agencies is not necessary. On dissolution, the remaining assets must be distributed to certain parties, such as other public interest corporations and national or local governments.[28]

When a public interest incorporated association loses its authorization, it becomes again a general incorporated association, but part of its assets, calculated based on the amount of property which is obtained by excluding the property that is consumed for the purpose of operating the business for public interest purposes from the property and subsidy donated or given to the public interest incorporated association, must be distributed to certain parties, such as public interest corporations and national or local governments.[29]

## 2.5. NPO Corporations

### 2.5.1. Characteristics

Another category of Japanese nonprofit corporations is the NPO corporation (tokutei-hieiri-katsudou-houjin) under the Act on Promotion of Specified Non-profit Activities (hereinafter the "NPO Act").[30] The "authentication" required to establish an NPO corporation is not difficult to obtain.[31]

NPO corporations appear suitable as formats for social enterprises for the following reasons. First, the system of NPO corporations is well known, as compared to general incorporated associations or public interest incorporated associations, and has been widely used. This is because the NPO Corporation Act was enacted in 1998, while the General Corporation Act and the Act on Authentication was enacted in 2006.

As to distributions, NPO corporations are fully subject to the nondistribution constraint, unlike in general incorporated associations (see 2.3.1. above). When it is liquidated, the remaining assets may only be distributed to certain parties, such as public interest corporations and national or local governments.[32] The full nondistribution constraint makes it impossible for them to raise fund through investment. At the same time, however, consumers and contributors to the corporation do not have to feel anxious that the money they pay or give will be distributed to members of the company. This nature

[26] The Act on Authorization section 27–28.
[27] The Act on Authorization section 29.
[28] The Act on Authorization section 5(18).
[29] The Act on Authorization section 5(17), 30(2).
[30] Tokutei-hieiri-katsudou-sokushin-ho, Act No.7/1998. Unofficial English translation is available at http://www.japaneselawtranslation.go.jp/law/detail/?id=3028&vm=&re=.
[31] The NPO Act section 10. See T. Ohta, *Hieiri-houjin-setsuritsu-unei-guidebook* [Guidebook for organizing and running nonprofit corporations], Koueki-houjin-kyoukai, 2012, p. 64.
[32] The NPO Act section 11.3, 32.

might make NPO corporations suitable formats for social enterprise. Furthermore, disclosure requirements are not burdensome compared with those for public interest incorporated associations.[33]

It should be noted, however, that other challenges remain for using NPO corporations as social enterprises. First, the primary purpose of NPO corporations must be to engage in "specified nonprofit activities", which must fall into any of 19 categories of activities listed in the NPO Act.[34] If the business engaged by a social enterprise does not fall into these categories, an NPO corporation cannot be used. Second, the NPO Act allows NPO corporations to pay remuneration only to a third of directors and auditors.[35] This restriction may be cumbersome and inconvenient to some social enterprises.

### 2.5.2. Formation

See 2.5.1. above.

### 2.5.3. Maintenance

Disclosure and reporting to the governmental agencies (the prefectural governor or the head of the designated city) should be made.[36] These documents must include an explanation regarding its social activities. There is no third-party standard for an assessment of whether a corporation has achieved its social goals.

Governmental agencies supervise NPO corporations,[37]and when they fail to meet the requirements, they may lose their authentication[38] and be forced to dissolve.[39] Failure to file a report (usually 3 years or more) is a common reason for revocation of authentication.

### 2.5.4. Exit

NPO corporations are primarily dissolved in one of two ways. First, they can be dissolved by the resolution of member meeting.[40] Approval by a governmental agency is not necessary. Second, an NPO corporation is dissolved when an NPO corporation loses its authentication.[41] In cases when NPO corporations are dissolved, the remaining assets must be distributed to certain parties, such as public

[33] It should be noted that the NPO Act imposes some restrictions on family members becoming directors and auditors (section 21).
[34] The NPO Act section 2.2., 2.1. and its appendix. The 19 categories include (i) activities for enhancing healthcare, medical care, and welfare, (ii) activities for promoting social education, (iii) activities for promoting development of communities, (iv) activities for promoting tourism, (v) activities for revitalizing rural areas or hilly and mountainous areas, (vi) activities for promoting science, culture, arts, or sports, (vii) activities for preserving the environment, (viii) disaster-relief activities, (ix) regional security activities, (x) activities for protecting human rights or promoting peace, (xi) international cooperation activities, (xii) activities for promoting the formation of a gender-equal society, (xiii) activities for assisting sound development of children, (xiv) activities for developing an information-oriented society, (xv) activities for promoting science and technology, (xvi) activities for vitalizing economy, (xvii) activities for supporting the development of vocational skills or the expansion of employment opportunities, (xviii) activities for protecting consumers, and (xix) activities for doing liaison work or for providing advice or assistance for the operations or activities of organizations engaging in any of the activities set forth in the preceding items.
[35] The NPO Act section 2.2(1)b.
[36] The NPO Act section 28–30.
[37] The NPO Act section 41–42.
[38] The NPO Act section 43.
[39] The NPO Act section 31.1(7).
[40] The NPO Act section 31.1(1).
[41] The NPO Act section 31.1(7).

interest corporations and national or local governments.[42]

### 2.6. Approved NPO Corporations

#### 2.6.1. Characteristics

When an NPO corporation applies for and obtains additional "approval (nintei)" under the NPO Act,[43] it is called an "approved NPO corporation" (nintei-tokutei-hieiri-katsudou-houjin) and obtains more favorable tax treatment, which includes tax preference to contributors to the NPO corporation (see 4.1. below). The additional approval is effective for five years, at which time the approved NPO corporation must re-apply. When an approved NPO corporation loses its additional approval, it becomes a (standard) NPO corporation.

The form, however, is unsuitable as a format for social enterprises. To obtain additional approval, an NPO corporation must meet the "public support test," which requires that the NPO corporation receives at least on-fifth of its revenue from donations or that the NPO corporation receives donations of at least three thousand JPY from at least, in average per year, a hundred people.[44] For social enterprises that generate revenue from trading rather than donations, this requirement may be cumbersome and difficult to meet.

#### 2.6.2. Formation

See 2.6.1. above.

#### 2.6.3. Maintenance

Approved NPO corporations must engage in disclosure and reporting to governmental agencies.[45] These documents must include an explanation of its "specified nonprofit activities" and ratio of expenditures for the activities. There is no third-party standard for an assessment of whether the corporation has achieved its social goals.

Governmental agencies (the prefectural governor or the head of the designated city) supervise approved NPO corporations.[46] When they fail to meet the requirements for approval, for example, the "public support test" explained above, they may be stripped of it and become (standard) NPO corporations.[47]

#### 2.6.4. Exit

The procedure of liquidation of an approved NPO corporation is the same as that of an (standard) NPO corporation (see 2.5.4. above). No additional process is required to liquidate.

## 3. State/Private Certifications

In Japan, there are no government designations or certifications available for social enterprises.

"B Lab" itself or its "B Corp certification" is hardly known in Japan. Using B Lab's website, 14

[42] The NPO Act section 11.3.
[43] The NPO Act section 44.
[44] The NPO Act section 45.1(1).
[45] The NPO Act section 28, 29, 30, 52–56.
[46] The NPO Act section 64–66.
[47] The NPO Act section 67.

Japanese companies are found as a B Corp.[48] Those companies are small to medium sized companies and there is not an example of listed company certified as B Corp in Japan. One example of B Corp is Eco Ring Co., Ltd., engaging in reuse and recycling thought purchasing and reselling of brand-name products, which is certified since June 2021.[49]

## 4. Subsidies/ Benefits

### 4.1. Tax Preferences

Certain corporate forms enable the corporations that adopt them, in some cases along with their contributors, to attain tax preferences. As to the corporation tax imposed on the entity, general incorporated associations[50], public incorporated associations, NPO corporations and approved NPO corporations enjoy the tax preferences that only revenues generated from "profit-making businesses"[51] under the Corporate Tax Act are taxable. In addition, for public interest incorporated associations, revenues generated from the "businesses for public interest purposes" are not taxable, even if they are generated from "profit-making businesses" under the Corporate Tax Act. Contributors to public interest incorporated associations and approved NPO corporations enjoy tax preference that individual contributors can acquire reductions for taxable income, and corporation contributors can include certain amounts in deductible expenses.

### 4.2. Other Benefits

In Japan, there are no procurement preferences designed for social enterprises. However, there are some procurement preferences managed by national and local governments, which can be utilized by corporations with social missions. For example, the Act on promotion of governmental procurement of goods from facilities where persons with disabilities work[52] offers procurement preferences to facilities that hire certain number of persons with disabilities. Also, the Act on promotion of governmental procurement of eco-friendly goods[53] requires national government to formulate a policy for procurement. The policy settled based on this act provides detailed criteria including, for example, that restaurants which will be operated in the governmental office shall use tableware that can be used repeatedly.

## 5. Private Capital

As with other countries, so-called "ESG investment" is attracting attention in Japan. However, when it comes to "impact investment", which focuses not only on sustainability but also on the extent to which the business makes some positive impact on the environment or society, it still remains uncommon and limited in Japan. Yet, some players have started engaging in impact investment. For example, the Japan Venture Philanthropy Fund,[54] established in 2013 and jointly operated by Nippon Foundation[55] and

[48] https://www.bcorporation.net/en-us/find-a-b-corp
Searched by using "Japan" as location and checking the box of "Headquarters Only".
[49] https://www.bcorporation.net/en-us/find-a-b-corp/company/eco-ring
[50] But only in case the articles of incorporation provide that residual assets will be given to certain parties, such as certain public interest corporations and national or local government.
[51] Houjin-zei-hou-sekourei (Order for the Enforcement of the Corporation Tax Act) section 5.
[52] Kuni-tou-ni-yoru-syougaisya-syuurou-shisetsu-tou-karano-buppin-tou-no-cyoutatsu-no-suishin-tou-ni-kansuru-houritsu, Act No. 50/2012.
[53] Ku-ni-tou-ni-yoru-kankyou-buppin-tou-no-cyoutatsu-no-suishin-tou-ni-kansuru-houritsu, Act No. 100/2000.
[54] http://www.jvpf.jp/en/. https://jvpf.jp/about/.
[55] https://www.nippon-foundation.or.jp/en.

Social Investment Partners,[56] is sourced by contributions and provides investments or loans to social businesses.

As there are no specific legal systems for social enterprises, securities regulations and securities exchanges do not treat share corporations differently depending on whether they are social enterprises.

## 6. Roles Played by Parties and Enforcement Mechanisms

To compel social enterprises to pursue their social missions, what role can constituencies play? What mechanisms can they use?

When social enterprises are organized using the form of share corporations (see 2.2. above), only shareholders have voting rights and can play roles in corporate governance. The mechanisms that shareholders can use to compel directors to pursue their social missions are insufficient. If directors are not sufficiently pursuing their social missions, nearly the only way shareholders can influence the situation is by dismissing those directors.[57] It is true that directors who breach their fiduciary duties are subject to liability for damages to the company,[58] and shareholders can pursue those liability through derivative suits.[59] However, in case the directors focus on making a profit failing to pursue social missions and no financially evaluable damages has occurred to the corporation, that mechanism will not work, because shareholders can only pursue financially evaluable damages. Employees, customers, and other stakeholders have no mechanism to compel the corporation pursue its mission.

When social enterprises are organized using general incorporated associations or public interest incorporated associations, (see 2.3., 2.4. above), directors are elected by the resolution of members meeting, and members meeting can also dismiss directors without cause.[60] In case of NPO corporations and approved NPO corporations (see 2.5. and 2.6. above), the process of member election is provided in the articles of incorporation, and members have rights to dismiss directors only if the rights are provided in the articles of incorporations.[61] Similar to the case of share corporations, without financially evaluable damages to the corporation, mechanisms to pursue liability for damages do not work. Employees or customers have no mechanisms to use. Public interest incorporated associations (see 2.4. above), NPO corporations (see 2.5. above), and “approved” NPO corporations (see 2.6. above), however, are supervised by a governmental agency. In extreme cases, if a social enterprise adopting one of these forms is ignoring its social mission, it would lose its authorization or authentication. As mentioned in 2.5.3. above, failure to file a report (usually 3 years or more) is a common reason for revocation of authentication for NPO corporations. There are few cases[62] where authorization of public interest incorporated associations are revoked, and most of revocation was made based on the application of revocation from the corporation itself.

## 7. Prospective Changes

In June 2022, the Japanese cabinet approved “Grand Design and Action Plan for a New Form of

[56] http://sipartners.org/english/.
[57] The Companies Act section 239.
[58] The Companies Act section 423.
[59] The Companies Act section 847.
[60] The General Corporation Act section 63, 70.
[61] The NPO Act section 11.1(6).
[62] There are 10 cases in 2018 fiscal year, and 12 in 2019 fiscal year.

Capitalism".[63] It includes the section titled "Consider reforms of new and existing corporate forms that play public roles in the private sector", which refers to benefit corporations in U.S. and Europe and says "[t]he [Japanese] government will consider the need for a new legal system as a new form of public private partnership. A forum will be established to study this concept as part of the Council of New Form of Capitalism Realization."[64]

## 8. Is a Specific Legal Form or Certification System Necessary?

Is a specific legal form or a certification system necessary for the growth of social enterprises in Japan?

As explained so far, one can engage in businesses with social aims by using an existing legal form. When one uses nonprofit legal forms, general incorporated associations or NPO corporations can be good options. However, as nonprofit corporations cannot raise money through investment, it may be difficult for them to enlarge the size of their businesses. In that case, the option to run social enterprises using the mechanism of for-profit corporations seems to be necessary. But share corporations too are not perfect as formats for social enterprises. What kind of new legal infrastructure, if any, is needed?

Introducing a new certification system may be easier than introducing a new legal form of organization. Considering that it is not guaranteed that a share corporation will preserve and pursue its social objectives (see 2.2. above), it would be beneficial to introduce a certification system to identify corporations that are truly pursuing social objectives and make those corporations attract ethical consumers and investors engaging in impact investment. The certification should be given by the government or by the private organization accredited by the government, in order to unify the requirement and criteria which is necessary to get the certification. To get the certification, corporations should be required to engage in activities or investment to solve social issues, and details of which would be disclosed with approximate amount consumed for that purpose annually.

Whether or not a new specific legal form of organization is necessary, in addition to a certification system, is a more complicated issue. As described in 2.2. above, when a social enterprise organizes itself as a share corporation, the issue of whether directors are allowed to prioritize social objectives over profit making arises. Certainly, directors of share corporations are given wide discretion, and the Japanese version of business judgment rule reduces the likelihood that directors will be held liable for breach of fiduciary duty. Therefore, as long as directors explain that "we balance social contribution and profit making," the risk that directors will breach their fiduciary duties does not seem high. It remains questionable, however, whether it constitutes a breach of fiduciary duty when directors clearly state that "we prioritize pursuing social objectives over making a profit" or "we reduce dividends to shareholders and use that amount to solve social issues." In the latter case, it may infringe on the interests of shareholders who do not want corporations to sacrifice profit. If there are a large number of corporations that wish to operate in this latter fashion, introduction of a new specific legal form may be required. It should also be noted that if a new legal form for social enterprises is introduced and conversion from ordinary share corporations to this new legal form is allowed, the right to exit should be provided to

[63] Atarashii-shihonshugi-no-gurando-dezain-oyobi-jikkou-keikaku. Provisional English translation is available at https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/ap2022en.pdf

[64] English translation is from https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/ap2022en.pdf

protect existing shareholders.

**[Appendix: Characteristics of each legal form]**

| | i) Share corporations (kabushiki-gaisya) | ii) One-person-managed unincorporated business (kojin-jigyo) | iii) General incorporated associations (ippan-syadan-houjin) | iv) Public interest incorporated associations (koueki-syadan-houjin) | v) NPO corporations (tokutei-hieiri-katsudou-houjin) | vi) "Approved" NPO corporations (nintei-tokutei-hieiri-katsudou-houjin) |
|---|---|---|---|---|---|---|
| Suitability and inconvenience as legal forms for social enterprises (author's personal view) | Apparently suitable.<br><br>Insufficient mechanisms compelling corporations to pursue social missions (see 2.2. in the text).<br><br>Question remains whether directors are allowed to prioritize social objectives over profit-making (see 2.2. and 6. in the text). | Apparently suitable.<br><br>No legal personality.<br><br>No mechanisms to compel the person to pursue social missions. | Apparently suitable.<br><br>Cannot get funding through investment.<br><br>Assets are not completely locked. Its residual assets can be distributed to members (see 2.3. in the text).<br><br>It is not guaranteed that a general incorporated association will permanently pursue its social objectives (see 2.3. in the text). | Not necessarily suitable.<br><br>Cannot get funding through investment.<br><br>Its primary purpose must be to operate the "business for public interest purposes", which must fall into any of the 22 categories of businesses listed in the Act (See 2.4. in the text).<br><br>Regarding "business for public interest purposes", the revenue must not exceed the amount compensating the reasonable cost for its operation (see 2.4. in the text). | Apparently suitable.<br><br>Cannot get funding through investment.<br><br>The primary purpose must be engaging in "specified nonprofit activities", which must fall into any of the 19 categories of activities listed in the Act (See 2.5. in the text).<br><br>It can pay remuneration only to one third or less of directors and auditors (see 2.5.1. in the text). | Not necessarily suitable.<br><br>Cannot get funding through investment.<br><br>The primary purpose must be engaging in "specified nonprofit activities", which must fall into any of the 19 categories of activities listed in the Act (See 2.5. in the text).<br><br>The "public support test", which requires a certain amount or number of donations, is cumbersome for corporations that produce revenue by trading (see 2.6. in the text). |
| Act (shown by abbreviation) | The Companies Act | N/A | The General Corporation Act | The General Corporation Act.<br><br>The Act on Authorization. | The NPO Act | The NPO Act (section 44 and below) |
| Legal personality | Yes | No | Yes | Yes | Yes | Yes |
| For-profit corporation or nonprofit corporation | For-profit | N/A | Nonprofit | Nonprofit | Nonprofit | Nonprofit |
| If it can get funding | Yes | N/A | No | No | No | No |

| | | | | | | |
|---|---|---|---|---|---|---|
| through investment | | | | | | |
| Formation | It can be easily incorporated by entering it at a registry. | N/A | It can be easily incorporated by entering it at a registry. | When general incorporated associations obtain "authorization", they become public interest incorporated associations. | "Authentication" is required to establish an NPO corporation. | When an NPO corporation applies for and obtains additional "approval", it is referred to as an "approved" NPO corporation. |
| Limitations and prohibition on profit distributions to owners or members (non-distribution constraint) | No | N/A | Basically, distribution is prohibited.<br><br>But residual assets can be distributed to members (see 2.3. in the text). | Distribution is completely prohibited. | Distribution is completely prohibited. | Distribution is completely prohibited. |
| Permissible objects | Basically, pursuit of profit<br><br>But directors have wide discretion. | Any object | Any object | Its primary purpose must be to operate the "business for public interest purposes", which must fall into any of the 22 categories of businesses listed in the Act (see 2.4. in the text). | The primary purpose must be engaging in "specified nonprofit activities", which must fall into any of the 19 categories of activities listed in the Act (see 2.5. in the text). | The primary purpose must be engaging in "specified nonprofit activities", which must fall into any of the 19 categories of activities listed in the Act (see 2.5. in the text). |
| Purpose/mission requirement | No | No | No | Yes | Yes | Yes |
| Limited liability | Yes | N/A | N/A | N/A | N/A | N/A |
| Rights to participation in management (incl. voting rights and other governance rights) of owners and other stakeholders (e.g., employees) | Shareholders: Yes<br><br>Other stakeholders: No | N/A | Members (not owners) have voting rights.<br><br>Other stakeholders: No | Members (not owners) have voting rights.<br><br>Other stakeholders: No | Members (not owners) have voting rights.<br><br>Other stakeholders: No | Members (not owners) have voting rights.<br><br>Other stakeholders: No |
| Continuity of existence | Yes | Until the person dies. | Yes | Yes | Yes | Yes.<br><br>But obtaining "approval" is required in every 5 years. |
| Transferability of ownership | Yes | N/A | N/A | N/A | N/A | N/A |

| | | | | | | |
|---|---|---|---|---|---|---|
| Fiduciary duty or other conceptions of obligations for leaders | Yes.<br><br>Directors owe fiduciary duty. | N/A | Yes.<br><br>Directors owe fiduciary duty. | Yes.<br><br>Directors owe fiduciary duty. | Although there is no explicit provision, it can be understood that directors owe fiduciary duty. | Although there is no explicit provision, it can be understood that directors owe fiduciary duty. |
| Discretion/limitations on serving stakeholders beyond investors | Question remains whether directors are allowed to prioritize social objectives over profit making (see 2.2. in the text). | N/A | N/A | N/A | N/A | N/A |
| Limitations on trading | No | No | No | Trading itself is not limited. However, regarding the "business for public interest purposes", it is required that the revenue is expected to not exceed the amount compensating the reasonable cost for its operation (see 2.4. in the text). | No | No |
| Disclosure/reporting requirement | Financial statements must be disclosed in accordance with the Company Act, and in case it is listed, the Financial Instrument Exchange Act. | No | Financial statements must be disclosed (see 3.3.4. in the text). | Detailed financial statements and other documents must be reported (to the governmental agency) and disclosed (see 4.3.4. in the text). | Disclosure and reporting (to the governmental agency) should be made (see 5.3.4. in the text). | Disclosure and reporting (to the governmental agency) should be made (see 6.3.4 in the text). |
| Disclosure/reporting requirement as to social activities or social impact | No | No | No | It must include an explanation on its social activities and the ratio of expenditures for the "business for public interest purposes". | It must include an explanation on its "specified nonprofit activities". | It must include an explanation on its "specified nonprofit activities" and the ratio of expenditures for the activities. |
| Supervision by governmental agencies or regulator | No | N/A | No | Yes (see 4.3.4 in the text). | Yes (see 5.3.4. in the text). | Yes (see 6.3.4. in the text). |

| | | | | | | |
|---|---|---|---|---|---|---|
| Procedure of dissolution | Resolution of shareholder meeting | N/A | Resolution of member meeting | Resolution of member meeting | Resolution of member meeting.<br><br>It is also dissolved when it loses its authentication. | Resolution of member meeting |
| Entity and owner taxation (as to national tax) | Share corporations are subject to corporation tax.<br><br>Shareholders are subject to Income Tax for dividends received and gain on sale. | The person is subject to income tax. | General incorporated associations are subject to corporation tax. | Public interest incorporated associations are subject to corporation tax. | NPO corporations are subject to corporation tax. | Approved NPO corporations are subject to corporation tax. |
| Tax preferences for the corporations | N/A | N/A | In case the articles of incorporation provide that residual assets will be given to certain parties, such as certain public interest corporations and national or local government, only revenues generated from "profit-making businesses" under the Corporate Tax Act are taxable. | Only revenues generated from "profit-making businesses" under the Corporate Tax Act are taxable<br><br>Revenues generated from the "businesses for public interest purposes" are not taxable. | Only revenues generated from "profit-making businesses" under the Corporate Tax Act are taxable. | Only revenues generated from "profit-making businesses" under the Corporate Tax Act are taxable. |
| Tax preferences for investors/contributors | N/A | N/A | N/A | Individual contributors can acquire reductions for taxable income.<br><br>Corporation contributors can include certain amounts in deductible expenses. | N/A | Individual contributors can acquire reductions for taxable income.<br><br>Corporation contributors can include certain amounts in deductible expenses. |

# Legal Perspectives on the Streaming Industry in Japan

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## 1 Introduction

Neither the Japanese Copyright Act nor any other piece of legislation provides a definition of streaming per se. However, the act of streaming works protected by copyright is subject to legal regulation since it constitutes an infringement of the rights protected by the Copyright Act. Infringement only occurs without authorisation of right holders or where no exception/limitation applies. Streaming a copyright protected work to an unspecified or large number of persons constitutes an infringement of the copyright owner's right of automatic transmission to the public which includes the right of making it available for transmission,[1] as well as the neighbouring right of making the work available for transmission.[2] In addition, the storage of copyrighted works on a transmission server, whether or not they are made available for transmission to the public, infringes the right of reproduction held by copyright and neighbouring rights holders.[3] Depending on the manner of use, it may also constitute an infringement of the moral rights of the author.[4] This paper will only refer to the authorial copyright, except in cases where neighbouring rights are treated differently.

It should be noted that the concept of streaming seems to envisage the continuous transmission of content. However, illegal sites where comics are made available online have become a problem in Japan, regardless of whether they are sites where downloading is envisaged or not[5]. As far as the rights of the copyright holder are concerned, even a still image of a comic book can be object of a public transmission, thus raising the same legal issues as streaming music clips or videos. Therefore, this issue is also discussed within the context of pirate sites in Japan. However, unlike UK law, the Japanese legal system does not provide for exclusive rights for publishers. For this reason, this paper will touch a little on the issue of online distribution of comics.

## 2 Economic Figures of Streaming Activities

According to a survey published by the Recording Industry Association of Japan (RIAJ)[6], the total

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[1] Article 23 of the Copyright Act, Act No. 48 of 1970. An unofficial English translation of Japan's Copyright Law can be viewed at: http://www.japaneselawtranslation.go.jp/law/detail/?id=3379&vm=02&re=2&new=1.
The amendments for 2019 onwards have not yet been translated. It was last amended in 2021. The latest Japanese legislation is available at the following official website: https://elaws.e-gov.go.jp/ (in Japanese).

[2] In the Japanese legal system, record producers, performers, broadcasters and cable broadcasters are classified as holders of neighboring rights (I would add the relevant provision of the Copyright Act here. Though I just looked that there are quite a few provisions, such as Articles 91). Of these, record producers and performers have the right to make their material transmittable (available?). Specifically, performers have the right to have their performances automatically made available for transmission to the public in response to access from a terminal (Article 92-2 of the Copyright Act). A producer of phonograms has the right to make his phonograms automatically available for transmission to the public in response to access from a terminal (Article 96-2 of the Copyright Act).

[3] Article 21 of the Copyright Act.

[4] It may be an infringement of the right of identity if the alterations are made against the author's intention. It may also be an infringement of the right to name if the author's name has been removed.

[5] These websites also allow browsing the comic online as an e-book rather than downloading a pdf of the comic.

[6] RIAJ, 'Statistics Trends RIAJ Year Book 2021', available at
https://www.riaj.or.jp/f/pdf/issue/industry/RIAJ2021E.pdf.

market size of recorded music (total of audio[7]/music videos[8]) and digital music[9] in Japan in 2020 was approximately 272.7 billion yen. This is characterised by the fact that recorded music account for 71.3% of total sales. The digital music market in Japan was worth approximately 90.8 billion yen, of which streaming accounted for 75.3% (approximately 58.9 billion yen).

According to a survey conducted by the Japan Video Software Association (JVA) and the Institute for the Arts (IFA),[10] the estimated value of the videogram market in 2020 is 687.4 billion yen (121.9% of the previous year's total). Of this, the fee-based video streaming market accounted for 397.3 billion yen. This represents a significant increase of 165.3% in comparison to the previous year, due to the increased use of subscription-based services. On the other hand, both the size of the video sells and rental markets have been decreasing. Amazon Prime Video (58.8%), Netflix (21.8%) and Hulu (13.9%) were the most popular subscription service providers（Figures in brackets are market share）according to this survey.

According to a survey by the Research Institute for Publications,[11] the publishing market (print and digital) in 2020 amounted to 1,616.8 billion yen (+4.8% YoY). Of this, the market in print publishing was 1,223.7 billion yen (-1.0% YoY), comprising of 666.1 billion yen in books (-0.9% YoY) and 557.6 billion yen in magazines (-1.1% YoY). In contrast, the digital publishing market amounted to 393.1 billion yen (+28.0% YoY), comprising of 342 billion yen for comics (+31.9% YoY), 40.1 billion yen for e-books (text) (+14.9% YoY) and 11 billion yen for magazines (-15.4% YoY). Interestingly, more than 80% of the volume of the e-publishing market comprises of comics. Japanese comics are also popular on the international market compared with other types of Japanese publications. Since the problem of piracy on the Internet has been highlighted the Japanese government has consequently been focusing on measures targeting these illegal sites.

## 3 Legal Streaming

### *3.1 Collective Management and Individual Rights Clearance*

As mentioned, streaming a copyrighted work requires authorization by the copyright owner. In relation to musical works, the management of copyright for most works is entrusted to collective management organizations, such as JASRAC or NexTone. Anyone wishing to use a musical work for streaming is required to seek a license which can be obtained by payment of a prescribed fee.

In order to stream sound recordings, neighboring rights of record producers and performers need to be considered. These, however, are generally not managed by a collective management organizations.

Phonogram producers and performers have the right to claim remuneration in relation to secondary uses of commercial phonograms for the purpose of broadcasting. Thus, broadcasters may therefore use sound recordings for broadcasting without permission of their right holders. The Recording Industry Association of Japan (RIAJ) and the Center for Performers' Rights Administration (CPRA) are responsible for the collection and distribution of the secondary use fees for record producers and performers, respectively[12] and rights holders cannot claim these secondary use fees individually. As no

[7] Audio: CDs, vinyl discs, cassettes and others (SACDsm DVDs-Audio, DVDs-Music and MDs).
[8] Music videos: DVDs, blu-ray discs, tapes and others.
[9] Digital music: Master ringtones, ringback tones, downloads, streams and others.
[10] Japan Video Software Association, Institute for the Arts, 'Video Software Market Size and User Trend Study 2020' (May 2021) http://jva-net.or.jp/report/annual_2021_5-11.pdf (in Japanese).
[11] HON.jp, 'In 2020, the paper and electronic publishing market will be worth 1,616.8 billion yen, the second consecutive year of positive growth, according to the Research Institute for Publications', https://hon.jp/news/1.0/0/30504 (in Japanese).
[12] Article 95(5) and 97(3) of the Copyright Act.

corresponding system exists for streaming uses, it remains necessary to obtain permission for such uses from the respective right holders.

### *3.2 Value Gap and Government Policy*

Although the issue of the so-called 'value gap' has been recognized by the government,[13] there is currently no regulation aimed at ensuring a fair share of authors and performers in the revenues generated by streaming services. In July 2021, the Minister of Education, Culture, Sports, Science and Technology consulted the Council for Cultural Affairs on the issue of 'the ideal copyright system and policies for the digital transformation (DX) era'.[14] The Council will deliberate on how to respond to the so-called "value gap" in digital platform services as well as contractual issues.

Currently, no legal regulations requiring audiovisual streaming platforms to include a certain percentage of Japanese audiovisual works in their catalogue exists. There is also no screen quota system for the screening of films in cinemas and for other content in Japan. Hence, the market share between domestic and foreign works is only determined by free competition.

## 4 Legal Liability of Illegal Streaming Services

### *4.1 Users*

#### 4.1.1 Uploading

The exclusive rights which copyright provides includes, *inter alia*, the right of transmission to the public[15] and the right of reproduction.[16] The right of public transmission can be categorized in four types of 'public transmissions': (1) broadcasting,[17] (2) cable broadcasting,[18] (3) automatic public transmissions,[19] and (4) other public transmissions.

Since streaming services on the Internet are transmitted automatically in response to a request, they fall under (3) automatic public transmissions. The right of automatic public transmissions includes the right to make the work transmittable,[20] which automatically makes it transmittable to the public via the Internet or the like. Therefore, the act of uploading a copyrighted work to a streaming service without obtaining permission from the respective right holder will infringe the public transmission right (i.e. the making transmittable right). The reproduction of a work on a server used for a streaming service is covered by the reproduction right. Unlike the making transmittable right, the right of reproduction is even affected where content is uploaded to a server which is not intended for automatic public transmission.[21]

The question arises whether users who unknowingly upload works while downloading works in a

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[13] Minister of Education, Culture, Sports, Science and Technology, Consultation No. 74 of 2021 https://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/bunkakai/61/pdf/93245501_03.pdf (in Japanese). The Minister's consultation notes that "there are some indications that there is a value gap between service providers and creators". However, the Minister was only pointing out the existence of a discussion, not acknowledging the actual existence of a value gap.

[14] Minister of Education, Culture, Sports, Science and Technology, Consultation No. 74 of 2021 (in Japanese).

[15] Article 23 of the Copyright Act.

[16] Article 21 of the Copyright Act.

[17] The definition is set out in Article 2(1)(viii) of the Copyright Act.

[18] The definition is set out in Article 2(1)(ix)-2 of the Copyright Act.

[19] The definition is set out in Article 2(1)(ix)-4 of the Copyright Act.

[20] Making available for transmission means making a file uploaded to a server available for downloading by an unspecified number of people (Article 2(1)(ix)5). Making available for transmission is a concept that captures the preliminary act of automatic public transmission.

[21] On the other hand, a reproduction does not constitute an infringement of the right of reproduction if it is for private use (Article 30 of the Copyright Act).

peer-to-peer system (P2P) are treated differently in terms of legal liability? On the one hand, the liability for civil damages for copyright infringement requires intent or negligence. However, intent or negligence of the infringer are not prerequisites for the grant of an injunction for copyright infringement. For criminal liability the infringement of copyright is only punishable if it was conducted intentionally, whereas negligent acts are not punishable. In the case of a P2P system, an assumption exists that users are aware of the fact that downloading data from a P2P system would automatically become available for transmission at the request of other users of the P2P system. Thus, neither intent nor negligence will be found to be absent, aside from in exceptional circumstances. In relation to this issue, the Osaka District Court did not accept the argument that BitTorrent users would lack intent or negligence when infringing copyright since they would lack the understanding that a person downloading a file using BitTorrent technology would also become an uploader at the same time.[22]

#### 4.1.2 Downloading

The act of downloading an unlawfully uploaded work from an unauthorized streaming site may, under certain requirements, constitute an infringement of the right of reproduction. This is even the case where the reproduction is conducted for private use. In this case, there is a difference in the requirements for the establishing civil and criminal liability. Importantly, the act of merely browsing an illegal streaming site does not constitute copyright infringement under Japanese law.[23]

In order for civil liability to be established for the act of reproduction by downloading for private uses, it is assumed that the work in question is an unlawfully uploaded work. Based on this premise, the requirements are (i) downloading the unlawfully uploaded work and (ii) downloading the work knowing that it has been unlawfully uploaded.[24] Even in this case, an exception to the infringement of the reproduction right applies where (a) the use is 'minor', (b) it is a download of a derivative work or (c) there are 'special circumstances which are deemed not to unreasonably prejudice the interests of the copyright owner'.[25]

In order for the act of reproduction by downloading for private use to be subject to criminal sanctions, the work in question must be such work for which an authorized version is available for a fee in addition to it having been uploaded unlawfully. On that basis, the requirements are: (i) to download the illegally uploaded work; (ii) to download the work knowing that it has been illegally uploaded; and (iii) to do so continuously or repeatedly.[26] The above mentioned exception to the right of reproduction equally applies in this case.

### *4.2 Website Operators (Leech Site Issue)*

If the operator of a pirate site rents a server from a hosting service provider (HSP), installs and operates the site, and uploads and transmits the copyrighted material without the permission of the copyright owner, the operator is liable for injunctive relief and damages as a copyright infringer. However, there had been legal difficulties in holding pirate operators who do not upload copyrighted content but only provide link information liable for copyright infringement.

The 2020 amendment to the Copyright Act introduced restrictions on websites and related apps that

[22] Osaka District Court 22 April 2021, 2020 (Wa) No. 8609 (Action against the provider for Disclosure of Identification Information of the Sender).
[23] The copyright exploitation rights are enumerated in Articles 21 to 28 of the Copyright Act, but the right of access to works is not included in the enumeration.
[24] Article 30(1)(iv) of the Copyright Act.
[25] Article 30(1)(iv) of the Copyright Act.
[26] Article 119(3)(iii) of the Copyright Act.

purposely direct users to infringing content. These sites and apps are referred to as 'Leech sites' and 'Leech apps' in Japan. Both (i) the act of providing a link on Leech site[27] or a Leech app, and (ii) the act of providing a link by the operator of a Leech site or the provider of a Leech app are considered to be acts of copyright infringement,[28] and are subject to not only civil measures but also criminal penalties.[29]

### *4.3 Development of Peer-to-Peer Software*

As such, no legal provision in the Copyright Act exists that deems the development of peer-to-peer software as an infringement of copyright. The question arises, however, whether there is room to establish that developers of peer-to-peer software can be regarded as infringers of copyright as a matter of interpretation of the Copyright Act? [30]

In Japan, the so-called Karaoke doctrine[31] will hold a person who has control over direct infringement to be normatively considered as a direct infringer when two factors are provided: (1) the person has control over the direct infringement of others and (2) makes profit of such direct infringement.[32] However, it is generally difficult to recognize the legal liability of a file sharing software developer/provider as a subject of copyright infringement because it cannot be said that the developer/provider directly manages or controls the acts of infringing users.

More recent case law has not applied only the above two factors to determine the party who use copyrighted works, but rather recognise the party based on the overall balance of various factors[33]. However, even if that approach is used, it would be difficult to identify the act of software development as an act of direct copyright infringement.

In contrast, liability can also be assumed for aiding and abetting infringement. The Supreme Court of Japan dealt with a case in which the offender was accused of aiding and abetting the infringement of the right of public transmission of copyrighted works by disclosing and providing a file-sharing software called 'Winny'. The software can be used for both lawful as well as infringing purposes, to an unspecified number of people through the Internet.[34]

The Supreme Court held that, in order for the act of providing "value-neutral" software, i.e. software that can be used for both legal and illegal purposes, such as copyright infringement to constitute an act of aiding and abetting, there must be a general possibility that it would be used for infringing uses. Additionally, the provider must be aware of and accept this possibility. In this case, the Supreme Court concluded that the accused lacked the intention to commit the crime of aiding and abetting the violation

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[27] (i) the act of providing links on the Leach site and Leach Apps (Article 113(2)), and (ii) the act of leaving the act of providing links by the operator of the Leach site and the Leach Apps (Article 113(3)) are deemed to be acts of copyright infringement and, as a result, are subject to injunctive relief (Article 112(1)).

[28] Article 113(2) of the Copyright Act for (i) and Article 113(3) of the Copyright Act for (ii).

[29] Article 120-2(iii), Article 119(2)(iv) and (v) of the Copyright Act.

[30] P2P developers can be the subject of infringement if they even provide a service. See Judgment of the Tokyo High Court on 31 March 2005 [*File Log case*], 2004 (ne) No. 446.

[31] Japanese courts have normatively extended the notion of direct infringement under the concept of Karaoke doctrine. For more information on Karaoke doctrine, please refer to the following references, T. B. Yamamoto, 'Legal Liability for Indirect Infringement of Copyright in Japan', in D. Campbell ed, *Comparative Law Year Book of International Business 35*, Wolters Kluwer, 2013, available at: https://www.itlaw.jp/yearbook35.pdf.

[32] Supreme Court, Third Petty Bench, 15 March 1988, Minshū(Saikō Saibansho Minji hanreishū), Vol.42, No.3, p.199〔*Club Cat's Eye case*〕. An unofficial translation (in English) is available at: https://www.ip.courts.go.jp/app/files/hanrei_en/627/001627.pdf (database of the Intellectual Property High Court).

[33] Supreme Court, First Petty Bench, 20 January 2009, Minshū (Saikō Saibansho Minji hanreishū), Vol.65, No.1, p.399〔*Rokuraku II case*〕.

[34] Supreme Court, Third Petty Bench, 19 December 2011, Keishū(Saikō Saibansho Keiji hanreishū), Vol. 65, No. 9, p.1380)〔*Winny case*〕. An unofficial translation (in English) is available at: https://www.ip.courts.go.jp/app/files/hanrei_en/399/002399.pdf (database of the Intellectual Property High Court).

of copyright.

Thus, a peer-to-peer software developer/provider could be found guilty of aiding and abetting the violation of the Copyright Act and be held criminally liable, but only in very exceptional cases.

If a file sharing software developer/provider is found to be aiding and abetting copyright infringement, damages may be claimed under the Civil Code as a civil action.[35] In relation to the question whether injunctive relief is provided automatically, the courts are split into denied[36] and affirmed.[37] Even where an injunction is granted against the act of aiding and abetting, it only covers the act of developing and providing the file sharing software not its use by third parties directly committing infringement.

In any event, it would be less effective to grant an injunction because it would only stop the development and distribution of the software.

### *4.4 Internet intermediaries*

#### 4.4.1 Hosting Providers

Aside from legal action being available against the operator of an illegal streaming service, it may be possible in certain cases to additionally hold the hosting service provider (HSP) that provides the streaming delivery service liable. Copyright owners may seek injunctive relief and claims for damages against hosting service providers through civil actions. Under the Provider Liability Limitation Act, hosting providers are subject to the application of the limitation of the provider's liability for damages (for more information, see 5.2).

There are some different legal interpretations of decisions on the liability of hosting providers. One decision held that if the HSP in question (in this case the operator of the bulletin board service provider) is found to have a duty to prevent copyright infringement by users of its services, it would be a joint infringer of copyright by breaching that duty[38].

Another judgment, based on the so-called "normatively infringing" entity[39] theory, found the operators of music file-sharing and video-sharing sites to be infringers.

However, according to the classification in this paper, these would simply be website operators as providers of illegal services (see 4.2). In this case, the provider cannot be exempted from liability for damages because it is the 'sender of the infringing information'.[40]

#### 4.4.2 Transit Provider (Common Carrier)

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[35] Article 709 of the Civil Code. There is no provision in the Copyright Act which provides a basis for the right to claim damages. Since copyright infringement is a tort, the Civil Code, which provides for damages in tort, is the basis for a claim for damages.

[36] Tokyo District Court, 11 March 2004, Hanrei jihō (Hanji) No. 1893, p. 131 [*2 channel case*](in Japanese).

[37] Osaka District Court, 13 Feb 2003, Hanrei jihō (Hanji) No. 1842, p. 120 [*Hit One*], Osaka District Court, 24 Oct 2005, Hanrei jihō (Hanji) No. 1911, p. 65 [*Yoridorimidori case*]. For Yoridorimidori case, an unofficial translation (in English) is available at: https://www.ip.courts.go.jp/app/files/hanrei_en/428/000428.pdf (database of the Intellectual Property High Court).

[38] Tokyo District Court, 3 March 2005, Hanrei jihō (Hanji) No. 1893, p. 126 [*2 channel case*](in Japanese).

[39] Intellectual Property High Court on 8 September 2010 [*TV Break case*], Hanrei jihō (Hanji) No. 2115, p. 102, Tokyo High Court on March 31, 2005 [*File Log case*], 2004 (ne) No. 446. For TV Break case, an unofficial translation (in English) is available at: https://www.ip.courts.go.jp/app/files/hanrei_en/555/000555.pdf (database of the Intellectual Property High Court).

[40] Article 3(1) of the Provider Liability Limitation Act, Act No. 137 of November 30, 2001. The official name of the Act is Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender. An unofficial English translation is available at: http://www.japaneselawtranslation.go.jp/law/detail/?id=3610&vm=02&re=02&new=1.

It is difficult to establish the liability for internet service providers as transit providers (common carriers) on the grounds that they cannot be identified as copyright infringers.

#### 4.4.3 Search Engine Companies

It would be difficult to require search engine companies not to display leech sites containing illegal streaming services within their search results, as the legal basis for this is not clear. With regard to measures to be taken by search sites, the 'Study Group on the Display of Copyright Infringing Content in Search Results' has been established as a forum for consultation between publishers, rights holders' organizations and search operators.[41] The Content Overseas Distribution Association（CODA）and Google have established and are operating a new system to effectively and efficiently remove top level pages and category pages pertaining to malicious pirate sites from search results.[42]

One aspect of the 2020 amendments to the Copyright Act establishes that leech sites themselves are now subject to criminal penalties and can be referred to as illegal sites with criminal penalties.[43] As a result, it may be easier for search engines to treat them in the same way as sites selling drugs, which also have criminal penalties.

#### 4.4.4 Advertising Agencies

Advertising agencies that pay advertising fees to infringing websites may be charged with aiding and abetting copyright infringement as a civil liability. In a very recent decision, the Tokyo District Court accepted a claim for damages against an advertising agency that had paid advertising fees to the pirate site "Manga-mura", claiming that it was aiding and abetting copyright infringement. The Court held that 'until Manga-mura was closed down, copyright infringement continued, and this illegal situation was promoted and facilitated by the payment of advertising fees by the defendants, and this can be assessed as 'aiding and abetting'.

In addition, the Court found that 'the defendants had a duty of care to investigate whether "Manga-mura" had obtained permission to use the copyrighted works it posted, and then to decide whether or not to accept requests for advertising, but they failed to confirm this, and the act of paying the advertising fees was a negligent breach of that duty of care'.[44]

With regard to counteracting advertisements on pirated websites, the Government will share the list of pirated websites through a joint meeting of rights holders and advertising-related organizations, and promote the formulation and dissemination of voluntary guidelines by advertising-related organizations.[45]

### *4.5 Freedom of Expression*

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[41] See, Google, Publishing and Public Relations Center, Japan Book Publishers Association(JBPA), Japan Magazine Publishers Association(JMPA), and Content Overseas Distribution Association(CODA), 'Study on the Display of Search Results for Copyright Infringing Content' (September 18, 2019) available at: https://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/hoki/r01_02/pdf/r1421572_02.pdf (in Japanese).

[42] Cabinet Office, National Police Agency, Ministry of Internal Affairs and Communications, Ministry of Justice, Ministry of Foreign Affairs of Japan, Ministry of Education, Culture, Sports, Science and Technology, Ministry of Economy, Trade and Industry, 'Comprehensive List of Measures and Process Chart against Internet Piracy' (9 April 2021) (hereinafter Cabinet Office, et al., 'Comprehensive List of Measures and Process Chart against Internet Piracy') https://www.kantei.go.jp/jp/singi/titeki2/chitekizaisan2020/pdf/kaizoku_taisaku.pdf (in Japanese).

[43] Article 113(2)(i) and (ii) of the Copyright Act.

[44] Tokyo District Court on 21 December 2021, Hanrei jihō (Hanji) No. 2522, p. 136, Intellectual Property High Court on 29 June 2022, 2022 (ne) No. 10005.

[45] Cabinet Office, et al., Comprehensive List of Measures and Process Chart against Internet Piracy.

The regulation of leech sites was introduced in the 2020 amendments to the Copyright Act (see chapter 4.2). During the deliberation process of the Copyright Subcommittee of the Council for Cultural Affairs, the opinions of constitutional law scholars were also submitted. As the viewpoint of the deliberation, the Cultural Council confirmed that 'the act of providing link information plays an essential role in the transmission of information via the Internet and is protected by Article 21(1)[46] of the Constitution as an act of freedom of expression',[47] and then set specific requirements based on the need to consider the clarity of the distinction between what is subject to regulation and what is not.

### *4.6 Specific Systems against Illegal Streaming*

In Japan, the three-strikes or website blocking systems that exist in other jurisdictions have not been implemented, although they have been discussed. The introduction and development of a blocking mechanism is currently being considered while observing the effects of several initiatives[48] promoted by the government and the possible pitfalls.[49]

The aforementioned (i) measures against leech sites and (ii) making it illegal to download infringing content for all types of copyrighted works were introduced in the 2020 amendments (i.e. (i) entered into force on 1 October 2020 and (ii) entered into force on 1 January 2021). These new regulations expand the acts of copyright infringement. It also needs to be mentioned that copyright is enforced by civil and criminal actions before courts, not through administrative procedures.

It is not always clear whether illegal streaming has decreased as a result of these legislative changes. However, data shows a sharp increase in access to 'publication piracy sites'.[50]

The users of peer-to-peer sharing services are the direct infringers (i.e. the senders of information), and it is necessary to identify those senders in order to claim damages or receive injunctive relief. Thus, Article 4 of the Provider Liability Limitation Act provides a legal mechanism for requesting the disclosure of relevant information.

The Japanese Government's 'Strategic Plan to Combat Internet Piracy' which was devised in collaboration with stakeholders implements a number of measures, such as courses for students and teachers, and the production of videos, posters and educational material.

In addition, the government has been working to develop partnerships with civil society to make the distribution of authorized versions of content more convenient for users, with a view to reaching overseas markets.

## 5 Semi-Legal Streaming Service

### *5.1 Legal Liability of Content Sharing Service Providers*

[46] Article 21(1) of the Constitution provides that 'Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed'.

[47] Copyright Subcommittee of the Council for Cultural Affairs, 'Report of the Copyright Subcommittee of the Council for Cultural Affairs' (February 2019), p. 21
https://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/pdf/r1390054_02.pdf (in Japanese).

[48] The following initiatives are underway: copyright education and awareness, promotion of the distribution of authorised versions, measures relating to search sites, control of advertising on pirate sites, filtering, measures against leech sites, etc. See, Cabinet Office, et al., 'Comprehensive List of Measures and Process Chart against Internet Piracy'.

[49] Cabinet Office, et al., 'Comprehensive List of Measures and Process Chart against Internet Piracy'.

[50] ABJ, 'The Latest Situation of and Countermeasures against Publication Piracy Sites' (Ministry of Internal Affairs and Communications, 'Study Group on Measures to Deter Access to Piracy Sites on the Internet' (5th Meeting), handout: (According to the data, the amount of money read for free by users on the top 10 websites for pirated publications, for which estimates are available, was 782.7 billion yen from January to October 2021, far exceeding the annual damage of around 210 billion yen in 2020) (in Japanese).

A content-sharing service provider is not itself a direct infringer, even where its users illegally upload copyrighted material to its platform. As the right to an injunction is to stop an illegal act, it is not possible to claim for injunctive relief as this remedy can only be sought for stopping an illegal act.[51] However, where a copyright holder requests removal of infringing content and the provider negligently omits to comply with this request albeit being obliged to do so, it may be subject to an injunction. Where an injunction is granted, a request may entail that the infringing content must not be made available for automatic public transmission anymore, thus, more concretely, its deletion. In this case, it is also subject to a claim for damages.

### *5.2 Exemption from Liability for Damages under the Provider Liability Limitation Act*

The liability of such hosting service providers for damages can be exempted if certain requirements are met. Specifically, these are the following cases;

- Exemption from liability for neglect of infringing information: Where a provider fails to remove infringing information when a copyright holder files a request for measures to prevent transmission, even though it is technically possible to prevent transmission, the provider is exempted from liability for damages,[52] unless it: (i) knew that IP rights were infringed; or (ii) had reasonable grounds to believe that IP rights could be infringed.
- Exemption from liability for deletion of infringing content: On the other hand, there are cases where the sender/user may suffer damage as a result of the provider's deletion in response to a request for transmission prevention measures. However, where the prescribed requirements are met, the provider is exempted from liability for damages brough by users.[53]

### *5.3 Filtering*

Article 3 of the Provider Liability Limitation Act provides that providers are not obliged to carry out general and preemptive monitoring of information and content on their networks.

Therefore, a copyright owner cannot mandate providers to filter content as a measure to prevent the transmission to unspecified persons of infringing copyrighted content. In addition, the monitoring of communications by providers without the user's consent is considered to be in violation of the secrecy of communications provided by Article 21 of the Constitution and Article 4 of the Telecommunications Business Law.[54]

This is why filtering services which protect adolescents from adult content and such filtering functions applied in security software are being considered as measures to prevent access to pirated websites on the user's terminal side,[55] without breaching the secrecy of communications.

Under the Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People,[56] service providers that provide Internet access from mobile phone terminals are generally obliged, to provide filtering services to adolescent users of mobile phone Internet access

[51] If the streaming server leased by the hosting service provider is used by another business operator to provide illegal streaming services, there is little relationship in terms of management and control. Therefore, in principle, it would not be possible to find that it is an infringing entity of copyright.
[52] Article 3(1) of the Provider Liability Limitation Act.
[53] Article 3(2) of the Provider Liability Limitation Act.
[54] Act No. 86 of 1984. An unofficial English translation of the Act can be viewed at: http://www.japaneselawtranslation.go.jp/law/detail/?id=3390&vm=02&re=01&new=1. The amendments for 2016 onwards have not yet been translated.
[55] Measures are being taken to establish a system of cooperation between rights holders' organizations and security software companies for the use of filtering by security software.
[56] Act No. 79 of 2008. The last revision is in 2017, Act No. 75 of 2017.

services. This filtering service includes piracy sites as restricted sites, and the right holders provide lists of such sites to filtering service providers. Therefore, the growth of such filtering services expected to help deter access to piracy sites.[57]

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[57] Ministry of Internal Affairs and Communications, 'Report of the Study Group on Measures to Deter Access to Pirated Websites on the Internet' (August 2019), p. 23(in Japanese).

# CONTEMPORARY FORMS OF SLAVERY, INCLUDING CAUSES AND CONSEQUENCES: NATIONAL REPORT OF JAPAN

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## ABSTRACT

This paper examined the issues of so-called contemporary slavery in Japan. In Japan, there are some differences in the problems of slavery and those of modern slavery that many other countries have experienced, due to its geographical and historical situations. Thus, there seems to be confusion in Japan regarding perception of the notion of modern slavery against which advanced nations are strengthening regulations. The government of Japan has established an Action Plan against Human Trafficking in 2014. Recently, the government launched 'Japan's National Action Plan on Business and Human Rights (2020-2025),' focusing on the abuse of human rights in the business setting. In my opinion, domestic problems regarding human rights are mostly covered by the existing domestic legal system in Japan. However, domestic laws alone are insufficient for the issue that can be regarded as modern slavery involving transnational migration. Regarding the issue of foreign workers, international cooperation will be essential.

## KEYWORDS

contemporary slavery, foreign workers, human trafficking, Japan, slavery

## TABLE OF CONTENTS



## INTRODUCTION[1]

This paper is intended to examine the issues of so-called contemporary slavery in Japan.

Part 1 of this paper examines whether slavery existed in the history of Japan and whether slavery in the contemporary form exists in current Japan.

Next, Part 2 examines the causes and consequences of the situation that can be argued to be

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contemporary slavery in Japan.

Then, Part 3 analyses redressing and recalibrating the situation that can be argued to be contemporary slavery in Japan.

## 1. THE PRESENCE OF THE PAST: SLAVERY AS A GLOBAL INSTITUTION AND ITS LEGACIES

### *1.1 JAPAN'S HISTORY AND LEGAL SYSTEMS IN TERMS OF GLOBAL SLAVERY*

#### 1.1.1. History

There appeared to be little, if any, history of association between Japan and global slavery.

Due to geographical distance and lack of trade relationship between Japan and African countries, there has been no history of African slavery in Japan except for Spanish or Portuguese merchants and missionaries' servants who were brought into Japan in the late 16th Century. There was a man named *Yasuke* serving the top samurai *Nobunaga ODA* (1534-1582), who was said to be a black slave from Mozambique and was brought into Japan by a Jesuit missionary. *Nobunaga* liked *Yasuke* and gave his residence and treated him not as a slave but as a samurai warrior[2].

Japan had trade relationships with other countries before the 17th century including Spain and Portugal in the Age of Discovery[3]. However, in the Edo Period (1603-1867), Japan's government was very cautious about invasions by Western European countries. Thus, as well as prohibiting Christianity[4], Japan adopted a closed country policy between 1639 and 1854, and traded only with Korea, the Ryukyu Kingdom[5], China and the Netherlands[6] in a very limited area and volume, mainly exporting silver and importing silk produced in China, arms and gunpowder manufactured in Europe. This means that Japan had little direct relationship with countries where slavery was rampant. This policy continued until 1854, when the government started building trade relationships with other countries, beginning with the treaty

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[2] *See* Thomas Lockley & Geoffrey Girard, AFRICAN SAMURAI: THE TRUE STORY OF YASUKE, A LEGENDARY BLACK WARRIOR IN FEUDAL JAPAN (New York, Hanover Square Press, 2019); reprinted ed., YASUKE: THE TRUE STORY OF THE LEGENDARY AFRICAN SAMURAI (London, Sphere, 2019).

[3] Historians have asked questions "Why didn't Japan became a Spanish or Portuguese colony in the 16th and 17th centuries?" The reason for this is thought to be that Spain and Portugal, seeing *Hideyoshi TOYOTOMI* 's dispatch of troops to Korea (1592-1598), evaluated Japan as a having strong military power that would have made colonialization difficult. *See* Arata HIRAKAWA, SENGOKU JAPAN AND THE AGE OF DISCOVERY [*SENGOKU NIHON TO DAIKOKAI JIDAI*] (Tokyo, CHUOKORON-SHINSHA, 2018), pp. 261-264.

[4] St. Francisco de Xavier was the first missionary landed Japan in 1549, just 6 years after the introduction of matchlock guns to Japan by a Portuguese merchant on a Chinese drifting ship in 1543, which changed battle styles and expedited to end up the nation-wide civil war from the middle of the 15th Century and achieved the unification of the nation in 1590 by the top samurai *Hideyoshi TOYOTOMI* who was a successor of *Nobunaga ODA*. The first prohibition order of Christianity was issued by *Hideyoshi* in 1587, a rumour of human trafficking of the Japanese to other nations by Portuguese merchants and missionaries who were said to use Japanese Christians for the purpose of invasions aroused his anger. In fact, it seems that Portuguese merchants took the Japanese abroad, and it is unclear whether they became slaves or indentured servants. A document exists that three Japanese were enslaved and two of them were freed in Mexico at the end of the16th Century. *See* Lúcio de Sousa & Mihoko OKA, JAPANESE SLAVES IN THE AGE OF DISCOVERY [DAIKOKAI JIDAI NO NIHONJIN DOREI] new enlarged ed. (Tokyo, CHUOKORON-SHINSHA, 2021), pp. 38-71.

[5] Now it is the *Okinawa* Prefecture of Japan.

[6] In General, the Netherlands were one of major actors in the global slave trade. However, the history of trade relationship between Japan and the Netherlands is quite unique. After the Suppression of the *Shimabara* Rebellion by Japanese Christians in an area of Kyushu during 1637 to 1638, the government was supported and helped to deport the Portuguese from Japan in 1639 during the Dutch-Portuguese War (1603-1665) by the Dutch East India Company. The government allowed the Dutch merchants to stay in but prohibit them from going outside a small trade zone in *Dejima* strictly.

with the United States[7]. Thus, there was no history of slavery during this period.

After the Meiji Restoration in 1868, Japan advanced a policy promoting national wealth and military strength in order to abolish unequal treaties with the Western countries[8].

In the course of pursuing this policy, Japan acquired Taiwan from China from 1895 to 1945, and Japan annexed Korea from 1910 to 1945. In 1932, Japan participated in the establishment of Manchuria as a puppet state in the northeast part of China, and Japanese nationals emigrated to the northeast part of China. Wars aimed at territorial expansion, such as the Japan-China War of 1937-1945 and the Pacific War of 1941-1945, were conducted in China and Pacific countries, but a slavery system in problems was not adopted during that period.

There may be differences in historical perceptions between the Republic of Korea and China on the issue of forced labour in mines and factories and military prostitutes, or so-called 'comfort women'[9], in connection with these colonial policies during the war period. Although Japan forced Taiwanese and Korean people to register as Japanese citizens, and there surely existed discriminations, they were not subject to possession of Japanese citizens.

### 1.1.2. Legal Systems and Developments

There is no legislation prohibiting slavery directly, but Article 18 of the Constitution of Japan[10], which entered into force in 1947, states that "no one shall be held in bondage of any kind. In addition, it is provided that involuntary servitude, except as punishment for crime, is prohibited." It is said that the Article is influenced by the 13th Amendment of the U.S. Constitution[11, 12].

Article 14, paragraph 1 of the Constitution of Japan[13] provides that all citizens are equal under the law and are not discriminated against in political, economic, or social relations because of race, creed, sex, social status or family origin. Although the article refers to 'citizens,' it is interpreted by the Supreme Court as extending, in principle, to foreigners within the framework of the status of residence system under the Immigration Control Act[14].

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[7] *See* the Treaty of Peace and Amity between the United States of America and the Empire of Japan (1854), *available at* http://www.yuhikaku.co.jp/static_files/pdf/file45.pdf, last accessed on 08.01.2023.

[8] The counterpart countries had extraterritorial rights in Japan, known as consular jurisdiction, and Japan did not have rights of tariff autonomy in the treaties, such as the Treaty of Amity and Commerce between the United States of America and the Empire of Japan (1858), *available at* http://www.yuhikaku.co.jp/static_files/pdf/file46.pdf, last accessed on 08.01.2023; as well as respective treaties with the United Kingdom, France, Russia, the Netherlands (1858), Portugal (1860), Prussia (1861) and Italy (1866).

[9] Ministry of Foreign Affairs of Japan, 'Measures Taken by the government of Japan on the Issue of "comfort women"' (Jan. 14, 2021), *available at* https://www.mofa.go.jp/policy/women/fund/policyhtml, last accessed on 09.01.2023.

[10] Article 18 of the Constitution of Japan: No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited. *See* Japanese Law Translation, *available at* https://www.japaneselawtranslation.go.jp/en/laws/view/174, last accessed on 14.01.2023.

[11] The 13th Amendment to the U.S. Constitution: Section 1 Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 Congress shall have power to enforce this article by appropriate legislation.

[12] The Constitution of Japan was enacted during the period of occupation, influenced by the General Head Quarters of the Allied Forces, mainly of the United States of America, and modelled, in some respects, after the Constitution of the United States of America.

[13] Article 14, paragraph 1 of the Constitution of Japan: All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. *See* Japanese Law Translation, *supra* note 10.

[14] *See* McLean v. Minister of Justice, Supreme Court Decision (en banc) on Oct. 4, 1978, *available at*

Furthermore, Article 5 of the Labour Standards Act[15], which took effect in 1947, prohibits forced labour, providing that an employer shall not force workers to work against their will by means of physical violence, intimidation, confinement, or any other unfair restraint on the mental or physical freedom of the workers. There are penalties under Article 117 of the Act[16] for violations of this article.

With regard to the requisition of labour during the period of World War II, the government of Japan expressed its view that the Japan-Republic of Korea Claims Agreement[17] was concluded in 1965 upon the normalization of Japan-ROK relations. However, the Korean Supreme Court of Justice upheld the liability of Japanese companies in its October 30, 2018 judgment[18] and November 29, 2018 judgment[19]. Thus, the views of the two Governments are in conflict over this issue[20].

### *1.2. INTERNATIONAL TREATIES AND OTHER LEGAL SCHEMES REGARDING SLAVERY*

Japan has not ratified the Slavery Convention, 1926[21], adopted by the League of Nations, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956[22].

Japan ratified the ILO Forced Labour Convention, 1930 (No. 29) on November 21, 1932, but has not ratified the Abolition of Forced Labour Convention, 1957 (No. 105)[23]. This is because the National Civil Servants Act and the Local Civil Servants Act had provisions including criminal sanction of prison labour, during which prisoners are obligated to work, against public employees who violate the duty not to engage in strikes and political activities. However, in June 9, 2021, the Parliament of Japan amended these Acts and abolished these provisions. Thus, Japan is expected to ratify the Abolition of Forced Labour Convention, 1957 (No. 105) in the near future.

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https://www.courts.go.jp/app/hanrei_en/detail?id=56, last accessed on 14.01.2023; English information about the case, *available at* Japan Civil Liberties Union's website, https://www.call4.jp/info.php?type=items&id=I0000056, last accessed on 08.01.2023.

[15] Article 5 of the Labour Standards Act: An employer must not force a worker to work against their will through the use of physical violence, intimidation, confinement, or any other means that unjustly restricts that worker's mental or physical freedom. *See* Japanese Law Translation, *available at* https://www.japaneselawtranslation.go.jp/en/laws/view/3567, last accessed on 14.01.2023.

[16] Article 117 of the Labour Standards Act: A person violating the provisions of Article 5 is subject to imprisonment with work for not less than one year and not more than 10 years, or to a fine of not less than 200,000 yen and not more than 3,000,000 yen. *See* Japanese Law Translation, *supra* note 15.

[17] The Agreement on the Settlement of Problem concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea.

[18] *In re* Nippon Steel Corp., Supreme Court of Korea en banc Judgment 2013Da61381 Rendered October 30, 2018 [Damages (Others)], *available at* Supreme Court of Korea's website, https://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=1306&pageIndex=7&mode=6&searchWord=2018, last accessed on 12.02.2023.

[19] *In re* Mitsubishi Heavy Industries.

[20] *See* Ministry of Foreign Affairs of Japan, Issue of Former Civilian Workers from the Korean Peninsula (CWKs) (October 21, 2020), *available at* https://www.mofa.go.jp/a_o/na/kr/page4e_000947.html, last accessed on 14.01.2023.

[21] *See* https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention, last accessed on 15.01.2023.

[22] *See* United Nations Treaty Collection, *available at* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en, last accessed on 15.01.2023.

[23] *See* ILO's website, *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105, last accessed on 15.01.2023.

Other than international treaties and conventions, Japan has a constitutional protection against racial discrimination under Article 14 as stated above. However, these constitutional or human rights protection against racial discrimination is not considered to be related to the legacy of slavery, because there was little, if any, background of slavery in Japan.

Also, as mentioned above, Article 18 of the Constitution of Japan[24] provides that no person shall be held in bondage of any kind. In addition, no person shall be subject to punishment against their will, except for punishment caused by crime.

With regard to the human rights of prisoners, the Prison Act of 1908 was revised in 2006 and is currently called the Penal Institutions Act. Under the Penal Institutions Act, in addition to prison labour, guidance for reform and guidance in school courses were introduced for social reintegration, and the procedure for receiving and handling complaints concerning prisoner's treatment was also introduced.

## 2. CAUSES AND CONSEQUENCES OF CONTEMPORARY SLAVERY

### *2.1. JAPAN'S RELATIONSHIP WITH CONTEMPORARY SLAVERY*

With regard to the issue of human trafficking, based on Article 3 of 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (New York, 15 November 2000)[25], the Japanese government has been taking measures provided under the Japan's 2014 Action Plan of Measures to Combat Trafficking in Persons[26].

In Japan, the sexual services by foreign women have sometimes become problems[27]. They often come to Japan under the false status residence such as 'entertainer'[28] and provide for sexual services arranged by foreign and domestic underground organizations. They are not necessarily abducted and forcibly brought to Japan, but often cannot help being subject to such organizations due to financial reasons.

### *2.2. ISSUES OF CONTEMPORARY SLAVERY IN JAPAN*

As a case of contemporary slavery in Japan, forced sexual service is taken up. On the other hand, the '2022 Trafficking in Persons Report' (July 2022)[29] issued by the U.S. Department of State warned

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[24] *Supra* note 10.

[25] *See* United Nations Treaty Collection, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18, last accessed on 14.01.2023. Article 3 (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

[26] *Available at* https://www.kantei.go.jp/jp/singi/jinsintorihiki/pdf/english-ver.pdf, last accessed on 14.01.2023.

[27] *See* Council for the Promotion of Measures to Combat Trafficking in Persons, Measures to Combat Trafficking in Persons (Annual Report) (June 22, 2022), *available at* https://www.kantei.go.jp/jp/singi/jinsintorihiki/dai8/eigoban_honbun.pdf, last accessed on 14.01.2023.

[28] In 2021, the Immigration Services Agency provides for protective procedures for 11 victims of trafficking in persons (8 in the previous year). Ten out of 11 are entertainers of Filipino women. *See* ISA's website, *available at* https://www.moj.go.jp/isa/content/001369631.pdf, last accessed on 14.01.2023.

[29] *See* U.S. Department of State, *available at* https://www.state.gov/reports/2022-trafficking-in-persons-report/, last accessed on 14.01.2023.

that the Technical Intern Training Program[30] for foreign nationals could be a cause of forced labour involving trafficking in persons. However, to date, there have been few officially announced cases in which the Japanese government appears to have found that the Technical Intern Training Program caused trafficking in persons. The first case appeared on the Annual Report of 2022.

Regarding the Technical Intern Training Program[31], it has often been pointed out that in Vietnam and other countries, individuals and their families who come to Japan pay a large amount of borrowed money to their sending organization[32].

Under the Technical Intern Training Act of 2016[33], the current system requires that no such deposit be collected. Companies are prohibited from accepting technical intern trainees knowing that they have paid such deposit money. At the time of entry, trainees are required to submit to the regional immigration office of the Immigration Bureau a document pledging that they and their families have not paid a deposit money[34].

If there is a sending organization that collects deposits from technical intern trainees of the program, the government of Japan and the government of the sending country consult with each other to exclude such sending organization from the permission of business by the government of the sending country.

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[30] The Technical Intern Training Program was established in 1993, it aims to contribute to developing countries by accepting people from these countries for a certain of time (maximum 5 years) and transferring skills through on-the-job-training (OJT). *See* Organization for Technical Intern Training's website, *available at* https://www.otit.go.jp/files/user/221215_ENG.pdf, last accessed on 14.01.2023.

[31] *Id.*

[32] According to a survey by the Immigration Services Agency of Japan, the average total amount of expenses paid by technical intern trainees to sending organizations or intermediaries in their home countries before coming to Japan was 542,311 yen. *See* Immigration Services Agency's Website, https://www.moj.go.jp/isa/content/001377366.pdf, last accessed on 14.01.2023. According to the notice to sending organizations of the Ministry of Labour, War Invalids and Social Affairs of Vietnam (April 6, 2016 No.1123/LDTBXH-QLDNN), the cost that can be charged to technical intern trainees is 3,600 USD or less for 3-year contract; 1,200 USD or less for 1-year contract; approximately 520 hours of Japanese language education guidance, pre-education fee of 5.9 million dong or less. *See* Embassy of Japan in Vietnam's website, https://www.vn.emb-japan.go.jp/itpr_ja/ginoujisshuusei_tesuuryou_jougen.html, last accessed on 15.01.2023.

[33] Technical Intern Training Act, the full title of which is the Act on Proper Technical Intern Training and Protection of Technical Intern Trainees, *available at* Japanese Law Translation, https://www.japaneselawtranslation.go.jp/en/laws/view/3612, last accessed on 14.01.2023.

[34] Article 46 (Prohibited Acts) A person engaging in the supervision (referred to as 'training supervisor' in Article 48, paragraph (1)) or its officers or employees (referred to as 'training supervisors, etc.' in the following Article) must not force the technical intern trainees to engage in training against their will through the use of assault, intimidation, confinement, or any other means which unfairly restricts their mental or physical freedom.

Article 47 (1) The training supervisors, etc. must not enter into a contract with technical intern trainees that stipulates penalties for or predetermines compensations for damage on the non-performance of a contract regarding technical intern training. This also applies to persons who wish to become technical intern trainees, their spouses, their lineal relatives, their relatives cohabiting with the technical intern trainees, etc., or any other person who has a close personal relationship with the technical intern trainees, etc.

(2) The training supervisors, etc. must not have a technical intern trainee, etc. enter into a savings contract incidental to the contract for technical intern training or enter into a contract assuming control of the savings of the technical intern trainee, etc.

Article 48 (1) A person conducting technical intern training, training supervisor, or officer or employee thereof (referred to as 'persons associated with technical intern training' in the following paragraph) must not retain the passport (meaning the passports as prescribed for in the provisions of Article 2, item (v) of the Immigration Control Act; the same applies in Article 111, item (v)) or residence card (meaning the residence cards as prescribed for in the provisions of Article 19-3 of the Immigration Control Act; the same applies in Article 111, item (v)) of a technical intern trainee.

(2) Persons associated with technical intern training must not improperly restrict the freedom of the technical intern trainees to go out, or otherwise impose unfair restrictions on their freedom in their personal lives.

Article 3 of the Labour Standards Act[35] prohibits discrimination in labour conditions on the grounds of nationality. In addition, the Immigration Control and Refugee Recognition Act requires that foreign nationals be treated on the same or higher level than that of Japanese nationals[36]. However, as it has been pointed out that the majority of the wages of technical intern trainees are barely higher than the minimum wage level under the Minimum Wage Act. It appears that there is still a shortage of mechanisms to link the provisions of Article 3 of the Labour Standards Act with the provisions of the Immigration Control and Refugee Recognition Act[37].

I believe it is necessary to enhance the effectiveness of Article 3 of the Labour Standards Act in response to the trend in industry toward low wages through paying low wages to foreign workers[38].

In Japan, the problem of slavery in other countries and that of modern slavery appears to be different due to its geographical and historical situations. This is because Japan, at least since the 17th century, has prohibited slavery in the sense that a person is subject to the possession and transaction by other persons regardless of his/her will. Thus, there seems to be confusion in Japan regarding perception of the notion of modern slavery against which advanced nations are strengthening regulations. There have surely been people in Japan who have been discriminated against or forced to work by persons possessing superior power. Modern Japan has taken measures specifically aimed at these problems through such means as prohibition of discrimination and forced labour.

### *2.3. DEFINITION OF SLAVERY IN JAPAN AND ITS CONTEMPORARY FORM*

#### 2.3.1. Definition of Slavery and Its Elements

As a general term, slavery is used to deny a person's personality and to make them another person's possession. It is regarded as a system of status in which the rights and freedoms of human beings are not recognized. However, in common understanding slavery itself is not recognized within Japan[39].

As mentioned above, slavery as a legal term is contained in Article 18 of the Constitution of Japan, which guarantees freedom from physical restraint that ignores one's personality[40, 41].

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[35] Article 3. An employer must not use a worker's nationality, creed, or social status as a basis for differential treatment with respect to wages, working hours, or other working conditions. *See* Japanese Law Translation, *supra* note 15.

[36] Basically, foreign nationals are treated as experts or engineers who do not have negative effects on the labour market in Japan, the Immigration Control and Refugee Recognition Act requires accepting companies pay them equal or higher wage compared to Japanese citizens.

[37] Because the Immigration Control and Refugee Recognition Act is a public law, the regulation under the law itself shall not automatically create private rights of labour contracts of foreigners like Article 3 of the Labour Standards Act. In fact, the average of the wages of foreigners does not reach the average of wages of Japanese citizens.

[38] Foreign workers in Japan are mostly coming from Vietnam, China and the Philippines, etc. They work in industries of manufacturing, building, etc.

[39] On the other hand, in Japan from ancient to pre-modern times, there was a social class of discriminated people. Around the Middle Ages, there was a cultural background in which certain professional groups (merchants, financiers, entertainers and craftsmen, etc.) were discriminated against. *See* Yoshihiko AMINO, REREADING THE HISTORY OF JAPAN [NIHON NO REKISHI WO YOMINAOSU], combined ed., (Tokyo, CHIKUMA SHOBO, 2005), pp. 63-142. The issue of discrimination continues to exist today to a certain extent, but human rights education is being widely conducted. *See also*, Act on the Promotion of the Elimination of *Buraku* Discrimination of 2016, *available at* Japanese Law Translation, https://www.japaneselawtranslation.go.jp/ja/laws/view/4080, last accessed on 15.01.2023.

[40] *See* Kazuyuki TAKAHASHI et al., THE DICTIONARY OF LAW, 5th ed. (Tokyo, YUHIKAKU, 2016), p. 1033.

[41] Related statutory provisions are Article 34 of the Constitution, the Habeas Corpus Law, Article 220 of the Penal Code, Article 226-2 of the Penal Code (Human Trafficking), the Anti-Prostitution Law, Article 5 and 69 of the

In the general sense, slavery has the concept of possession of human, but right to freedom from physical restraint under Article 18 of the Constitution does not require such possession as a condition of protection.

Japan has ratified the United Nation Convention against Transnational Organized Crime and the Protocol to prevent, suppress and punish trafficking in persons, especially women and children.

Also, in the interpretation of human trafficking by the Japanese government, Article 3 of the Protocol on Human Trafficking includes the requirement of exploitation.

In Article 226-2 of the Penal Code, which prohibits trafficking in persons, exploitation is not a requirement, but "a person who buys or sells another person", "a person who buys or sells a minor", or "a person who buys or sells a person for the purpose of transporting another person abroad" is required.

Forced labour and trafficking in persons are defined within domestic laws, such as in the Labour Standards Act and Penal Code. Although the relationship between 'forced labour' and 'bondage', which can be interpreted to be slavery restraint under Article 18 of the Constitution[42], is not clear in the law, it is interpreted that forced labour and trafficking constitute slave restraint prohibited by the Constitution.

**2.3.2. Contemporary Issue on Modern Slavery**

Unlike the United Kingdom[43] or Australia[44], where the issues of a modern slavery law is highlighted, the scope of modern slavery in Japan is not necessarily clear because it is not a legal term, and it is not a common term, either. The term 'modern slavery' is often used to discuss human rights in supply chains, both at home and abroad, from the perspective of international labour due diligence.

The government of Japan has established an Action Plan against Human Trafficking[45]. In addition, the Cabinet Office's Council for Promotion of Measures against Trafficking in Persons published the 'Measures to Combat Trafficking in Persons (Annual Report)'[46]. In addition to Japanese nationals, foreigners are also included as victims of trafficking. Many of them are victims of sexual exploitation and include minors. Cases are published in the annual reports.

For foreign workers, including technical intern trainees, the issue of low-wage labour exists, but as long as the Minimum Wage Act is observed, it is not treated as a matter of modern slavery.

Article 3 of the Labour Standards Act prohibits discrimination based on nationality, but this article does not include discrimination in hiring. Therefore, the effectiveness anti-discrimination provisions for foreign workers' wages is not necessarily high.

In the context of the COVID-19 pandemic, modern slavery is not an issue in Japan. The Japanese government is concerned about discrimination against foreigners in Japan and has not released statistics

Labour Standards Act, the Employment Security Act, the Child Welfare Act, Article 2 (vii) of the Immigration Control and Refugee Recognition Act, the Technical Intern Training Act, etc.

42 *Supra* note 10.

43 *See* Modern Slavery Act 2015, *available at* https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted, last accessed on 14.01.2023.

44 *See* Modern Slavery Act 2018, *available at* https://www.legislation.gov.au/Details/C2018A00153, last accessed on 14.01.2023.

45 *Supra* note 26.

46 *See* Council for the Promotion of Measures to Combat Trafficking in Persons, s*upra* note 27.

on the number of infected foreigners. However, a conference of municipalities with large numbers of foreign residents has raised the issue of the spread of infections among foreigners. The COVID-19 pandemic may have spread among foreigners because they often live closely with each other. In addition, some municipalities distribute information on the Vaccination based on the Basic Resident Registration, but it may not have reached to foreigners, or there may be many who are not aware of such information.

While there are industries, such as agriculture, in which foreign workers, such as technical intern trainees, are unable to enter the country because of prevention of COVID-19 and the labour shortage is becoming serious, there is also a problem with the large number of domestic technical intern trainees leaving their jobs and become unemployed. There seems to be a problem where foreigners and employers are not aware of the use of various systems to avoid unemployment, such as the government's Employment Adjustment Subsidy Program.

## 3. REDRESSING AND RECALIBRATING CONTEMPORARY SLAVERY IN JAPAN

### *3.1. JAPAN'S PRIMARY APPROACHES TO REDRESSING CONTEMPORARY SLAVERY*

#### 3.1.1. Innovations in Addressing Contemporary Slavery in Japan

In recent years, awareness of 'Business and Human Rights' in the contexts of global supply chains or Sustainable Development Goals (SDGs) has been improved among industries. The Japan Business Federation (*KEIDANREN*) amended its 'Charter of Corporate Behaviour- For the Realization of a Sustainable Society –' in 2017.[47] It is not a hard law, but it seems to have promoted the member companies of the federation to adopt a policy to respect the principle of SDGs.

Then the government launched 'Japan's National Action Plan on Business and Human Rights (2020-2025)'[48], focusing on the abuse of human rights in the business setting.

However, there is no specific dispute resolution system aimed at modern slavery, but victims have an equal access to dispute resolution systems in Japan. Japan Legal Support Centres (*HOTERASU*) provides multilingual information services and financial aid under certain circumstances to make civil procedure accessible for those who have linguistic or financial difficulty.[49]

Looking at the legal areas where violations are found, enforcement under the Penal Code and the Immigration Control and Refugee Recognition Act seems to be effective.

Regarding the area of labour law, there are violations of the Labour Standards Act and the Employment Security Act. Although there are many violations of the Employment Security Act regarding foreign workers, there are few cases of forced labour under the Labour Standards Act. In response to the domestic and foreign criticism, monitoring of the Technical Intern Training Program is being strengthened.

### *3.2. SIGNIFICANCE AND CHALLENGES OF EXISTING TRANSNATIONAL, COORDINATED INITIATIVES ON CONTEMPORARY SLAVERY SUCH AS ALLIANCE 8.7, INCLUDING CORPORATE SOCIAL RESPONSIBILITY INITIATIVES, TO REDRESSING CONTEMPORARY SLAVERY*

[47] *See* Japan Business Federation's website, *available at* http://www.keidanren.or.jp/en/policy/csr/charter2017.html, last accessed on 08.01.2023.
[48] *See* Ministry of Foreign Affairs website, *available at* https://www.mofa.go.jp/press/release/press4e_002939.html, last accessed on 08.01.2023.
[49] *See* HOTERASU's website, *available at* https://www.houterasu.or.jp/multilingual/index.html, last accessed on 08.01.2023.

Japan has not participated in 'Alliance 8.7'[50].

The United Nations' Principles of Action on Business and Human Rights have domestic implications. Domestically, the Japan NCP Committee[51] is composed of the Ministry of Foreign Affairs, the Ministry of Health, Labour and Welfare, the Ministry of Economy, Trade and Industry, the Japan Business Federation, and the Japanese Trade Union Confederation (*RENGO*). Opinions are also exchanged on the promotion of CSR, etc. by multinational enterprises.

As for the protection of the rights of foreign workers, the government has a project cooperating with the International Organization for Migration (IOM), individual labour unions have been active, and recently, there have been moves to form a platform centring on Japan International Cooperation Agency (JICA), 'the Responsible Platform for Accepting Foreign Workers: JP-MIRAI'.

In my opinion, domestic problems are mostly covered by the existing domestic legal system, but in Japan, domestic laws alone are insufficient for the issue of modern slavery involving transnational migration. Regarding the issues that can be regarded as foreign workers, international cooperation will be essential.

As described above[52], since the problems of foreign workers cannot be fully addressed only in Japan, cooperation with the countries of origin, and multilateral rules for such international human resource business rules are necessary. For example, if other receiving countries permit the issue of security deposits, it may be for Japan to call on the governments of sending countries to prohibit such amounts from being collected when they send their citizens to Japan. It may also be necessary to establish a framework for multilateral consultation and monitoring of the resolution of labour exploitation issues related to human resource businesses.

## CONCLUSION

This paper examined the issues of so-called contemporary slavery in Japan.

Part 1 of this paper examined whether slavery existed in the history of Japan and whether slavery in the contemporary form exists in current Japan. In sum, there appeared to be little, if any, history of global slavery in Japan. Due to geographical distance and lack of trade relationship between Japan and African countries, there has been no history of African slavery in Japan. Also, Japan had little direct relationship with countries where slavery was rampant. Japan acquired Taiwan from China from 1895 to 1945, and Japan annexed Korea from 1910 to 1945, but a slavery system in problems was not adopted even during that period. Although Japan forced Taiwanese and Korean people to register as Japanese citizens, and there surely existed discriminations, they were not subject of possession by Japanese citizens.

Japan ratified the ILO Forced Labour Convention, 1930 (No. 29) on November 21, 1932. Japan is expected to ratify the Abolition of Forced Labour Convention, 1957 (No. 105) in the near future.

Next, Part 2 examined the causes and consequences of the situation that can be argued to be contemporary slavery in Japan. In sum, in Japan, the sexual services by foreign women have sometimes

[50] *See* https://www.alliance87.org/, last accessed on 15.01.2023.
[51] NCP stands for the National Contact Point for the OECD Guidelines for Multinational Enterprises. *See* OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, *available at* http://mneguidelines.oecd.org/OECD-Due-Deligence-Guideance-for-Responsible-Business-Conduct.pdf, last accessed on 08.01.2023.
[52] *Supra* note 32.

become problems. As a case of contemporary slavery in Japan, forced sexual service is taken up. On the other hand, 'the 2022 Trafficking in Persons Report' (July 2022) issued by the U.S. Department of State warned that the Technical Intern Training Program for foreign nationals could be a cause of forced labour involving trafficking in persons. However, to date, there have been few officially announced cases in which the Japanese government found that the Technical Intern Training Program caused trafficking in persons. The government of Japan has established an Action Plan against Human Trafficking in 2014.

Then, Part 3 analysed redressing and recalibrating the situation that can be argued to be contemporary slavery in Japan. In summary, the government launched Japan's National Action Plan on Business and Human Rights (2020-2025).' Looking at the legal areas where violations are found, enforcement under the Penal Code and the Immigration Control and Refugee Recognition Act seems to be effective. Regarding the area of labour law, there are violations of the Labour Standards Act and the Employment Security Act regarding foreign workers. Nevertheless, there are few cases of forced labour under the Labour Standards Act. In response to the domestic and foreign criticism, monitoring of the Technical Intern Training Program is being strengthened.

The United Nations' Principles of Action on Business and Human Rights have domestic implications. Domestically, the Japan NCP Committee is composed of the Ministries, the Japan Business Federation (*KEIDANREN*), and the Japanese Trade Union Confederation (*RENGO*). As for the protection of the rights of foreign workers, the government has a project cooperating with the International Organization for Migration (IOM). Japan International Cooperation Agency (JICA) established 'the Responsible Platform for Accepting Foreign Workers: JP-MIRAI'.

In conclusion, in Japan, the problem of slavery in other countries and that of modern slavery appears to be different due to its geographical and historical situations. Thus, there seems to be confusion in Japan regarding perception of the notion of modern slavery against which advanced nations are strengthening regulations.

In my opinion, domestic problems are mostly covered by the existing domestic legal system, but in Japan, domestic laws alone are insufficient for the issues that can be regarded as modern slavery involving transnational migration. Regarding the issue of foreign workers, international cooperation will be essential.

# The law and regulations on drones in Japan

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## I. Developments of regulations of drone operations in Japan

Drones, or unmanned aerial vehicles (UAVs),[1] were developed for military use, but their miniaturization and declining costs have made them popular for civilian use for, for instance, disaster observation and monitoring, inspecting buildings and infrastructure, providing security, and delivering goods. The Civil Aeronautics Act was amended in 2015 to newly define UAVs to establish basic flight regulations. Industrial unmanned helicopters (a type of drone) have been in (peaceful) use in Japan for over 30 years use in many places, including in agriculture from the early days. From early days, it was pointed out that there was no legal basis for utilizing drones. The Japan Agricultural and Fishery Aviation Association and other organizations even voluntarily drew up strict drone application rules and certified them.[2]

Recently news organizations in Japan have been using drones for aerial photography, and others use camera-equipped drones for various surveys and inspections. Drones are also used for disaster monitoring, surveillance, security, and logistics[3]. However, drones for aerial photography have fallen and injured people on the ground.[4] Concerns have also been reported regarding the possibilities of voyeurism or terrorism attacks. Then, on April 22, 2015, a drone was discovered on the roof of the Prime Minister's Office, carrying traces of radioactive materials. In response to this troubling occurrence, the Prime Minister's Office hastily convened an Inter-Ministerial Meeting on Small Drones, and on June 2, 2015, the "Outline of Rules for Ensuring Safe and Secure Operation of Small Drones" was published.

The Outline described (1) basic approach to establishing a system for small UAVs; (2) rules for ensuring safe operation of small UAVs; (3) development of an environment for the sound use of small UAVs; and (4) steps to be taken and argued that regulations are urgently needed.[5] In response, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) produced a bill to revise the Civil Aeronautics Act, which was submitted to the Diet following the cabinet decision on July 14 of the same year.[6] Subsequently, the Act for Amendments to the Civil Aeronautics Act (Act No. 67 of 2015;

[1] Drones are also sometimes referred to as unmanned aircraft systems.
[2] See http://www.j3a.or.jp/shoukai/data/kaiinn-kiyaku/unyouyouryou_h22.pdf. There are also guidelines by the Japan UAV Association, the Japan Aerospace Exploration Agency, and the Japan UAS Industrial Development Association.
[3] The Ministry of Land, Infrastructure, Transport and Tourism used drones to monitor volcanic activities in the Hakone area in July 2015.
[4] See, for instance, this notice about an accident at a marathon event on November 21, 2014: http://www.shonan-kokusai.jp/9th/information/index.html. For accidents in other countries, see Justin Davenport, *Man accused of flying a drone over Parliament and the Palace,* LONDON EVENING STANDARD, March 18, 2015, at 10., David Lawler Washington, *New York bound plane nearly collides with drone*, THE TELEGRAPH, May 29, 2015, (http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11640126/New-York-bound-plane-nearly-collides-with-drone.html).
[5] http://www.kantei.go.jp/jp/singi/kogatamujinki/dai3/siryou2.pdf
[6] Usually the Japanese government spends about a year preparing a bill, but the bill to amend the Civil Aeronautics Act was prepared in less than two months.

hereinafter, the Amended Act) was enacted on September 4, promulgated on September 11, and entered into force on December 10.

Because Japan's drone regulations were prompted by the discovery of a drone on the Prime Minister's Office, the legislation has an idiosyncratic feature: restrictive regulations appear to coexist with efforts to facilitate drone-related industry. With regard to drones, Japan appears to have its feet on the accelerator and brake at the same time.

On the restrictive side, the Drone Act (the Act on Prohibition of Flying Small Unmanned Aircrafts over and Around Certain Key Facilities) was introduced in 2016. Its scope of application has been expanded since then.[7] When originally enacted, the Drone Act prohibited flying drones over and around the following facilities:

- Key national facilities (Diet Building, Prime Minister's Office, office buildings of administrative authorities for crisis management, Supreme Court, Imperial Palace and Akasaka Estate (Prince's Palace), political parties' offices)
- Foreign diplomatic establishments
- Nuclear sites.[8]

In 2019, the Act was amended to add defense-related facilities to the facilities over and around which flying drones is prohibited,[9] and further amendments were made in 2020 to add airports to the list of facilities[10]. Furthermore, the Special Act on the Rugby World Cup 2019 temporarily expanded the scope of prohibited airports to cover the airports that players and officials would be using, and the same amendments were made in the Special Act on Tokyo Olympic Games and Tokyo Paralympic Games 2020 to enable temporary addition of the airports to be covered. These temporary measures were extended until the postponed Olympic Games were held in 2021.

In contrast with these restrictive regulations, however, Japan has also facilitated drone usage from the early stage. The Public–Private Council for the Improvement of Environment concerning Drones was set up with the Cabinet Secretariat in December 2015 with the aim of removing impediments to business and technology developments in drone operations (Cabinet Secretariat Council)[11]. In 2018, the Public–Private Council for the Revolution of Transit in the Air was convened and co-chaired by the Ministry of Economy, Trade and Industry (METI) and the MLIT (METI/MLIT Council). The aim of METI/MLIT Council is realizing "flying automobiles" including manned drones and improving "the speed and utility of transit of humans and cargos and facilitate the new industry, which can make businesses in the global market"[12].

Cabinet Secretariat Council published the "Roadmap for the Industrial Revolution in the Air," most recently in 2021,[13] and METI/MLIT Council published the "Roadmap for the Transit Revolution," most recently in 2020.[14] Both roadmaps not only address technological and business issues but also points out legal issues as part of the business environment. In particular, Cabinet Secretariat Council adopted the "Basic Policy on Regulations for unmonitored flights of drones in the populated areas" at its 13th

[7] The current restrictions are described at https://www.npa.go.jp/english/uas/uas.html.
[8] The original title of the Act was the Act on Prohibition of Flying Small Unmanned Aircrafts over and around the Diet Building, Prime Minister's Office, Official Residences of the Prime Minister and Chief Cabinet Secretary and other key national facilities, Foreign Diplomatic Establishments, as well as nuclear sites.
[9] The title was amended at the same time to the current one: the Act on Prohibition of Flying Small Unmanned Aircrafts over and Around Certain Key Facilities.
[10] A current list of these prohibited facilities can be found at https://www.npa.go.jp/english/uas/facilities.html.
[11] https://www.kantei.go.jp/jp/singi/kogatamujinki/kanminkyougi_dai1/siryou1-1.pdf
[12] https://www.meti.go.jp/shingikai/mono_info_service/air_mobility/pdf/air_mobility.pdf
[13] https://www.kantei.go.jp/jp/singi/kogatamujinki/pdf/siryou21.pdf
[14] https://www.meti.go.jp/shingikai/mono_info_service/air_mobility/pdf/008_01_02.pdf

meeting on March 31, 2020[15]. The Basic Policy was drafted into law in 2021 amendments to the Aviation Act.

Another idiosyncrasy of Japanese law on drones is that little attention is paid to the global harmonization; Japan's regulations focus solely on domestic drone-related concerns. The "Roadmap for the Industrial Revolution in the Air 2021" does mention "advancing harmonisation through ICAO, ISO and other institutions," but the focus appears to be on technical harmonization with no concern for international conventions. Japan has no equivalent of the regional organization like the European Union Aviation Safety Agency, so the country's drone laws are domestically self-contained, and legislators have broad regulation options.

## II. Drone operation policies

In 2014, a private organization named the Japan UAS Industrial Development Association (JUIDA) was established as a drone operations self-regulatory body. On its website it claims: JUIDA "aims to actively promote the industry of the next-generation mobility systems (Advanced Mobility Systems, abbreviated as "AMS"), including Japanese unmanned aerial vehicles. Since its establishment in July 2014, we have been working on industrial promotion of unmanned aerial vehicles and support for market creation."[16] JUIDA publishes newsletters and holds seminars to keep members informed about national and international trends and issues related to UAS, declaring that they serve as "the bridge to convey constructive suggestions" between the government and private sector. They host the Japan Drone Expo, the largest of its kind, annually in Tokyo. JUIDA has played a major role in promoting drones in Japan including active involvement in education.

The Aviation Act (see 6.5 below) is set to introduce a certificate for drone operator capability into the statutory regulation, which is going to reduce, although not eliminate, JUIDA's role as a drone self-regulatory body. In response, JUIDA is now offering as a new initiative a service it calls SORAPASS,[17] a platform for securing drone flight safety. Specifically, SORAPASS is a smart phone app that shows prohibited areas for drone flight and weather information on maps as well as enabling drone operators to communicate their flight paths with each other, all with the aim of preventing accidents.[18] Furthermore, JUIDA participates in international standardization on behalf of the Japanese industry[19]. Thus, it seems that JUIDA's activities will shift from self-regulation in place of statutory regulations to co-regulation involving making up the market rules together with the government agencies.

## III. Current regulations on drone operations

### 1 Regulations before the 2015 amendment of the Civil Aeronautics Act

The Civil Aeronautics Act of Japan, before it was amended in 2015, did not include UAVs in the definition of aircraft, so there were no operating drone regulations.[20] Drones were regarded as a kind of

[15] https://www.kantei.go.jp/jp/singi/kogatamujinki/pdf/siryou13.pdf
[16] https://uas-japan.org/en/
[17] SORA means "sky" in Japanese, while "pass" apparently connotes passport.
[18] See https://www.sorapass.com/map/
[19] An example of the international standards introduced by the initiatives of JUIDA is ISO23665 Unmanned aircraft systems — Training for personnel involved in UAS operations. See https://uas-japan.org/cms/wp-content/uploads/2021/02/JUIDA_press_release_ISO23665.pdf.
[20] The general rules of property law and privacy law can also be applicable. For instance, the Ministry of Internal Affairs and Communication has privacy-related guidelines concerning posting drone photos (http://www.soumu.go.jp/main_content/000376723.pdf).

model aircraft and prohibited from flying in airspace over 250 m to avoid endangering aircraft operations. However, private organizations developed the use of industrial unmanned helicopters, especially for agriculture, including rules for their operation.[21] Other operational guidelines include safety standards established by the Japan Association of Unmanned Aerial Vehicles and operational technical guidelines for ensuring safety in flight experiments using UAVs conducted by the Japan Aerospace Exploration Agency.

## 2 The 2015 amendments to the Civil Aeronautics Act

Technological advancements and reductions in size have greatly expanded the public use of UAVs, but with their increasing use have been frequent accidents, which has increased the need for rules for operating drones. To reduce drone accidents by establishing basic principles of operation and ensuring standards of safety, the Civil Aeronautics Act was amended by the Act for Amendments to the Civil Aeronautics Act (Act No. 67 of 2015). Based on the recognition that it is necessary to establish basic flight rules for UAVs, the amended Civil Aeronautics Act stipulates (1) airspace that requires permission for the flight of UAVs, (2) flight methods for UAVs, and (3) exemption from application and penalties in the case of accidents and disaster relief.

With the amendment of the Civil Aeronautics Act in 2015, the definition of UAVs, which had not been included in the definition of aircraft before, was added to Article 2, para. 22: “aeroplane, rotorcraft, glider, airship or other equipment specified by Cabinet Order that can be used for aviation and cannot structurally be boarded by a person, and that can be flown by remote control or autopilot.” The definition excludes vehicles specified by MLIT ordinances as being unlikely to impair the safety of aircraft navigation or of persons or objects on land or water.[22]

Furthermore, Article 132 of the Amended Act stipulated no-fly zones: (1) airspace where MLIT ordinances dictate the flight of an unmanned aircraft could affect the safety of aircraft navigation and (2) airspace where MLIT ordinance dictates as having high density of people or houses. Because of these new no-fly zone designations, drone flight in these areas now in principle requires MLIT permission.

With regards the flight method, the Amended Act mandates that flights (1) only take place from sunrise to sunset, (2) maintain continuous visual surveillance, (3) maintain MLIT-designated distances between UAVs and persons or objects on the ground or on water, (4) not fly in airspaces where many people gather, (5) not transport explosives or other hazardous materials, and (6) not drop objects except in MLIT-approved circumstances (Article 132-2). It is necessary to obtain approval of MLIT in order to make a flight without complying with these flight methods.

The 2015 Act mandated receiving MLIT approval to fly a drone without meeting the above conditions. The penalty for violating the above provisions was set as a fine of not more than 500,000 yen (Article 157, para. 4). In addition, there are special provisions for search and rescue (Article 132, para. 3).

### 2.1 Screening Drone Flights under the Examination Guidelines

On November 17, 2015, in accordance with the amendment of the Civil Aeronautics Act, MLIT established “Examination Guidelines for Permission or Approval for Flight of Unmanned Aerial Vehicles”

[21] As of 2014, 2600 drones were registered in an area of 9.7 billion square meters. See also Statement of Henio Arcangeli, Vice President of Corporate Planning, Yamaha Motor Corporation, U.S.A., in “The Future of Unmanned Aviation in the U.S. Economy: Safety and Privacy Considerations”, Committee on Commerce, Science and Transportation, United States Senate, January 15, 2014.

[22] Drones with the wight of less than 200 grammes are excluded from the regulation by the Ministerial Ordinance.

as the standards for receiving MLIT permission an unmanned aircraft in a no-fly zone or to fly in a zone that does not comply with the restrictions on flight methods. The examination guidelines specify the procedures and criteria for obtaining permission for a flight over the no-fly zone or approval for the flight not complying with the mandated flight method, including: (1) the functions and performance of unmanned aircraft; (2) the flight experience, knowledge, and capability of the person flying the unmanned aircraft; and (3) the system necessary to ensure the safety of flying the unmanned aircraft. In addition to the basic standards, additional standards are provided for each type of flight.

### 2.2 Re-amendment of the Civil Aeronautics Act

The examination guidelines established in 2015 require, as an additional standard, the deployment of an assistant who can constantly monitor the flight status of an unmanned aircraft and changes in surrounding weather conditions, etc., at a position where the entire flight route can be viewed, in principle. However, in view of METI's target of full-scale Level 3 operation outlined in "Roadmap for the Industrial Revolution in the Air 2018: Technological Development and Environmental Improvement for the Safe Use of Small UAVs," it became necessary to set the requirements for flights without assistants or visual contact. In response, the MLIT released on March 29, 2018, a document entitled "Requirements for Unmanned Aircraft Flight without Visual Surveillance" ("Requirements").

First, the requirements state that as a general rule, flying should take place "where there is little possibility of a third party." The exception is allowed when flying over roads or railways if there is little traffic or over a house outside the densely inhibited districts for the limited period of takeoff and landing. Requirements also stipulates guidelines on third-party access and control; monitoring of manned aircraft, weather conditions, etc.; and pilot education and training of pilots. Solicitation for public comments at the time included an explanation for why UAV flight was being limited to areas where there was little possibility of third-party presence: "It is difficult to fully assume the role of an assistant with the current technical level of an unmanned aircraft airframe, ground equipment, etc."

The Logistics Subcommittee of the Study Group on Unmanned Aircraft Flight out of Visual Aerial View and Over Third Parties, etc., set up by METI and MLIT, issued the Voluntary Guidelines for Package Delivery by UAVs on September 18, 2018. This guide has stipulations beyond the purview of the above examination guidelines to ensure the safety and reliability of cargo delivery using UAVs in mountainous areas, etc. Matters covered are divided into those that should be addressed to ensure safe cargo delivery and those that are recommended to be addressed to enhance social credibility. They include (1) a mechanism that prevents unintentional drop of cargo on the aircraft, (2) knowledge necessary for safe delivery of cargo, (3) operational items such as preventing overloading and not delivering cargo that may impair safe flight, and (4) provision of financial resources to compensate for damage caused by dropped aircraft or cargo (i.e. insurance).

## 3 The Act on Prohibition of Flying of Small Drones, etc. over the Diet Building, etc.

Although deliberated at the same time as the amendment of the Civil Aeronautics Act in 2015, the Act on Prohibition of the Flying of Small Drones, etc., over the National Diet Building, the Prime Minister's Official Residence, and other important national facilities, foreign diplomatic missions, etc., and the surrounding area of nuclear power plants (Act No. 9 of 2016) was enacted a year later during the 190th session of the Diet on March 16, 2016. The Act prohibits small UAVs from flying within 300 m above the grounds and areas of the Diet Building, the Prime Minister's Official Residence, and facilities designated by public notice as important (Article 8, para. 1). In addition to small UAVs such as drones,

specified aeronautical equipment[23] is also subject to regulations under this law.

This Act does not apply to (1) flights over the area surrounding the relevant facility by an administrator of the facility or a person with that administrator's consent, (2) flights by the owner or possessor of the land with the legitimate title or a person with the owner or possessor's consent to fly over the land, and (3) small UAV flights performing national or local government services. However, pursuant to the provisions of the National Public Safety Commission Regulations, a person who intends to fly a small drone etc. is required to notify the Prefectural Public Safety Commission in advance via the police station having jurisdiction over the area where the drone is intended to be flown (Article 8).

The Act also stipulates that police officers can order someone who is flying a UAV in violation of the provisions of this Act to remove the equipment or take necessary measures (Article 9, para. 1) and that in certain cases the police officers may take necessary measures such as obstructing the craft's flight or damaging the craft by themselves (Article 9, para. 2). Article 9, para.4 of the Law provides that the national government or the relevant local government will compensate persons who have suffered losses due to the measures taken under Article 9, para. 2, such as destruction of the craft. In addition, the Act stipulates penalties for flying a UAV in violation of the Act or violating an order of a police officer under Article 9 (1) of imprisonment with work of maximum of one year or fine of maximum of 500,000 yen (Article 11).

## 4 Amendments to the Civil Aeronautics Act of 2020 and mandatory registration

On March 8, 2019, the Cabinet approved the Bill for Amendments to the Civil Aeronautics Act and the Act for Establishment of the Japan Transport Safety Board and submitted it to the Diet. Subsequently, it was enacted on June 13, 2019, and promulgated on the 19th of the same month[24]. The revised law adds restrictions on flight methods and applies provisions concerning collecting reports and on-site inspections to UAVs. The additional restrictions on flight methods specifically prohibit flights while using alcohol or drugs; take measures to prevent collisions with aircraft or other UAVs such as pre-flight inspections; and prohibit flights with harmonic sounds, steep descents, or any other nuisance method, without exceptions.

### 4.1 Amendments to the Civil Aeronautics Act of 2020 – Specific Details of the Drone Registration System

Another amendment to the Civil Aeronautics Act was passed on June 17, 2020, to make it mandatory for drone owners to register their crafts in response to accidents and other problems involving drones.[25] Specifically, the Act created a mandatory drone registration system guided by the procedures and details below (Civil Aeronautics Act, Art. 131-3, 131-5, and 131-6). First, the MLIT maintains the Unmanned Aerial Vehicle Registry and drones cannot fly that are not registered (Art. 131-4). Additionally, an aircraft cannot register that "falls under the definitions specified by Ordinance of the MLIT as being likely to significantly impair the safety of aircraft navigation or the safety of persons or objects on the ground or on water" (Art. 131-5).

The registration of a drone shall be made upon application of the owner by describing the following matters, specifying the registration mark and entering it in the registry of drones (the registry of

[23] Equipment that is not aircraft as defined by the Civil Aeronautics Act but that is capable of manned flights and can be used for aviation.

[24] https://www.sangiin.go.jp/japanese/joho1/kousei/gian/198/meisai/m198080198043.htm

[25] Accidents are reported in many countries. See, for instance *BBC News*, "Drone in aircraft near-miss over Brockworth" at https://www.bbc.com/news/uk-england-gloucestershire-56942429.

unmanned aerial vehicles), and when the registration is made, the MLIT shall notify the registration mark and other registration matters (Civil Aeronautics Act, Art. 131-6).

Items Required for Registration of Drones

(1) Types of unmanned aerial vehicles
(2) Model of unmanned aerial vehicle
(3) Manufacturer of unmanned aerial vehicles
(4) Serial number of unmanned aerial vehicles
(5) the name and address of the owner;
(6) the date of registration;
(7) the name and address of the employer;
(8) In addition to the matters listed in (1) through (7), matters specified by Ordinance of the MLIT.

The registration mark notified by the Minister of Land, Infrastructure, Transport and Tourism must be displayed on the drone as soon as it is notified (The registration mark shall be displayed and other measures shall be taken to identify the registration mark of the unmanned aircraft.). No aircraft shall be allowed to fly without an indication of this registration mark (Civil Aeronautics Act, Art. 131-7).

MLIT's registration mark must be displayed on the drone as soon as the owner is notified that it is approved, and no aircraft can fly without the mark (Art. 131-7).

**4.1.1 The effect of registration**

Registration must be renewed after a certain period to be specified by Ordinance of the MLIT of not less than three years and not more than five years. Registration that is not renewed ceases to be effective after the last day of the registration period (Art. 131-8).

**4.1.2 Responsibility of the person who registered**

Drone operators are responsible for maintaining their registration status, including not making modifications that would cost them registration (Art. 131-9). In addition, a drone operator must notify MLIT within 15 days if the drone's ownership is changing, after which MLIT changes the registration. If MLIT finds no evidence of no notification, the agency will order the owner to rectify the situation (Art. 131-10, 131-11). MLIT will also cancel a registration if any corrective orders are violated or if the registration or its renewal is made by wrongful means (Art. 131-12). Additionally, a drone operator must notify MLIT (1) when a registered drone is lost or dismantled, (2) when the location of a registered drone is unknown for two months, or (3) when a registered drone is no longer an unmanned aircraft, to apply for deletion of registration, which MLIT documents upon completion of the procedures (Art. 131-13). A future issue for resolution is the appropriate MLIT response for violators of these provisions who are unaware of them as opposed to disobeying them.

**5 Expansion of commercial use of drones**

The need for UAVs has continued to grow from its earlier uses, from the need for contactless business services against the backdrop of COVID-19 to responding to the labor shortage. Against this backdrop, the Act for Partial Revision of the Civil Aeronautics Act, etc. was enacted in the 204th

Ordinary Session of the Diet on June 4, 2021, which amended the Civil Aeronautics Act to introduce new risk-based flight regulations. This regulation allowed nonvisual (Level 4) flights without assistance in populated, an expansion that marks a full-scale institutional change toward the commercial use of drones. It makes a further step to the developments of drone's civil use, following the rise of use for hobbies from around 2010 and the rapid expansion of use in industrial agriculture, surveying, and inspection that began in 2016.

### 5.1 The 2021 Amendments to the Civil Aeronautics Act – Direction of Drone Regulations

The 2021 revision makes a few significant changes. First, the Amended Act stipulates three broad flight categories according to the degree of risk and establishes different flight regulations for each category (Articles 132-85 and 132-86). The Act also designated as "specified flights" flights that had previously required MLIT permission or approval (Article 132-87).

Second, Article 132-13 of the Amended Act introduces a system to ensure the structural safety of drones through certification. Third, the Amended Act established a pilot competence certification system and a system of designating and accrediting UAV pilot examination agencies. Furthermore, the Amended Act requires operators of drones that have had an accident to take necessary measures to prevent danger to any injured by immediately observing the drone's flight (Article 132-90, para. 1 of the Amended Act) and report the incident to MLIT (Article 132-90, para. 2). Near accidents must also be reported (Article 132-91).

This amendment allows a person who holds a competence certificate to fly a drone that has received airframe certification to fly in dangerous areas (Level 4, described below), which was prohibited before the amendments, after obtaining permission and approval from the national government. The amendments also aimed to streamline procedures for flying drones and were expected to promote and expand the use of drones, in particular by developing criteria for operating high-risk flights in areas where they were previously prohibited (designated Level VI flights). The revisions also aimed to rationalize the current practice of granting and approving flights individually according to the risk of flight by combining the license system, the aircraft certification system, and the category system.

### 5.2 Categories of drone flight regulations

Japan regulates several levels of drone flights. Level III is specified flights over third parties with no no-entry control measures, Level II is flights over third parties do involve no-entry control measures. Level I refers to flights other than these. Level IV means flights without visual surveillance not accompanied by an assistant in manned areas and flights over event venues. Under the system allowing Level IV flights, three Categories are distinguished, among which Category III means flights over third parties that are not accompanied by an assistant. Prohibition of Category III flights was lifted by the 2021 amendments. Because high-risk flights such as Level IV flights require strict safety measures, drone operators must acquire specific permission for each intended flight in addition to obtaining Type 1 drone certification and competence certification for first-class UAV pilot.

For Level II flights, flights with relatively high risk but that are not in densely populated area accompanied with an assistant or flights at night, it is necessary to obtain a Type II aircraft certification and a competence certificate for a second-class UAV pilot. Permission is required for some but not all flights except when the operator does not possess either competence or aircraft certification (Article 132-85 (4) (i) and Article 132-86 (5) (i) of the Amended Act, excluding items that can be moored to ensure safety). Japanese ordinances state that low-risk aerodromes designated as Category I can use online registration systems for owners and aircrafts for visual flight in daytime in areas with few people. Flights

in this low-risk category are not subject to the Civil Aeronautics Act.

### 5.3 Drone Certification and Registered Inspection Bodies

The revised law introduces a system for examining and certifying safe drone designs. Type 1 certification is mandatory for drones that will be flying at the danger level classified as Category III, and Type 2 certification for drones that will fly in Category II. MLIT inspects drones for compliance with strength, structure, and performance safety in terms of design, manufacturing process, and current status once it receives an application from a UAV operator, and drones that comply with the safety standards, receive an airframe certificate (Article 132-13; the operator is then required to display the certification or take identification measures (Article 132-13). Because it was difficult for the government alone to conduct nationwide drone inspection and certification work, the Amended Act established a registered inspection system that enabled the government to entrust inspection to private registered organizations (Article 132-24).

### 5.4 Drone pilot certification

Currently, the bodies that grant permission for drone flights consider the relevant drone flight records as well as certificates of completion from private drone schools. The Amended Act established competence certification system for drone operators and mandate this certification for anyone who wants to fly. The pilot's license (competence certificate) is good for three years, and renewal requires completing the training course to confirm the physical condition and the latest knowledge and ability.

The government supervises the pilot licensing system via designated private examination organizations and regularly examine these organizations with the power to demand that they improve or suspend their operations or to rescind an organization's designation if necessary. In practice, only one designated examination institution is designated in order to ensure uniformity and fairness of the examination and passage criteria. The designated examination institution may not offer training service to avoid collusions of examiner and examinees. In addition to these, a system was established to exempt those who had completed certain courses at private institutions from some or all of the national examinations.

## 6 Establishing drone flight airspace in accordance with local ordinances

Regions around Japan have enacted their own independent regulations restricting drone flights, and drone operators must comply with their local ordinances. In the future, amending the Civil Aeronautics Act and the Freight Forwarding Business Act and institutionalizing the drone transportation business will allow local governments to monitor drone airspace even when operation does not involve direct flight over private land. For flights over private land, the local government will give as much notice as possible, but flights are allowed based on a unilateral announcement and not requiring consent from individual landowners. Although some compensation is offered for the infringement on landowners' rights, the governing assumption is that the benefits to the whole municipality outweigh the inconveniences to individuals. Although this approach might appear to be circuitous, it is useful, especially in the beginning phase of the drone delivery business, because it enables establishing flexible airspace for drone operation under ordinances that took into account the opinions of local residents.

In addition, the scope of jurisdiction of unmanned vehicle traffic management is technically limited to the airspace of a city, town, or village or a part thereof, and it is not immediately possible to have jurisdiction over the entire airspace of Japan. Therefore, traffic management facilities are needed in each municipality (some districts) that will be in the last-mile transport zones of different drones. Some

municipalities have already established such regulations including the ones discussed below.

In Shibayama-cho, Chiba Prefecture, one ordinance establishes Hikoki-no-Oka and governs its management, including prohibiting the use of small unmanned aircraft such as drones within the area (Article 6).[26] In Yokohama City, Kanagawa Prefecture, the Yokohama City Park Ordinance (Article 5, No. 10 of the Ordinance on the Establishment and Management of Parks) prohibits dangerous activities and acts that can disturb others. Drone operations fall under this category and are prohibited in principle, although exceptions are recognized, such as in large areas where there are few people around (such as in the early morning after sunrise) or few objects nearby such as buildings or cars.

In all, MLIT had 256 ordinances in 2022 specifically related to drones posted on its website, up from about 40 in 2019. Many of the 1700 local governments in Japan have not enacted such ordinances, but they do predominate around tourist spots, and many local governments have enacted ordinances that restrict the use of drones in parks. Mie Prefecture enacted an Ordinance on Prohibition of Flying Small UAVs over the Areas and Areas Surrounding the Facilities Subject to the Ise-Shima G7 Summit in Mie Prefecture with the intention of ensuring the smooth organization of the conference as well as maintaining good international relations and regional safety by preventing dangers to VIPs. Flying small unmanned aircraft over the entire area surrounding the target facility was prohibited from March 27 to May 28, 2016 (after the summit ended), although this did not apply when permission has been obtained in advance). For violations, the ordinance stipulated imprisonment with work for not more than 1 year or a fine of not more than 500,000 yen was also stipulated. Notwithstanding the Ordinance of Mie Prefecture expired when the G7 summit event ended, local ordinances around Japan may hold that as a precedent and prohibit drone usage when a similar event takes place in the future.[27]

## IV. Civil liability of drone operators

### 1 The absence of special rules on liability

There is no special rule on civil liability related to drone operation. If a drone crashes on the ground or otherwise causes an incident and gives rise to any personal or property damage to a third party, the drone operator is liable for any such damages based on the general rules on tort[28], which is fault-based liability. If the incident is due to a defect in the drone, the drone manufacturer is liable based on the Products Liability Act[29]. In case a defective component is identified, both the component manufacturer and the drone assembler are liable; Japan's product liability law is a kind of strict liability in the sense that that liability is affirmed by the mere existence of a defect, rather than fault.

It is no surprise that Japan does not introduce a special statute on the liability caused by drones in view of the absence of special liability rule for accidents of an aircraft. Unlike European jurisdictions where the operator of an aircraft is strictly liable under a special statute, Japan has no special law on the third-party damages caused by the operation of an aircraft. In Japan, the general tort law, which is the fault-based liability, applies to liability for the third-party damages due to the operation of an aircraft. Neither does the Japanese law recognize any global limitation on aircraft operator liability. Japan is not a Party to the 1952 Rome Convention on the surface damages from aircraft (or its predecessor Convention of 1933 or the most recent 2008 General Damages Convention).

Under the fault-based liability system, the extent to which the operator may be held liable depends

[26] http://www1.greiki.net/town. shibayama/reiki_honbun/g061RG00000586. html
[27] See the list of local ordinances restricting flights of drones, https://www.mlit.go.jp/common/001370402.pdf.
[28] Art. 709, Civil Code.
[29] Art. 3, Products Liability Act.

on the finding of fault in the actual acts and omissions of the operator. Among others, the fault-based system raises a serious issue of whether it is possible to find fault when the drone flies autonomously without visual surveillance, which is going to be admitted in the future. The issue, commonly found with the autonomous vehicles and autonomous ships, is yet to be fully examined. Fault is difficult to establish when a vehicle is unmanned and flying autonomously without visual surveillance. This issue is not the problem unique to drones, but common with other autonomous vehicles, such as autonomous cars or ships. As with the latter types of autonomous vehicles, the issue is yet to be fully examined.

### 2 Insurance

As with liability for accidents, there is no statutory regulation on insurance for drones, even after the 2021 amendments. This does not mean, however, that Japanese regulators have overlooked the importance of insurance. The application form that MLIT offers for use on its website asks if the intended operator holds third-party liability insurance, and the applicant, if insured, is required to fill in the insurer's name, product name, and the insured amount distinguishing the cover for personal damages and that for property damages. Still, the application is not rejected if the applicant is not insured.

The "Basic Policy" (see I above) mentions insurance in its section on titled "remedies for the damaged". However, although the document highlights the significance of measures to ensure compensation if a third party incurs damages, it does not support introducing mandatory insurance for drones equivalent to the liability insurance for automobiles. To be more specific, the Basic Policy states that it is premature to take a position on the need for mandatory insurance for small, unmanned aircraft when there is not yet a policy on the autonomous driving of cars; instead, the Basic Policy requires that education for drone operators should highlight the importance of insurance. This position could reflect the abovementioned challenge of how to assign fault when a drone flies autonomously without monitoring by human eyes.

In practice, the market offers insurance products for drone operators, for instance the group insurance offered by JUIDA. Having established itself as a self-regulatory body for unmanned vehicle operations, being in transition to an organisation engaged in co-regulation, JUIDA adopted "Guidelines on the safety of unmanned aircraft", which recommend that members purchase insurance. JUIDA then made an arrangement with the insurer on the group insurance under which JUIDA members become insureds and benefit cover for its losses. The insurance cover consists of the cover of liability, which includes not only liability for physical damages but liability for infringement of privacy as well, and the first-party property insurance for the destruction and theft of the drone. SORAPASS Care is another insurance product that is offered to SORAPASS users. Since using SORAPASS improves flight safety, its users enjoy lower premiums.

## V. Conclusion—Future Challenges

Drones have been of interest and in use in Japan for more than 30 years. It is even envisaged that the drone technology will be applied to flying cars in the future. The regulatory legislation began to be enacted in the mid-2010s and major revisions to the Civil Aeronautics Act were made in 2020 and 2021. Although the enactment of the new regulations progressed rapidly, many matters were delegated to ministers for ministerial ordinances, and many issues remain with detailed regulations under these ordinances. The lack of clarity has had practical implications.

There is still a possibility of mandating drone insurance, which is currently only strongly recommended. In addition, it is necessary to examine the effects of administrative fines and other

penalties introduced in the recent revision in cases of violation of the aircraft registration system. Careful consideration should continue to be given to the design of the insurance system and the possibility of establishing additional fines while taking into account the progress of commercial use of drones as social implementations.

# The justiciability of economic, social and cultural rights in Japanese constitutional law

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## 1. OVERVIEW

The Constitution of Japan (the Constitution), established in 1946 by the Japanese people prompted by the General Headquarters of the Allied Powers (GHQ) shortly after the defeat of the Empire of Japan in World War II, is the first constitution in human history which guarantees the subjective and judicially enforceable right to welfare.[1]

Article 25 of the Constitution provides '[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living' (paragraph (1)) and '[i]n all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health' (paragraph (2)).[2]

However, the Supreme Court of Japan (the Court), which 'is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act',[3] has never held 'any law, order, regulation or official act' unconstitutional under Article 25 since the Constitution took effect in 1947. This article will, after a brief survey of the historical and legal background (2., 3, &. 4.), consider how and why the Court has kept interpreting the right so narrowly and in a restrictive manner (5.) and will briefly refer to other related rights (6.).

## 2. HISTORY AND BACKGROUND OF THE CONSTITUTION AND THE COVENANT

### 2.1. CONSTITUTION

There were no provisions for individual rights to welfare as Article 25, paragraph (1) in the original draft prepared by GHQ or the draft submitted to the Imperial Diet by the Emperor according to Article 73 of the Constitution of the Empire of Japan. Paragraph (1) as cited above was inserted during the Imperial Diet deliberations based on a proposal by the Japanese Socialist Party.[4]

In addition to Article 25, the Constitution has a wide variety of provisions relating to economic, social and cultural rights – collectively called 'social rights' in Japanese academic literature – as follows.

Article 26 guarantees the right to education. 'All people shall have the right to receive an equal education correspondent to their ability, as provided by law' (paragraph (1)). 'All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by

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[1] It does not necessarily mean that one can get welfare benefits solely by invoking the right in court, but it does mean that the court could hold legislation, administrative regulations, or judgements unconstitutional (or at least illegal) with regard to the right (see 4., 5., & 6. below for details.).

[2] English translations of laws and judgements in Japan throughout this article are made by the author, except for the Constitution, which has an official English version printed on the Official Gazette in English published in occupied Japan. Other materials sometimes have unofficial translations on the websites of the Court, the Ministry of Justice, and other related government offices. Those translations are generally useful, but sometimes they use different English words for the same Japanese, or are quite accurate but too redundant for standard English readers. There are many tasks left in providing Japanese legal information in English.

[3] Article 81 of the Constitution of Japan. Articles and paragraphs of the Constitution of Japan are hereinafter mentioned without the name of the Article or Code.

[4] K. Takayanagi, I.Otomo and H.Tanaka (eds), *Nihonkokukenposeitei no Katei II Kaisetsu [The Making of the Constitution of Japan, Vol. II Comments]*, Yuhikaku, Tokyo 1972, p.176.

law. Such compulsory education shall be free' (paragraph (2)).

Article 27 guarantees the right to work. 'All people shall have the right and the obligation to work.' (Paragraph (1)) 'Standards for wages, hours, rest and other working conditions shall be fixed by law' (paragraph (2)). 'Children shall not be exploited' (paragraph (3)).

Article 28 guarantees the '[t]he right of workers to organize and to bargain and act collectively'.

There has been no amendment to the Constitution of Japan since it took effect in 1947.

### 2.2. COVENANT

Japan ratified the International Covenant on Economic, Social and Cultural Rights in 1979. Japan made a reservation as to the clause of 'in particular by the progressive introduction of free education' in Article 13, paragraph (2), item (b) and (c) of the Covenant. This reservation was revoked in 2012. No amendment has been made to the Constitution since ratification. The general view in Japan is that the Covenant has made little impact on the caseload of the Japanese judiciary.

## 3. THE SUPREME COURT AND THE LOWER COURTS

### 3.1. LEGAL FRAMEWORK

Article 76, paragraph (1) provides that '[t]he whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law' and Article 81 provides that '[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act'. Japanese courts have the power of judicial review just as US courts do. Japan has no constitutional court, and it has no federal system.

There are no class actions in Japan, except that in some consumer cases, certified NGOs are permitted to bring suit on behalf of consumers according to the Act on Special Provisions of the Civil Procedure Act upon the Collective Remedies for Damages in Properties of Consumers.[5]

The Court and lower courts (the courts) have the power to issue writs of mandamus and injunctive orders to administrative authorities according to the Administrative Case Litigation Act. They can also exercise preliminary powers, too, if necessary. Declaratory judgements are available. Details are regulated by the Act. There are cases in which preliminary injunctions have been granted for welfare rights,[6] but they are not constitutional cases.

### 3.2. POLITICAL CONDITIONS FOR THE COURT

Considering the legal situation outlined above, it might be helpful for foreign readers to mention a few concerns about constitutional or judicial politics in regard to Japanese judicial review.

#### *3.2.1. Judicial passivism and the rules for the appointments of Justices*

Though things may be gradually changing, there has been a strong tendency toward judicial passivism in Japanese courts. For example, the Japanese Supreme Court has only held legislative acts unconstitutional ten times in the 75 years since the Constitution took effect.

A wide range of explanations might be given for this phenomenon. One worth noting is that there has been almost no change of governing parties in Post-war Japan. Under the Constitution, 'the Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet' (Article 6, paragraph

[5] Act No. 96 of 2013.

[6] For example, Tokyo District Court, 25 January 2006, 1931 *Hanji* 10 issued a preliminary injunction against a nursery school to admit a child with cannula.

(2)) and '[t]he Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.' (Article 79, paragraph (1)) The Cabinet does not have to obtain 'the Advice and Consent' from the House of the Councillors, as required in the US Constitution when the President 'appoint[s]…Judges of the supreme Court'.[7] It would be a great surprise if there were an activist Court while all Justices have been appointed by the Cabinet from the same ruling party.

#### *3.2.2. Judicial activism while avoiding constitutional adjudication*

Another aspect of Japanese courts worth pointing out, is that they consistently avoid rendering constitutional judgements. However, that does not mean they always act passively. Outside the constitutional sphere, the courts sometimes behave very actively. They have shown their activist face in some constitutional cases such as reapportionment[8] but those have been quite exceptional.

One of the very latest examples of judicial activism is a case in which the Court, without referring to the constitutional right to privacy, denied the application of rules on Exclusion from Application provided in Article 45 of the Act on the Protection of Personal Information Held by Administrative Organs.[9] The right to informational privacy is, roughly speaking, generally thought and held guaranteed by the 'right to the pursuit of happiness' in Article 13. In this case, the right to seek one's own information is excluded by Article 45 of the Act when it is about the execution of criminal punishment, so as to prevent employers from using the system to gather criminal records of applicants. Lower courts applied this exclusion rule to a case in which a plaintiff sought his medical records while he was in prison. The Court held the rule did not apply in this case and ordered the disclosure. The result sounds appropriate but it seems the court should have held that the rule is at least partially unconstitutional and void. Without using the Constitution, the statutory interpretation adopted by the Court is quite unnatural and seems to go beyond normal statutory interpretation.

The Court seems afraid to use its constitutional power of judicial review because that may incite reactions in other branches. At the same time, the Court seems to believe, reasonably or not, that statutory interpretation would not arouse politicians as much as a constitutional judgement. This may explain why in the recent *Horikoshi Case*[10] the Court continued to hold a prohibition on political activities by public servants constitutional following the *Saruhutsu Case*,[11] but held that the defendant in the Case not guilty on separate non-constitutional grounds.

The judicial passivism mentioned above is even more evident in the Court's social rights cases. Thus, seen in this context, it may be understood why the Court, even in an exceptional case in which it invalidates a governmental action, would adopt a statutory rather than a constitutional basis (see 5.2.3.).

There may be a structural reason which enables the Court to decide more actively in statutory cases. That is, it is the highest court and the court of last resort both for constitutional and non-constitutional adjudication. Furthermore, Japan is not a federal system, so the Court is not bound by any interpretation by the highest State courts.

## 4. THEORETICAL FRAMEWORK

[7] Article 2, section 2 of the Constitution of the United States.
[8] Supreme Court, Grand Bench, 14 April 1976. 30 *Minshu* 223 the Court declared the election unconstitutional but did not invalidate the result.
[9] Supreme Court, 3rd Petty Bench, 15 June 2021, 1489 *Hanta* 29.
[10] Supreme Court, 2nd Petty Bench, 7 December 2012, 66 *Keishu* 1337.
[11] Supreme Court, Grand Bench, 6 November 1974, 28 *Keishu* 393.

## 4.1. LIBERTIY RIGHTS AND SOCIAL RIGHTS

### *4.1.1. Classical understanding of social rights*

The Constitution guarantees classical liberties such as freedom of speech (Article 21), freedom of religion (Article 20), freedom to choose one's occupation (Article 22) and property rights (Article 29) as well as social, economic and cultural rights listed above. In Japanese academic literature the latter group of rights are, as noted above, called social rights and the former liberty rights. The right guaranteed by Article 25 is generally called the 'right to existence' (*Seizon-ken* in Japanese) and thought to be at the foundation and centre of the social rights.

The term 'right to existence' reflects that Article 25 was born under the influence of Article 151 on 'a dignified existence as human-beings' of the so-called 'Weimar Constitution' of Germany established in 1919.[12] This provision in the German Constitution at that time did not guarantee the subjective right and so the first part of this article indicated that the Japanese Constitution was the first one in this regard. However, the influence of the German experience through Socialists claims in the Constitution Making Diet was quite apparent.

Social rights were called 'fundamental rights like the "right to existence"'(*Seizon-ken-teki-kihonken*) of the 20th century and were contrasted with 'fundamental liberty rights of the 18th or 19th century' by the most prominent civil law scholar of the age, just after the enactment of the Constitution.[13] There was a strong tendency toward a political attitude shown in slogans like 'from liberty rights to social rights' among legal academic writings at that time.

### *4.1.2. Social rights and economic liberties*

The guarantee of social rights entails the restriction on economic liberties. In this sense, admissions of socio-economic legislation by Article 27, paragraph (2) (see 2.1.) precludes the *Lochner*[14]-era style libertarian argument against legislation realizing social rights from Japanese constitutional analysis.

The Court, in the *Public Marketplace Case,*[15] upheld the constitutionality of proximity restrictions on a public marketplace for the purpose of protecting individual shops from the threat of financial instability that would result from excessive competition. It held that '[i]t is quite apparent that the Constitution, which, as a whole, having the concept of the welfare state as its ideal, intends to realise the balanced and coordinated economic developments of the society, and, from this point of view, requires appropriate protective measures for the economically disadvantaged by guaranteeing all the Japanese people the so-called right to existence and right to work which itself contributes to realisation of the right to existence'. Then the Court applied quite a lenient standard of review against the law restricting the freedom to choose one's occupation guaranteed in Article 22.[16]

In this regard, it is noteworthy that the text of Article 31, the Due Process Clause of the Constitution, which provides '[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be

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[12] '*Die Verfassung des Deutschen Reiche*s of 1919("*Weimarer Reichsverfassung*")' in its Article 151, Section 1, **provided** '[*d*]*ie Ordnung des Wirtschaftslebens muß den Grundsätzen der Gerechtigkeit mit dem Ziele der Gewährleistung eines* ***menschenwürdigen Daseins*** *für alle entsprechen. In diesen Grenzen ist die wirtschaftliche Freiheit des einzelnen zu sichern*.' (emphasis added)

[13] S. Wagatsuma, 'Kihon-teki Jinken [Fundamental Human Rights]' in The Association of Political and Social Sciences (eds), *Shin-Kenpo no Kenkyu [Studies on the New Constitution]*, Yuhikaku, Tokyo 1947, p.63.

[14] See *Lochner v. New York*, 198 U.S. 45 (1905).

[15] Supreme Court, Grand Bench, 22 November 1972, 26 *Keishu* 586.

[16] As for cases and academic arguments around the Article 22 guarantee of freedom to choose one's occupation, see M. Nakamura 'Freedom of Economic Activities and the Right to Property' in P. Luney, Jr. and K. Takahashi (eds), Japanese Constitutional Law, University Tokyo Press, Tokyo 1993, pp.255-267. See also T. Matsumoto 'Article 22' in C. Jones (ed), *The Constitution of Japan–An Annotation*, (forthcoming).

imposed, except according to procedure established by law' was, narrowly and carefully drafted in 1946 so as not to implicate any substantive components as its counterparts in the US Constitution had done in the *Lochner*-era.

#### *4.1.3. Contemporary understanding based on personal autonomy*

One of the leading constitutional scholars who specialized in social rights studies criticized the classical understanding of 'social rights from the top' and argued it needed reconstruction to 'social rights from the bottom' based on personal autonomy, that is, freedom and participation.[17]

Since the 1980s', in concert with a rise of arguments in normative ethics and social philosophy, especially in English literature, academic inquiries into philosophical or other theoretical foundations of fundamental human rights have been made by Japanese constitutional scholars. Some of them have been interested in John Rawls' argument[18] about a veil of ignorance and the difference principle.[19] It is true that there is an interesting correspondence between his theory and an integrated understanding of liberty rights and social rights in the Constitution. Others have found that a theory of hypothetical insurance is instructive in analysing matters in relation to social rights.[20] In any event, it is now widely understood that both liberty and social rights are important for the 'respect' of 'all of the people…as individuals' (Article 13).

The author started his own academic research consulting with Rawlsian principles and philosophical analysis by Alan Gewirth.[21] In the author's opinion, it is important to secure strong protection for the core elements of the right in Article 25, paragraph (1) and at the same time, because the right is that of 'minimum standards', there should be some limits on the constitutionality of laws enforcing the social rights in regards to economic liberties specifically guaranteed by the Constitution.[22] There is a related argument below (4.4.).

### 4.2. SOCIAL RIGHTS UNDERSTOOD AS MAINLY INDIVIDUAL

Social rights in the Constitution are individual rights. But '[t]he right of workers to organize and to bargain and act collectively' guaranteed by Article 28 has, by its nature, collective implications. This right is widely acknowledged to a have direct effect on private persons. There have been fierce arguments and a long history of meandering by the Japanese Supreme Court as to the rights of public workers, but they lie outside the scope of this article.

### 4.3. THEORETICAL FRAMEWORK ON THE INTERPRETATION OF THE RIGHT TO EXISTENCE IN ARTICLE 25

There are three different theories among Japanese academics as to the interpretation of one of the most important social rights in the Constitution, the so-called 'right to existence' of Article 25.[23]

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[17] M. Nakamura, *Shakai-ken Houri no Keisei [The Formation of the Doctrines of the Social Rights]*, Yuhikaku, Tokyo 1973, p.290. Dr. Professor Nakamura passed away during Covid 19 pandemic in April 2020.
[18] J. Rawls, *A Theory of Justice*, Belknap Press, 1972.
[19] K. Sato, *Gendai-Kokka to Shiho-ken [Contemporary States and Judicial Power]*, Yuhikaku, Tokyo 1988.
[20] T. Ogata, *Hukusi-Kokka to Kenpo-Kozo [Welfare State and Constitutional Structure]*, Yuhikaku, Tokyo 2011.
[21] A. Gewirth, *Reason and morality,* University of Chicago Press, 1978
[22] T. Matsumoto, Levels of Standard Reviewing Laws Regulating Economic Liberties (1) & (2) (1996) [original Japanese title omitted], 113 *Minshoho Zasshi* 736 & 769.
[23] See generally S. Matsui, *The Constitution of Japan – A Contextual Analysis*, Hart Publishing, Oxford and Portland, Oregon 2011, pp.222-224 and A. Osuga 'Welfare Rights' in Tokyo P. Luney, Jr. and K. Takahashi (eds), *Japanese Constitutional Law*, University Tokyo Press, Tokyo 1993, pp.269-288.

#### *4.3.1. Understanding as a 'Program Provision'*

The classical understanding of this is only as a political goal. According to this theory, Article 25 is a 'Program Provision'. This theory, which is compatible with the old Supreme Court case discussed below (in 5.1.1), apparently contradicts the text of Article 25, and now only has historical significance.

#### *4.3.2. Understanding as a Legal Right*

The current academic approach along with the Court as we shall see later (in 5.1.3.), adopts a theory which recognizes the right to existence not as a policy goal but as a Legal Right.

4.3.2.1. Understanding as a Concrete or Specific Right (*Gutaiteki-Kenri-Setsu*).

Some academics dare to recognize the right as a legal right in the same sense as other constitutional rights, such as liberty rights. According to this theory, the right to existence is a right, which by itself, without legislation, empowers an individual to be eligible for remedies in the courts. This theory is called the Concrete or Specific Right theory *(Gutaiteki-Kenri-Setsu*).

The classical version of this theory only recognizes the remedy of declaratory judgement by the courts, which would hold legislative inaction, that is, the fact that the Diet has not appropriately made legislation to enforce the constitutional right to existence, unconstitutional. The modern version of this theory further proclaims that the courts can order an administrative remedy, for example, payment of an amount of money if there is a lack of appropriate legislation.

4.3.2.2. Understanding as an Abstract or General Right *(Chushoteki-Kenri-Setsu*).

A majority of academics, together with the Court, recognize the right as a legal right, but not as a right solely by itself, without legislation, to empower an individual to be eligible for remedies in the courts. This theory argues, however, that the courts can evaluate the constitutionality of the law enforcing the right to existence as a constitutional right once it is enacted by the Diet. The courts can hold legislation by the Diet unconstitutional if the enforcement is inappropriate. It is important for this theory that the remedy is specified by legislative act. This theory is called 'Abstract or General right theory' (*Chushoteki-Kenri-Setsu*).

Furthermore, according to this theory, the courts can hold a regulation or specific decision by administrative authority unconstitutional in cases in which it is inappropriate from a constitutional point of view. In those cases regarding the administrative action, it might be said that if the administrative action is to be held unconstitutional, it may also be held illegal in the sense that it is not based upon the law, as long as the law itself is constitutional. That could be true, and it should be again noted that courts prefer to base their decisions on statutory rather than constitutional grounds.

But we should also note that the courts can choose to hold an administrative action 'unconstitutional' rather than 'illegal' in order to express strong condemnation. We should further note that a losing party at High Court, that is an intermediate appellate court in Japan, has the right to make an appeal to the Supreme Court only if the decision below is unconstitutional.

One of the leading proponents of this theory thinks it is possible for the courts to recognize the demand for compensation if the legislative or administrative response is unconstitutional, even though he does not recognize that the right to existence as a right solely by itself, without legislation, empowers an individual to be eligible for remedies in the courts. In addition, he thinks that there is a prohibition of reduction of the level achieved without legitimate reason.[24] But the Court has not had an opportunity to

[24] K. Sato, *Nihonkoku Kenpo Ron [On the Constitution of Japan]*, Seibun-do, Tokyo 2020, p.402.

show its opinion in the case of damages and does not appear to share his view on the non-retrogression principle, as shown later (5.2.2.4.).

It is commonly understood that there are four rationales for this theory: (1) vagueness of the concept of 'the minimum standards of wholesome and cultured living', which might depend on common sense and change with the times. (2) the courts lack the political and technical competence to adjudicate the constitutionality of laws enforcing the right. (3) actions which should be taken by the legislature, or the administrative authorities are not clearly specified for the courts as to make a judgement ordering them to take a specific action. (4) budgetary implications of decisions in this field and the lack of democratic legitimacy of the courts.[25]

### 4.4. THE RELATIONSHIP BETWEEN PARAGRAPHS (1) AND (2) OF ARTICLE 25

Reading Paragraphs (1) and (2) of Article 25 literally, it is self-evident that the former guarantees a right and the latter imposes an obligation to make efforts. But the courts generally do not consider this to be an important difference with one exception[26] and classical academic understanding did not differ in this regard. They interpret the two paragraphs of the Article to guarantee one right. It should be noted that if one interprets Article 25 to have specific meanings or core guarantees, one must consider these two parts separately.

### 4.5. COVID-19 CRISIS AND SOCIAL RIGHTS IN JAPAN

The impact of the COVID-19 crisis on the debate about social rights in Japan is yet to be seen. Politically, there has been a strong argument for the proposition of 'no restriction without compensation' but, theoretically, the Court judgement in the *Nara Prefectural Ordinance on Pond Case*[27] implies that compensation is not constitutionally required by the Just Compensation Clause of Article 29, paragraph (3), as long as the restrictions are imposed for the purpose of public health. In addition, the Court held in the *Order Restricting Riverside Developments Case*[28] that the compensation need not to be paid beforehand. That is, if there is a statute imposing restrictions without constitutionally necessary compensation, the statute is not void but government should only pay if ordered by the courts.

However, if compensation is paid unequally, it may raise a different problem. That is at issue in litigation now in the Tokyo District Court seeking compensation for sex-workers, who were denied payment by the government even though they were restricted from doing their business just as others were.

The government view seems to be that welfare benefits paid according to the Public Assistance Act will serve as a safety net.[29] We should, nevertheless, note that there has been almost no growth in the number of public assistance recipients compared with that of the same month last year[30]. This surprising phenomenon might imply either an availability of rescue measures other than public assistance for those economically damaged by the pandemic, or complete dysfunction of the public assistance system from the outset. In this regard, it must be pointed out that according to governmental statistics only 43.7 % of

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[25] K. Munesue, 'Seizon-ken no Gutai-teki Kenri-sei [The Right to Existence as a Concrete Right]' in his *Kenpo-gaku Sairon [Constitutional Argument revisited]*, Shinzansha Publisher, Tokyo 2001, P.349.

[26] Osaka High Court, 10 November 1975, 26 *Gyoshu* 1268. This is an appellate level judgement in the *Horiki Case*, which will be discussed below in 5.1.3.

[27] Supreme Court, Grand Bench, 26 June 1963, 17 *Keishu* 521.

[28] Supreme Court, Grand Bench, 27 November 1968, 22 *Keishu* 1402.

[29] Remarks by Prime Minister Suga, at Budget Committee, House of Councillors, 01.27.2021. https://kokkai.ndl.go.jp/#/detail?minId=120415261X00120210127&current=1

[30] Research on the Recipients of Public Assistance in 2021, https://www.e-stat.go.jp/stat-search/file-download?statInfId=000032167507&fileKind=0

households with income and deposits below the amount set by the Public Assistance Standard could be estimated to receive assistance in 2016.[31]

## 5. LEADING CASES IN ARTICLE 25 JURISPRUDENCE

### 5.1. WHAT ARE THE MINIMUM STANDARDS OF WHOLESOME AND CULTURED LIVING?

#### *5.1.1. The Food Supply Control Act Case*

In the *Food Supply Control Act Case*[32], the Supreme Court was given its first opportunity to show its understanding of Article 25. The case occurred in the era of severe food shortages which began in the last days of World War II. A criminal defendant charged with purchasing rice on the black market argued his prosecution violated Article 25 because it was impossible to 'maintain the minimum standards of wholesome and cultured living' without acting illegally.

The Court rejected his argument and held that 'Article 25 does not directly guarantee concrete and real rights for individual nationals.'[33]

This case may not have been the most appropriate opportunity for the Court to show its interpretation of Article 25, for prohibiting a black market is one thing and providing enough food to 'maintain the minimum standards of wholesome and cultured living' is another. It should be noted that this case was decided before the enactment of the Public Assistance Act in 1950. At the time, it was widely understood that the Court took a position very near to interpreting Article 25 as only providing a policy goal shown above in 4.3.1. But we should also note the literal reading of the text of the judgement squarely contradicts with the understanding of the 'Concrete or Specific Right' theory at 4.3.2.1., but it is not completely incompatible with the understanding of the 'Abstract or General Right' theory at 4.3.2.2., which as shown below (5.1.3.), the Court adopted without overruling this old case.

#### *5.1.2. The Asahi Case*

5.1.2.1. Enactment of the Public Assistance Act

In 1950, while Japan was still under occupation by Allied Powers, the Public Assistance Act was enacted by the Diet to enforce the right guaranteed by Article 25.

Interestingly, the Act makes clear that it guarantees the same level of welfare benefits as Article 25, for it repeats and refers to provisions in Article 25. Article 1 of the Act provides that '[t]he purpose of this Act is for the State to guarantee a minimum standard of living as well as to promote self-support for all citizens who are living in poverty by providing the necessary public assistance according to the level of poverty, based on the principles prescribed in Article 25 of the Constitution of Japan' and Article 3 of the Act provides that '[t]he minimum standard of living guaranteed by this Act shall be where a person is able to maintain a wholesome and cultured standard of living.' This approach makes it possible for courts to hold insufficient measures by administrative authorities to be either illegal or unconstitutional.

Article 8 of the Act provides that '[p]ublic assistance shall be provided, based on the level of the demand of a person requiring public assistance, which has been measured according to the Standard specified by the Minister of Health, Labour and Welfare, to the extent that makes up the shortfall thereof

[31] Remarks by Y. Jozuka, Director for Social Welfare and War Victims' Relief Bureau, Ministry of Health, Labour and Welfare, at Committee on Welfare and Labour, House of Councillors, 05.29.2018. https://kokkai.ndl.go.jp/#/detail?minId=119614260X01620180529&current=1

[32] Supreme Court, Grand Bench, 29 September 1948, 2 *Keishu* 1235.

[33] 2 *Keishu* 1238.

that cannot be satisfied by the money or goods possessed by said person' (paragraph (1)) and '[t]he Standard set forth in the preceding paragraph shall be one that sufficiently satisfies but shall not exceed the demand pertaining to a minimum standard of living, taking into consideration the age, sex, household composition and location of the person requiring public assistance and any other necessary circumstances according to the type of public assistance' (paragraph (2)).

'A prefectural governor, a city mayor, or a mayor of a town or village managing an office concerning welfare … shall decide on and implement public assistance, pursuant to the provisions of this Act…' (Article 19, paragraph (1)).[34]

*5.1.2.2. The Asahi Case*

The *Asahi Case*[35] is one of the most famous cases concerning Article 25. In that case Shigeru ASAHI, the appellant, was hospitalized for approximately ten years in a sanatorium as a tuberculous patient with no family. He received 600 yen per month for expenses which was the maximum amount of aid under the Public Assistance Standard set by the Minister of Health and Welfare. Later it was found that his brother was alive, and as the appellant began receiving support of 1,500 yen a month from this brother, the Director of the Welfare Office issued an order to terminate the aforesaid allowance of 600 yen a month and to assess against him 900 yen a month, the difference between the amount of support sent him from his brother and the stipulated amount of his living expenses.

This order was sustained both in the remedial proceedings before the Governor of Okayama Prefecture and in the remedial proceedings before the Minister of Health and Welfare. The appellant filed suit against the Minister, alleging that the determination to dismiss the claim for administrative relief should be annulled. Appellant argued that the amount of 600 yen a month allowed under the Standard was too low to maintain minimum standards of wholesome and cultured living as prescribed by the Livelihood Protection Law and was therefore illegal.

The appellant died before the judgement of the Court and, although the Court held the suit was terminated upon his death, it went on to uphold the validity of the Standard.[36] Accordingly, the opinion of the Court in this case concerning Article 25 was *obiter dictum,* but it is widely regarded as an important case in this field.

The Court held, following its judgement in the *Food Supply Control Act Case*, that Article 25, paragraph (1) 'does not grant individual people any concrete rights'[37], but very ambiguously affirmed the possibility of invalidating the Standard from constitutional concern, saying:

> The concept of minimum standards of wholesome and cultured living is a rather abstract and relative one. Its substance must be improved in proportion to the development of culture and national economy. It can be determined only after taking into synthetic consideration all these and other uncertain elements. Therefore, it is reasonable to understand that the authority to determine what constitutes minimum standards of wholesome and cultured living is first vested in the discretionary power of the Minister of Health and Welfare, and that his decision does not directly produce an issue of illegality, although such decision might produce an issue of propriety which might lead to a political debate about governmental responsibility. Only in cases where such decision is made in

[34] Article 8 &19 of the Act have been amended since its enactment in some minor points but here I cite the current version, for the amendments have no substantial concerns for the present argument.
[35] Supreme Court, Grand Bench, 24 May 1968, 21 *Minshu* 1043.
[36] It was handed down in an odd style which added a long insertion into the judgement stating '(As a matter of further elaboration…).' 21 *Minshu* 1045-1049.
[37] 21 *Minshu* 1045.

> excess of, and by abuse of, the power bestowed by the law, **against the objects of the Constitution** and the Public Assistance Act, by ignoring the real condition of life and establishing extremely low standard of schedule, would such decision be subject to judicial review as an illegal action. (emphasis added)[38]

This holding was sometimes blamed for promoting a 'policy goal' theory. It is undeniable that such reading of the judgement is possible but taken together with the *Horiki Case* which will be examined next, the Supreme Court should be deemed to support an 'Abstract Right' theory.

#### *5.1.3. The Horiki Case, the most important precedent*

*The Horiki Case*[39] is another one of the most famous cases in this area and undoubtedly the most important judgement by the Court on Article 25.

The issue in this case was the constitutionality of a provision prohibiting co-payment of both welfare pensions for persons with disabilities and child rearing allowances. The appellant, Ms Horiki, was a visually handicapped woman who received a welfare pension for persons with disabilities. She had divorced and was raising a child, so she thought she was eligible for a child rearing allowance. But her application for the allowance was dismissed for the reason that the co-payment of the pension and the allowance was prohibited by a provision of the Child Rearing Allowance Act.

The Court upheld the prohibition on the co-payment. After reiterating the denial of a direct guarantee of concrete and real rights for individual nationals in the *Food Supply Control Act Cas*e, the *Horiki* Court held 'the choice and decision on what concrete legislative action to take, responding to the spirit of the Article 25 of the Constitution, is up to the legislature which have wide discretion in this regard and it is not appropriate for the Court to adjudicate and decide, except in the case in which it is inevitable to hold that they are apparently and unambiguously made in excess of, and by abuse of the power in terms of being significantly unreasonable.'[40]

In its decision the Court enumerated the abstract and relative character of the right, financial conditions, and highly political and technical nature of the judgement concerning the enforcement of the right.

Under the quite lenient standard of review cited above, the Court then rejected the appellant's argument by reasoning that the degree of the impairment of earning capacity might not be proportional to the number of contingencies which makes a person eligible for the social insurance benefit.

The provision was later amended to permit co-payment after the suit was filed, but the Court held the existence of this amendment had nothing to do with the constitutionality of the original prohibition.

Appellant also invoked Article 13 and 14 and the Court recognized that the provision would violate Article 13 if the law enforcing the right guaranteed by Article 25 impaired the dignity of an individual person or would violate Article 14 if it discriminated people without any rational reasons, but the Court nevertheless denied the appellant's arguments altogether.

#### *5.1.4. Analysis of the Horiki Case*

5.1.4.1. Reaction from academics

Although precedents predating the *Horiki Case* were ambiguous, the *Horiki* Court clearly showed it followed the 'Abstract Right' theory in interpreting Article 25. In this respect, the Court's opinion is

[38] 21 *Minshu* 1046.
[39] Supreme Court, Grand Bench, 7 July 1982, 36 *Minshu* 1235.
[40] 36 *Minshu* 1239.

well accepted by a majority of academics. But there is strong criticism that the standard of review adopted by the Court is so lenient as to be incompatible with the character of the right as an individual, subjective, and legal one.

The Court did not refer to international law in the *Horiki Case*. This is the general tendency of the Court, which rarely mentions any international documents substantially when reviewing the constitutionality of governmental actions.

5.1.4.2. Remedies?

It is unclear how the Court would hold if it found a provision in law enforcing Article 25 to be unconstitutional. Thus far, it has never made such a determination. The *Horiki Case* showed it may be possible, but it seems unlikely for the Court to invalidate any legislation in this area.

However, it should be noted that in the *Nationality Act Case*,[41] the Court took a more activist role by affirming the lower court judgement declaring that the plaintiff had Japanese nationality. Therefore, it may be worthwhile here to see whether the approach the Court took in the *Nationality Act Case* is useful in understanding the social rights cases.

In the *Nationality Act Case*, the Court held that Article 3, paragraph (1) of the Nationality Act provided that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth might acquire Japanese nationality only if the child had acquired the status of a child born in wedlock, thereby causing a distinction in granting Japanese nationality. The Court stated that by 2003 this distinction was in violation of Article 14, paragraph (1) of the Constitution. The Court further went on to hold that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth should acquire Japanese nationality if the child satisfied the requirements for acquisition of Japanese nationality prescribed in Article 3, paragraph (1) of the Nationality Act, except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents.

*The Nationality Act Case* was a landmark judgement. Instead of holding Article 3, paragraph (1) of the Nationality Act unconstitutional and void, the Court invalidated part of the Act's requirement and found a way to recognize the Japanese nationality of the appellants. This reasoning could bring huge benefits to the plaintiffs in Article 25 cases. But there might be a distinction between a case concerning nationality and cases concerning welfare benefits, as the fiscal situation in those cases are completely different.

It is also unclear to what effect a judgement declaring laws violating social rights void would have. As a general rule, Court judgements only have *inter partes* effect, but it is generally accepted the administrative authority, which is under constitutional obligation to '[a]dminister the law faithfully' (Article 73, item (i)), should be freed from the obligation if the Court holds the law void. Moreover, the judgement might have effect *ex tunc* or *ex nunc* according to the situation. This possibility was shown in the *Statutory Share of Inheritance of Illegitimate Child Case*,[42] in which the Court limited the extent of the effect *ex tunc* of the judgement to the cases which have not settled conclusively.

## 5.2. CASES APPLYING THE *HORIKI CASE* AS A PRECEDENT.

The *Horiki Case* is a controlling precedent. It has been applied to cases regarding the constitutionality of laws and constitutionality or legality of administrative regulations, in all of which the Court upheld the constitutionality or legality of the governmental act.

[41] Supreme Court, Grand Bench, 4 June 2008, 62 *Minshu* 1367.
[42] Supreme Court, Grand Bench, 4 September 2013, 67 *Minshu* 1320.

### *5.2.1. Cases related to the constitutionality of the Act*

*5.2.1.1. The Sohyo Salaried Workers Tax Case*

In the *Sohyo Salaried Workers Tax Case*[43], the Court relied on the *Horiki Case* and upheld the constitutionality of a provision in the Income Tax Act providing the exemption limit for salaried workers. The Court rejected the argument by the appellants that it was lower than the amount of money necessary 'to maintain the minimum standards of wholesome and cultured living' and therefore unconstitutional. The Court pointed out that the appellants only showed the limit was lower than they thought favourable and failed to show it was 'apparently and unambiguously made in excess of, and by abuse of the power in terms of being significantly unreasonable' in the manner shown in the *Horiki Case.*

The Court seems not to have categorically excluded the possibility of holding that tax law could violate Article 25 '*mit abwehrrechtlicher* Dimension' that is, in regard to its aspect as a liberty right. Although the caseloads of the Federal Constitutional Court and Financial Court of Germany have been reported by comparative studies since then,[44] the Court has had no opportunity to show its current understanding.

*5.2.1.2. Shiomi Cases I & II* on foreigners and welfare pensions for persons with disabilities

In *Shiomi Case I*,[45] again relying upon the *Horiki Case*, the Court upheld the constitutionality of a provision in Article 56, paragraph 1 of the National Pension Act which excluded individuals without Japanese nationality when they were certified ineligible for welfare pensions for persons with disabilities, which was defined as a non-contributory pension in 1959. The Court found no violation of Article 9 of the Covenant, either.

Traditionally, a majority of Japanese academics thought that social rights guaranteed by the Constitution were solely for Japanese nationals. But there has been strong criticism against the Court's judgement in *Shiomi Case I.*

In addition, we should note here that the case was brought by a former national of the Republic of Korea residing in Japan who became a Japanese national by marriage to her Japanese husband before she filed the suit. It is not appropriate to simply understand this case as concerning foreigners in Japan in general. She was born in 1934 in Osaka, Japan with Japanese nationality, for her parents had their family registration at a Korean Family Register organised after Japanese annexation of Korea in 1910. She became visually impaired in 1936 and lost Japanese nationality pursuant to the Treaty of Peace with Japan in 1952. She was able to continue to stay in Japan according to Article 2, paragraph (6) of the Act on Measures for Ministry of Foreign Affairs Orders Issued pursuant to the 'Imperial Ordinance on Orders Issued Incidental to Acceptance of the Potsdam Declaration' (Act No. 126 of 1952).[46]

There is now no legal bar on individuals who have lost Japanese nationality pursuant to the Treaty of Peace with Japan acquiring Japanese nationality. But there have been obstacles reported, such as the

[43] Supreme Court, 3rd Petty Bench, 7 February 1989, 35 *Shogetsu* 1029. *Sohyo* is Japanese abbreviation for General Council of Trade Unions of Japan.

[44] See, e.g., N.Matsumoto, 'Die Garantie des verfassungsrechtlichen Existenzminimums mit abwehrrechtlicher Dimension des Art. 25 – Die Entscheidungen des Bundesverfassungsgerichts über das Prinzip der Steuerfreiheit des Existenzminimums'[original Japanese title omitted](2018) 17 *Hitotsubasi Hogaku* 1.

[45] Supreme Court, 1st Petty Bench, 2 March 1989, 35 *Shogetsu* 1754.

[46] Paragraph (6) provided that 'a person who: has lost Japanese nationality pursuant to the provisions of the Treaty of Peace with Japan, on the date on which that Treaty came into effect; has been residing in Japan continuously since before September 3, 1945 (including children born under said residency), may continue to reside in Japan without holding status of residence, notwithstanding the provisions of Article 22-2, paragraph (1) of the Immigration Control Order, until his or her status of residence and period of stay are otherwise determined by Law.'

requirement to register a Japanese-style name, without using one's original Korean name.

The special permanent residency of those who have lost Japanese nationality pursuant to the Treaty of Peace with Japan is now regulated by the Special Act on the Immigration Control of, Inter Alia, Those who have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan (Act No. 71 of 1991).

In 1981, Japan ratified the Convention Relating to the Status of Refugees, and in response to the principles of national treatment in Articles 23 and 24 of the Convention, by Act No.86 of 1981, the said exclusionary provision was deleted. In *Shiomi Case II*, the Court, relying on the *Horiki Case* once again, upheld the constitutionality of a transitional provision in the Act of 1981 which denied the effect of the deletion of the exclusionary provision for a person who had been denied eligibility before the amendment by the same Act.[47]

5.2.1.3. Foreigners and public assistance: illegal overstayers and permanent residents

The Public Assistance Act provides assistance only for 'Japanese nationals' (Article 2). In practice, based on the public notice from the director of the Ministry of Welfare of 1954, public assistance is provided for permanent residents, not by application of the Act or as a matter of legal right but only as a matter of an administrative convenience.

The Court, relying on the *Horiki Cas*e, upheld the constitutionality of the denial of public assistance to an illegal overstayer.[48]

Although it was not a constitutional case and therefore the Court did not mention the *Horiki Case* (and this article is focusing on constitutional issues), it is worth noting here that the Court found no problem in the 'only as an administrative convenience' treatment of public assistance even for permanent residents.

In 2008, a permanent resident applied for public assistance, but the application was dismissed by the administrative authority for the reason that she and her husband had a sufficient amount of money. She bought suit in the District Court seeking revocation of the dismissal. The District Court dismissed her claims,[49] but on appeal, the High Court reversed the original dismissal for the reason that the government was legally obliged to provide certain foreigners with benefits on par with equally situated Japanese nationals.[50] The High Court understood the Public Assistance Act intended to protect only Japanese nationals. But it held that the Diet and the Administration recognized the obligation by ratification of the Convention Relating to the Status of Refugees and through the deliberation process in the Diet. In the Diet, the government took the position that it did not need to amend the Public Assistance Act because, from the beginning of the history of the Assistance Act, the administrative authority treated foreigners in the substantially same manner as Japanese nationals both in practice and in financial consideration. For this reason, the government thought the revision of the Public Assistance Act was unnecessary, even though other social welfare statutes than the Public Assistance Act were all amended in response to the ratification. With that background, the High Court affirmed the obligation of the local administrative authority.

However, the city appealed to the Supreme Court. The Court vacated the judgement of the High Court and affirmed the District Court's judgement affirming the original dismissal by the administrative authority.[51] The Court held that the Act applied only to Japanese nationals and the fact that the benefit

[47] Supreme Court, 3rd Petty Bench, 13 March 2001, 48 *Shogetsu* 1961.
[48] Supreme Court, 3rd Petty Bench, 25 September 2001, 61 *Shogetsu* 1273.
[49] Oita District Court, 18 October 2010, 61 *Shogetsu* 363.
[50] Fukuoka High Court, 15 November 2011, 61 *Shogetsu* 377.
[51] Supreme Court, 2nd Petty Bench, 81 July 2014, 61 *Shogetsu* 356.

was given to permanent residents as an administrative convenience, based on the public notice from the director of the Ministry of Welfare in 1954, did not change this legal situation.

The explanation by the Court may be considered persuasive as to the interpretation of the Act and the public notice. But if this interpretation is adopted, there are serious concerns with respect to refugees under Article 20 of the Convention which requires that 'refugees shall be accorded the same treatment as nationals' as the Court denied foreigners the same procedural protections guaranteed to Japanese nationals.

*5.2.1.4. The Students Without Disability Pension Case*

The National Pension Act excluded students as defined by the said Act from compulsorily participation in the national pension system and allowed these students to participate in the national pension system voluntarily.

As a result, under the Act prior to the revision in 1989, even when a student aged 20 or over had become disabled due to a disease or injury, the student was, unless he had voluntarily participated in the national pension system and paid contributions, ineligible to receive payment of disability basic pension, etc. on the grounds that he was not an insured person for purposes of the national pension as of the date of first medical examination.

Appellants were former students who became disabled while they were students and sought rescission of the ruling of non-payment of the basic disability pension.

The Court, in the *Students Without Disability Pension Case*,[52] relying on the *Horiki Case*, found neither violation of Article 25 nor equal protection of Article 14, paragraph (1).

This litigation by former students had some social impact, even though no courts have upheld any claims of the plaintiffs. By the revision in 1989 mentioned above, students aged 20 or over are now included in the compulsory system, but people in the appellants' situation still had no disability pension. As the lower courts decisions upholding the Act in this case and other cases brought by equally situated former students gained public attention, members of the Diet came to understand the hardships that the former students faced and in 2005 a law was enacted to provide them with 40-50 thousand yen a month.

5.2.1.5. Recent cases concerning sex discrimination

The Court, relying on the *Horiki Case*, upheld the constitutionality of a provision in Article 32, paragraph (1) of the Local Public Service Accident Compensation Act, which, on the one hand, did not put any age limitation on the payment of Compensation Pension for Bereaved Family in case of bereaved wives, but, on the other hand, limited it to bereaved husbands aged 55 or over.[53]

In the same way, the Court upheld the constitutionality of provisions in Article 37 and 37-2 of the National Pension Act (before Amendment by Act No.62 of 2012) which limited the payment of a Basic Pension for the Bereaved only to wives and children.[54]

***5.2.2. Regulations***

In addition to cases reviewing the legislation, the *Horiki Case* is used by the Court as a precedent when it reviews the regulations or standards made by the Minister according to the Public Assistance Act. We should note here that the phrasing chosen by the Court might literally read less leniently than the original *Horiki* judgement and the Court closely reviews the process of regulation-making by the

[52] Supreme Court, 2nd Petty Bench, 28 September 2007, 61 Minshu 2345.
[53] Supreme Court, 3rd Petty Bench, 21 March 2017, 1439 Hanta 70.
[54] Supreme Court, 3rd Petty Bench, 25 September 2018, LEX/DB25561677.

Minister.

*5.2.2.1. The Abolishment of Old-age Additional Grants Case*

According to the Public Assistance Standards that were effective prior to the revision made by the Public Notice of the Ministry of Health, Labour and Welfare No. 130 of 2004, there were Old-age Additional Grants among many kinds of additional grants, e.g., Maternity Additional Grants, Single Mother Family Additional Grants, and Disability Additional Grants. Under the system of Old-age Additional Grants, any public assistance recipient aged 70 and above and any public assistance recipient aged 68 or 69 in need of assistance due to poor health was entitled to receive a certain amount in addition to the standard living expenses.

In 2004, the Minister of Health, Labour and Welfare determined that there was no special demand among those aged 70 and above that would justify Old-age Additional Grants and decided to abolish the system. In order to prevent abrupt change, the Minister decided to reduce said grants in phases over a period of three years and revised the Public Assistance Standards to the effect that the Old-age Additional Grants would be reduced based on the Public Notice of the Ministry of Health, Labour and Welfare No. 130 of 2004 and the Public Notice of the Ministry of Health, Labour and Welfare No. 193 of 2005 respectively and that the Old-age Additional Grants would be abolished based on the Public Notice of the Ministry of Health, Labour and Welfare No. 315 of 2006.

The appellants received notice of the decision to reduce the grants. In response, they argued that the revisions violated Article 25, paragraph (1) of the Constitution and Article 3, Article 8, Article 9, etc., of the Public Assistance Act, and should be considered unconstitutional and illegal and demanded that the administrative authority reverse its change in policy.

In the *Abolishment of Old-age Additional Grants Case*,[55] the Court upheld the abolishment of the grants, but it is noteworthy that it reviewed the decision-making process by the Minister in detail. In this regard, this case should be considered to be the second most important case concerning Article 25.

First, the Court, citing the *Horiki Case* held that the term 'minimum standard of living' used in these provisions is an abstract, relative concept, which needs to be defined in consideration of the latest conditions. These include the economic and social conditions and the conditions of the livelihoods of the general public. The Court determined that in order to embody the minimum standard of living in the form of the Public Assistance Standards, highly specialized and technical considerations and a political decision made based thereon are required. The Court further held, as for a general understanding of the matter, that

> [t]herefore, the Minister of Health, Labour and Welfare, who is revising a part of the Public Assistance Standards concerning Old-age Additional Grants, should be given discretionary power to make a political decision from a specialized and technical perspective as mentioned above, when determining whether there is any special demand among elderly persons that must be satisfied under the minimum standard of living and whether the revised Livelihood Assistance Standards concerning elderly persons are sufficient to guarantee a healthy and culturally rich life.[56]

Second, as for expectations of the recipients, the Court held that

[55] Supreme Court, 3rd Petty Bench, 28 February 2012, 66 *Minshu* 1240.
[56] 66 *Minshu* 1249-1250.

the abolition of Old-age Additional Grants could cause the public assistance recipients, who are planning their lives on the assumption of receiving them, to lose the expected benefits that have been provided under the Public Assistance Standards. In this situation, the Minister of Health, Labour and Welfare, who recognizes the necessity to abolish Old-age Additional Grants from the perspective of fairness between recipients and non-recipients and also from the perspective of **national financial conditions,** should be considered to have discretionary power to make a political decision from a specialized and technical perspective as mentioned above, when making a decision as to whether it is necessary to take **measures to ease the drastic change** and involving any other decision concerning a specific method of abolition, in order to pay utmost attention to the loss of the benefits that public assistance recipients expect to gain.(emphasis added)[57]

Third, the Court interpreted the Articles in the Act as follows,

In light of these facts mentioned above, the revision of the Public Assistance Standards, i.e., the abolition of Old-age Additional Grants, would violate Article 3 and Article 8, paragraph (2) of the Public Assistance Act and therefore considered to be illegal only in the case where (i) the Minister of Health, Labour and Welfare, who made a decision, at the time of the Revision, to the effect that those aged 70 and above did not have any special demand that could justify Old-age Additional Grants and that the revised Livelihood Assistance Standards for elderly persons were sufficient to guarantee the healthy and culturally rich life of elderly persons, is found to have overstepped the scope of his/her discretionary power or abused such power from the perspective of whether the Minister has made any mistakes, omissions, etc., in the process or procedure of determining the specifics of public assistance necessary in order to guarantee the minimum standard of living, or where (ii) the Minister of Health, Labour and Welfare, who devised the policy of taking or not taking measures to ease the drastic change to be caused by the abolition of Old-age Additional Grants, and who considered, in the case that the policy of taking measures has been adopted, that the devised measures were reasonable, is found to have overstepped the scope of his/her discretionary power or abused such power from the perspective of the expected benefits of public assistance recipients, the influence on their lives, etc.[58]

Finally, the Court found 'no circumstances to conclude that the Minister has made a mistake or an omission in the process or procedure of making this [Grants abolishing] decision' and held that 'it is unreasonable to go so far as to consider that the reduction in the amount of livelihood assistance as a result of the Revision had caused a non-negligible effect on the households of public assistance recipients, who suffered the loss of expected benefits.'[59] Then the Court held that 'the Revision does not violate Article 3 or Article 8, paragraph (2) of the Public Assistance Act' and that '[t]here are no grounds to consider the Decisions made based on the Revision to be illegal'.[60] The conclusion was stated as follows:

…the Revision, i.e., a revision of the Public Assistance Standards made by the Minister of Health, Labour and Welfare in order to reduce Old-age Additional Grants in phases and to eventually abolish

[57] 66 *Minshu* 1250.
[58] 66 *Minshu* 1251.
[59] 66 *Minshu* 1252-1253.
[60] 66 *Minshu* 1253.

them, does not violate Article 3 or Article 8, paragraph (2) of the Public Assistance Act, which embody the spirit of Article 25 of the Constitution. Therefore, it is reasonable to interpret that the Revision does not violate Article 25 of the Constitution. This is evident in light of the aforementioned judgment of the Grand Bench [the *Horiki Case*].[61]

5.2.2.2. Comments on the *Abolishment of Old-age Additional Grants Case*: level of scrutiny

The Court in the *Abolishment of Old-age Additional Grants Case* explicitly cited and relied on the *Horiki Case*, but the text of the former lacked adjectives or adverbs meaning lenient review such as 'wide', 'apparently', 'unambiguously' and 'significantly' which were the important components of the holdings of the latter. The research law clerk allocated the case at the Supreme Court, who, in the Japanese system was qualified as a judge and had plenty of experience in the lower courts, explained in a later published official note that it was partly due to the fact that in this case adverse changes were made[62] It seems that the Court gave some consideration to the protection of expectation of the recipients.

5.2.2.3. Comments on the *Abolishment of Old-age Additional Grants Case* consideration of financial conditions

The Court in the *Abolishment of Old-age Additional Grants Case* cited above did not mention 'financial conditions' to which it referred in the *Horiki Case*, except when the former treated 'measures to ease the drastic change'. We need to carefully evaluate this partial inaction, for the Court used the very same combination of phrasings in some[63] of the accompanying cases but did mention 'financial condition' without any reservation in the one[64] of the remaining cases just as it did in the *Horiki Case*. Some academics pay serious attention to this inaction, However, the author is not so confident and afraid that the real intent of the Court has yet to be seen, and we should note that the Petty Bench of the Supreme Court has no power to render a different decision from the Grand Bench on constitutional matters.[65]

5.2.2.4. Comments on the *Abolishment of Old-age Additional Grants Case*: on the possibility of a non-retrogression principle

Opinions are divided among academics as to whether Article 25 contains a non-retrogression principle (see 4.3.2.2.). However, there is agreement that the Court has rejected the argument for the adoption of the principle in the *Abolishment of Old-age Additional Grants Case*. As noted, the Court

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[61] 66 *Minshu* 1253.

[62] Y. Okada, 'Note on Judgment concerning a case wherein the court held that the revision of the Standards for Public Assistance Provided under the Public Assistance Act (Public Notice of the Ministry of Health and Welfare No. 158 of 1963), which was made to abolish Old-age Additional Grants given as a part of livelihood assistance, did not violate Article 3 or Article 8, paragraph (2) of the Public Assistance Act', *Saihankai Minjihen* 2012 Vol I, p.260.

[63] Supreme Court, 1st Petty Bench, 6 October 2014, *LEX/DB25504782*[This is the second appeal to the case remanded by Supreme Court, 2nd Petty Bench, 2 April 2012, 66 *Minshu* 2367 which is cited in the next footnote. This case is not published in any printed reporters]. Supreme Court, 1st Petty Bench, 6 October 2014, 1622 *Wage & social security* 40.

[64] Supreme Court, 2nd Petty Bench, 2 April 2012, 66 *Minshu* 2367. *Mishu*, together with *Keishu*, is the official reporters of the Court and a committee in the Court including the Justices as its members are to decide which decision to be reported on them.

[65] Article 10 of the Court Act provides that '[r]egulations of the Supreme Court shall determine which cases are to be handled by the Grand Bench and which by the Petty Bench; provided, however, that in the following instances, a Petty Bench may not give a judicial decision' and item (i) of the said article provides that '[c]ases in which a determination is to be made on the constitutionality of law, order, rule, or disposition, based on the argument by a party (except the cases where the opinion is the same as that of the judicial decision previously rendered through the Grand Bench in which the constitutionality of act, order, rule, or disposition is recognized).'

gave some consideration to the protection of expectation but did not find any vested rights there.

5.2.2.5. Comments on the *Abolishment of Old-age Additional Grants Case*: lower court cases

Judging from the general passive approach of the Court above illustrated, it is unlikely that the Court would hold any governmental actions either legislation or administrative regulation unconstitutional in the near future in Japan, but considering the standard of review used by the Court when it reviewed administrative regulation and a detailed approach in evaluating the procedural facts in the *Abolishment of Old-age Additional Grants Case*, there might be a small possibility for lower courts to follow the Supreme Court's approach and hold the administrative regulations if not unconstitutional at least illegal.

In 2013, the Minister of Health, Labour and Welfare, by amending the Public Assistance Standards, started to reduce the amount of public assistance generally by an average of 6.6 % over three years in order to respond to deflation and to redress the balance between households on public assistance and low-income households generally.

Over one thousand plaintiffs filed suit in 29 District Courts nationwide arguing that the reduction violated the provisions in the Public Assistance Act and Article 25 of the Constitution. Nine District Courts have announced judgements as of the end of January of 2022 and all but one of those District Courts have held the reduction did not violate the Act and therefore was not unconstitutional. Only the Osaka District Court held the reduction was illegal in the sense that it violates the Public Assistance Act, but (or it might here be said 'therefore') did not reach the constitutional questions.[66]

### *5.2.3. An exception in which the Supreme Court held an administrative action illegal: the Registered Education Savings Plan Case*

In this regard, while the scope of this article has been limited to constitutional cases, it might be appropriate here to mention the *Registered Education Savings Plan Case.* This case was an exception in that the Court denied the legality of an administrative decision which reduced the amount of public assistance by recognizing part of the payment of insurance money in a Registered Education Savings Plan used by a household on public assistance as income.[67] Though the Court understood that the Public Assistance Act did not originally expect that the person receiving the Assistance would use welfare benefits, or the person's own money or articles to accumulate savings, it went on to hold that the possibility could not be denied that the person receiving Assistance might be reasonably able to save some money. As background, it should be noted that more than 97% of people went to high school in Japan but the cost was not well covered by the Public Assistance system.

## 6. OTHER ARTICLES AND SUBJECTS

The following section will briefly address issues related to social rights guaranteed by the Articles other than Article 25 including those related to family protection.

### 6.1. ARTICLE 26

Article 26, paragraph (2) requires that 'compulsory education shall be free.' The Court held in the *Free Textbook in Compulsory Education Case*[68] that the Article requires free education, that is, tuition

[66] Osaka District Court, 22 February 2021, 1490 *Hanta* 121.
[67] Supreme Court, 3rd Petty Bench, 16 March 2004, 58 *Minshu* 647.
[68] Supreme Court, Grand Bench, 26 February 1964, 81 *Minshu* 343.

should be free, but it does not require that the textbooks should be free. In reality, textbooks at the stage of compulsory education elementary and junior high school, are free, but those benefits are, according to the view of the Court, given as a matter of policy, not as a right guaranteed by the Constitution.

### 6.2. ARTICLE 27

The right to work guaranteed by Article 27 is understood to have a social rights aspect just as the right guaranteed by Article 25. This aspect is generally understood, for example, to abstractly require the establishment of an unemployment insurance system.

### 6.3. FAMILY PROTECTION AND HOMOSEXUAL MARRIAGE

Finally, it is appropriate to have a brief look at the matters of family protection here.

Article 24 of the Constitution guarantees the individual dignity and the equality of the sexes in family life. 'Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis' (paragraph (1)). 'With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes' (paragraph (2)).

Historically, Japanese culture was very tolerant of homosexual activities, and they have never faced a prohibition by law. But the degree of public recognition and protection of their relationships through marriage in the contemporary Japanese legal system has lagged far behind global standards. Similarly, the legal protection given to people with non-traditional sexual orientation and gender identity still needs serious improvement.

There have never been any Supreme Court Cases on homosexual marriage, and only one District Court judgement[69]. That case held that Articles in Civil Code which recognize heterosexual marriage only violate the equal protection guarantee in Article 14, paragraph (1).

As for gender identity disorder or gender dysphoria, the Supreme Court has repeatedly held the restrictions on changing one's registered sex imposed by Act on Special Treatment of Sex of Person with Gender Identity Disorder constitutional as not violating Article 13 nor 14 of the Constitution in cases regarding the requirement of 'currently having no children' of Article 3, paragraph (1), item(3) of the Act (before amendment by Act No. 70 of 2008),[70] 'having no gonad or permanently without function of it' of Article 3, paragraph (1), item(4),[71] 'currently not in marriage' of Article 3, paragraph (1), item(2)[72], and 'currently having no unmatured children' of Article 3, paragraph (1), item(3) (after amendment by Act No. 70 of 2008). [73] We should note that in the second to last case two Justices wrote in their Concurring Opinion that it would become unconstitutional in the future. In the last Case Justice Uga dissented.

## 7. CONCLUDING THOUGHTS

As pointed out at the beginning of this article, the original draft of the Constitution lacked the individual and subjective right to welfare, and the insertion of paragraph 1 to Article 25 was made during

[69] Sapporo District Court, 17 March 2021, 2487 *Hanji* 3.
[70] Supreme Court, 3rd Petty Bench, 19 October 2007, 60 *Kagetsu* 36, Supreme Court, 1st Petty Bench, 22 October 2007, 60 *Kagetsu* 37.
[71] Supreme Court, 2nd Petty Bench, 23 January 2019, 1716 *Saiji* 4.
[72] Supreme Court, 2nd Petty Bench, 23 January 2019, COURTS IN JAPAN WEBSITE.
[73] Supreme Court, 3rd Petty Bench, 30 November 2021, 1780 *Saiji* 1.

the deliberation at the Diet.

Looking back the history of the Constitution over 75 years, from the standards of review applied by the Court and the fact that it has never held anything unconstitutional under Article 25, it might be argued that there has been a kind of discordance in the Constitution from the outset.

But the enactment of a subjective 'right to maintain the minimum standards of wholesome and cultured living' was a milestone in human history. In addition, it might also be argued that we could and should understand the liberty rights and social rights together from a contemporary and philosophical point of view. Furthermore, though it has not had a significant impact, the right has had some meaning and control over Japanese laws and regulations in social welfare.

As for judicial review generally, it is undeniable there has been a strong tendency toward passivism in Japanese courts. However, there have been some signs of change here. For example, the first five out of ten judgements of the Court holding an Act unconstitutional were made in the 20th century, that is, during the first 54 years of the Constitution. The latest five judgments have been handed down in the last 22 years.

It is not easy to argue at this stage of history that the Court is likely to play a great role in the social rights area of constitutional law, but, at the very least, it seems clear that in the shrinking economy and society Japan is facing, the demands for fairness and accountability will inevitably increase.

# ARTIFICIAL INTELLIGENCE ACCOUNTABILITY OF PUBLIC ADMINISTRATION IN JAPANESE LAW ＆ POLICY CONTEXT

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## 1. INTRODUCTION

### 1.1. RESEARCH QUESTIONS AND PURPOSE OF THIS REPORT

The following are the research questions presented to the Special Rapporteurs on this topic: Does algorithmic accountability rather perpetuate with some minor adjustments pre- or non-algorithmic accountability or does the peculiarity of algorithmic decision-making foster a profound renewal of the legal regime? Moreover, the questionnaires used to address this research question include detailed questions, in particular, about the framework for transparency and participation.

In Japan, principal theories for addressing the artificial intelligence (AI) society are being actively explored, and a number of proposals, including those for the global community, are being presented. However, there are currently no examples of this being successfully incorporated into the domestic legal system or administrative management. The use of the system has not progressed, and there has not been sufficient discussion in designing the system. In terms of the framework for transparency and participation, since there are a number of voluntary frameworks that exist before algorithms, it is unclear if there is enough regulatory density.

Therefore, in light of the purpose of the research question, this study provides an overview of the current state of Japanese law and policy. This study also discusses the issues that need to be addressed regarding whether algorithmic accountability discipline may be incorporated in the future and whether there is a possibility of establishing some oversight body or a particular legal system and, if so, where.

Currently, there are only a few frameworks other than academic theories that discuss the accountability of AI to government activities in Japan. However, this study aims to demonstrate a possible course of action if the academic discussion here is implemented in actual policies and cases.

### 1.2. STRUCTURE OF THIS REPORT

In order to answer the above questions, the structure of this report consists of the following four points:

The first part examines the current state of Japanese policy involving AI and governance, as well as the government's use of AI. Here it is confirmed that when addressing AI across disciplines, regulations on private sector activities using AI are assumed, and the discussion on governance using AI has not reached a cross-disciplinary level. Therefore, the discussion in public jurisprudence and, in particular, administrative jurisprudence, has not been taken into account. The same problems are in the composition of the members and the way the agenda is selected in the various expert meetings. Most of the discussion is about "regulation of AI," and the discussion of the "use of AI by the government" is either an afterthought or only incidental. In addition, in the context of the digitization of public administration, the term "AI" has been discussed with other information-related technologies, but no discussion of the particularities of AI has been conducted.

The second part examines whether the discussion will be based on the prevailing legal norms that govern administrative accountability or on the perspective of uncertainty in AI. The currently envisioned norms for algorithms are all limited to guidance and belong to soft law. This study reviews how the legal

system has dealt with transparency and participation prior to the development of algorithms and examines the issues that may arise if we attempt to address them in the current law. Similarly, the survey items' questions will be reviewed in light of Japan's regulation regarding the protection of personal information. Based on the analysis of the current situation up to this point, it is evident that the policies governing AI are not properly aligned with the specific legal system.

The third part introduces the public jurisprudence discussions on transparency, focusing on the debate on accountability and openness, which explains what sort of system should be created and why in light of the development and implementation of information technology. First, this part introduces the fact that there is a debate regarding the theories of administrative law, including a review of the administrative jurisprudence system, on how to address the use of AI in public administration. Second, it introduces the debate on automated decision-making.

The fourth part reviews the legal policy developments that may trigger a new legal system for algorithms. We can expect that the Japanese information law policies in the last few years, in particular, the reform of the personal information protection law system and the changes in the legal and organizational structure for administrative reform to promote the digital society, may be catalysts for change. In other words, the Personal Information Protection Committee (PPC), as a cross-sectional public–private oversight body in the personal information protection legislation, can influence the use of AI in government agencies by bringing to bear the discussions in the private sector, where there have been a number of discussions on the topic, to bear. In addition, in the context of public administration and digitization, the establishment of the Digital Agency is intended to be a cross-cutting institutional change. This study examines the debates over whether there is room for responsibility for AI accountability in this context.

Lastly, this study presents possible pathways for incorporating the discussions from the perspective of public jurisprudence, in particular, legal systems, in the future.

## 2. NATIONAL STRATEGIES FOR ARTIFICIAL INTELLIGENCE AND ITS CURRENT USE BY GOVERNMENT

### 2.1. "PRINCIPLES OF HUMAN-CENTRIC AI SOCIETY", "AI STRATEGY 2019 "AND "AI STRATEGY 2021"

Since it was predicted that the number of local government employees would be reduced by half by 2040 due to population decline, the use of AI in the local government has been anticipated from the beginning. "The second report of the Study Group on Local Government Strategy 2040,"[1] issued in July 2018, presented the idea of promoting a shift to smart local governments, emphasizing the need to boldly standardize and collaborate local government business processes and systems, introduce AI and other cutting-edge technologies, and use ICT to the fullest extent possible for tasks that can be handled by ICT. There is already an urgent need to improve the working environment in local governments due to excessive workloads due to the reduction in the number of employees, and the utilization of AI was expected to be a primary focus of local government strategies to automate work and improve services for residents.

In terms of national policies, on March 29, 2019, the Integrated Innovation Strategy Promotion

[1] MIC, The Second Report of the Study Group on Local Government Strategy 2040, July 2018, https://www.soumu.go.jp/main_content/000562117.pdf

Council, which directly reports to the Cabinet, decided on the "Principles of Human-centric AI society."[2] The draft was developed by the Council on Principles of Human-centric AI Society, which was established to examine basic principles for better implementation and distribution of AI in society and to reflect them in AI strategies. This provided a basic idea of how Japan thinks about the world and laid out the basic principles for developing Japan's AI strategy. The principles of an AI society are the human-centric principle; the principle of education/literacy; the principle of privacy protection; the principle of ensuring security; the principle of fair competition; the principle of fairness, accountability, and transparency; and the principle of innovation.

In June of the same year, the Integrated Innovation Strategy Promotion Council compiled the "AI Strategy 2019," focusing on measures that should be implemented immediately by the government[3]. One of the key measures of this plan is the "III Establishing a Foundation for Industry and Society," which also addresses "III-3 AI Era Digital Government." The basic understanding of the use of AI in public administration presented here is as follows: "The delay in computerization in the public services sector and the rapidly declining birth-rates and aging population, especially in rural areas, have increased the administrative costs of local governments, while the labor shortage of administrative staff has become apparent. That is, the so-called decline in productivity in the public sector has further progressed, and there is a strong desire for the use of AI-related technology to solve this." In other words, the plan aims to promote the use of AI to improve administrative efficiency in a society with a declining population. However, in terms of the total volume, there is only a small discussion on this topic, which is only 2 out of 74 pages. The AI Strategy 2019 is a document that primarily promotes and coordinates national science and technology policy.

Two years later, the implementation of the AI Strategy 2019 was reviewed and revised, and a new AI Strategy 2021 was developed[4]. In this context, the same item has been expanded by one page, demonstrating a sense of urgency with the slow pace of change in this area. First, according to the AI Strategy 2021, there is a need to respond to the delay in digitization due to COVID-19, as well as the fact that the utilization of AI in national administrative bodies is not necessarily progressing. It is essential to mention that, "In order to improve the efficiency of government operations and provide high-quality government services, more active use of AI should be considered. It is necessary to promote the introduction of AI, based on the understanding that it is particularly important to ensure transparency, fairness, and accountability when utilizing AI by national government agencies. For this reason, it is necessary to compile and implement comprehensive measures, such as organizing the basic concept of introducing AI in national administrative organs and formulating AI introduction guidelines." In other words, the strategy requires organized and comprehensive measures by March 2022, such as basic concepts and guidelines for the introduction of AI by national government administrative bodies (the current situation is referred to in 2.4).

Therefore, although Japan has been quite proactive in formulating AI principles, the government document itself assesses that attempts to connect them to the use of AI in public administration are still in their early stages. In addition, it is not entirely clear how AI principles affect decision-making.

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[2] the Integrated Innovation Strategy Promotion Council, Social Principles of Human-Centric AI, March 29, 2019, https://www8.cao.go.jp/cstp/ai/humancentricai.pdf

[3] the Integrated Innovation Strategy Promotion Council, AI Strategy 2019 AI for Everyone: People, Industries, Regions and Governments, June 11, 2019, https://www8.cao.go.jp/cstp/ai/aistratagy2019en.pdf

[4] the Integrated Innovation Strategy Promotion Council, AI Strategy 2021 (Follow-up to "AI Strategy 2019"), June 11, 2021 https://www8.cao.go.jp/cstp/ai/aistrategy2021_honbun.pdf. Currently, only the Japanese version is available. Translations of quotations in the text are by the reporter.

## 2.2. THE RELATIONSHIP BETWEEN DIGITAL GOVERNMENT POLICIES AND ARTIFICIAL INTELLIGENCE

Let us examine how AI is being used in e-government policy. The current policies for the digitization of public administration are based on the Basic Act on the Advancement of Public and Private Sector Data Utilization (Act No. 103 of 2016).[5] Article 2 (2) of this law states: "The term 'artificial intelligence-related technology' as used in this Act means technology for the realization of intelligent functions, such as learning, inference, and judgment, by artificial means, and utilization of the relevant functions realized by artificial means." Article 3 (8) explains the promotion of utilization, and Article 16 explains the responsibility of the national government to promote R&D and demonstrate and distribute the results thereof.

However, the Basic Act on the Formation of a Digital Society (Act No.35 of 2021)[6] has been enacted in response. It refers to "information and communication technologies," which include AI- and IoT-related technologies and cloud computing service technologies, among others, and, therefore, does not use a description specific to AI-related technologies. The basic principles of this law are to ensure that citizens live comfortable and prosperous lives, create a society where citizens can live safely and without fear, reduce disparities in opportunities due to the use of AI, and protect the rights and interests of both individuals and corporations (Articles 3–8 and 10). However, items related to participation and transparency are not included in the basic principles, such as those related to participation, transparency, and accountability, which are included in the government's mandate. Article 19 states, "The Government shall take necessary measures to deepen public understanding of the formation of a digital society through public relations activities and to reflect public opinions widely in the formulation and implementation of measures for the formation of a digital society." There is a possibility of implementing some measures based on this provision.

## 2.3. ESTABLISHMENT OF THE DIGITAL AGENCY AND REFORM OF THE PERSONAL INFORMATION PROTECTION LAW SYSTEM

The year 2021 was the year of significant legal reforms, which included laws on digital reform. In addition to the Basic Act on the Formation of a Digital Society mentioned above, the Digital Agency was established based on the Act on the Establishment of the Digital Agency (Act No. 36 of 2021). The Digital Agency is established, and matters regarding its activities and organization will be determined in order to promote measures for the creation of a digital society in a timely and focused manner. Together with the Cabinet Secretariat, it assists the Cabinet in carrying out Cabinet activities regarding the creation of a digital society and other relevant administrative activities regarding the creation of a digital society in a timely and focused manner (Article 3). The head and chief minister of the Digital Agency is the Prime Minister, who will designate a Digital Minister who will oversee the activities of the Digital Agency and have the authority to make recommendations to the heads of relevant administrative organs (Article 8).

As its first task, the Digital Agency formulated the Priority Policy Program for Realizing Digital

[5] The English translation of this law:
http://www.japaneselawtranslation.go.jp/en/laws/view/2975
However, the 2021 amendments (by the Act No.35 of 2021) are not yet reflected. The revised article (in Japanese) is https://elaws.e-gov.go.jp/document?lawid=428AC1000000103.

[6] English summary prepared by the Digital Agency,
https://cio.go.jp/sites/default/files/uploads/documents/digital/20210901_en_01.pdf.

Society,[7] which was approved by the Cabinet on December 24, 2021. In this program, the guiding principle for achieving a digital society is "digital society where no one will be left behind." The basic principles for the formation of a digital society are: (1) Open / Transparent (2) Fairness / Ethics (3) Safety / Secure (4) Continuation / Stable / Resilient (5) Solving social issues (6) Quick / Flexible (7) Inclusion / Diversity (8) Immersion (9) Creating new value (10) Leap / International contribution. In this study, transparency is listed as the first principle. In addition, the priority plan includes a list of various issues that will be highlighted in the future. Among them, the digitization of public administration has now been integrated into the Digital Agency, although it is unclear whether the intention is to standardize algorithms. In this context, the "standardization of the mechanism of cooperation" is an important measure. However, there is no mention of focusing on the special characteristics of AI. Although this Priority Policy Program includes a description of the open data strategy, there is no clear connection between it and the discussion of algorithm transparency.

Furthermore, the Act on the arrangement of related acts must be amended if a digital society is to be formed (Act No. 37 of 2021).[8] In order to implement measures for the creation of a digital society, this Act makes the necessary revisions to associated laws, such as the Act on the Protection of Personal Information and the Act on the Use of Numbers for Identifying Specific Individuals in Administrative Procedures.

The impact of the creation of the Digital Agency and the implementation of its priority plans and measures, as well as the significant modifications to the legal system governing personal information, in the context of the accountability of AI, will be thoroughly discussed in Section 5 below.

### 2.4. THE CURRENT PROGRESS IN THE PROMOTION AND USE OF ARTIFICIAL INTELLIGENCE BY GOVERNMENT

The AI Strategy 2019 and AI Strategy 2021 have already shown how poorly AI is being used in administrative functions in Japan. In Japan, the government is not required to declare the use of algorithms as a significant prerequisite, either at the design stage or at the trial and introduction stage. Therefore, the following is a limited list of surveys conducted by the government.

The Ministry of Internal Affairs and Communications (MIC), which is in charge of policies promoting AI and Robotic Process Automation (RPA) in local governments, has conducted a survey[9] that received responses from all local governments (prefectures, municipalities, 1.788 organizations) from FY2018 to FY2020. According to their report, on the one hand, in prefectures and ordinance-designated cities (large cities with the same authority as prefectures), they also saw an increase in the percentage of respondents who stated they had implemented AI, exceeding 80%. On the other hand, municipalities, excluding ordinance-designated cities (relatively small municipalities), remained at 21% in 2021. However, the "AI technology" on which this survey is based is not necessarily limited to those types that have an impact on administrative decision-making. This report also includes a survey of the number of various types of AI installations in local governments, categorized by type, and examines

[7] For more information and resources in Japanese, see https://www.digital.go.jp/policies/priority-policy-program. Only Overview and Summary are available in English, OVERVIEW https://cio.go.jp/sites/default/files/uploads/documents/digital/20211224_en_priority_policy_program_01.pdf Summary https://cio.go.jp/sites/default/files/uploads/documents/digital/20211224_en_priority_policy_program_02.pdf.

[8] See, Digital Agency, Outline of the Act on the arrangement of related acts for the formation of a digital society, https://cio.go.jp/sites/default/files/uploads/documents/digital/20210901_en_03.pdf.

[9] Ministry of Internal Affairs and Communications, Promoting the Use of AI and RPA in Local Governments, updated version of July 14, 2021, https://www.soumu.go.jp/main_content/000716134.pdf.

how various types of AI have been introduced by local governments. However, the majority of the cases that were introduced in 2020 simply assumed an auxiliary function. For example, on the one hand, the most prevalent categories were as follows: character recognition (recognition of handwriting and type, 275 cases), speech recognition (texting speech, identifying speech, 239 cases), and chatbot response (guidance to government services, 179 cases). On the other hand, only a few types may affect the decision process depending on the usage: matching (adjustment of supply and demand, 54 cases), optimal solution display (suggestions and detection of fraud and errors, 29 cases), and numerical prediction (future prediction of changing actuarial science, 12 cases).

This tendency appears in a guidebook[10] prepared by the MIC to promote the use and introduction of AI in local governments. Page 13 of the guidebook states that "AI functions introduced by local governments are mainly in the 'identification' and 'prediction' stages, and there are still few cases of AI with 'execution' functions, resulting in a gap between the public and private sectors in AI introduction." The guidebook continues by pointing out that it then offers some case studies, including some that are based on demonstration experiment proposals from private companies.

In particular, an effective use of AI in matching has been highly recognized in the automation of the admissions process for childcare centers. The matching of supply and demand for childcare centers is a common problem that local governments frequently encounter, in particular, in urban areas. It is common practice to decide whether or not to enroll children by allocating points to various conditions since the number of children who want to be cared for in childcare centers exceeds the number of children that the centers can take. These conditions not only include a wide variety of items, but there are also a huge number of factors that must be taken into account, such as whether it is preferable to place siblings in the same childcare center. In addition, a number of local governments allow applications to be prioritized; however, changing the priority list is quite challenging. Therefore, rule-based AI programs are created based on ordinances and administrative regulations in each local government to make allocations. Around 2015, a major private IT vendor started a demonstration experiment, and since around 2018, full-scale implementation has started in several regions. The guidebook mentioned above (page 63) also introduces the system as a good example, stating that, as a result of the introduction of AI, "the selection of thousands of children for admission, which used to take a total of about 1,500 hours, can now be completed in a few dozen minutes (primary adjustment: about 30 minutes/secondary adjustment: about 3 minutes), thereby improving operational efficiency."

In addition, this introduction guidebook is built around the notion of adopting a machine learning algorithm, and on page 23, there is a column that explains the concept in connection to the disclosure of personal information, which has been questioned up to this point. In order to improve the efficiency of administrative work and to benefit the public, it is not considered to be provided for purposes other than the stated purpose. Based on this example, government recommendations do not generally suggest avoiding machine learning algorithms. However, it is unclear from this guidebook if only decision-support or decision-making type is assumed.

However, no clear survey has been conducted to examine how much AI has been introduced in the central government. In December 2021, in response to the AI Strategy 2021 described above, the science, technology, and innovation secretariat of the cabinet office conducted an investigation[11] and held a

[10] Ministry of Internal Affairs and Communications, Guidebook for the Use and Introduction of AI in Local Governments (Introduction Procedure), June 2021 https://www.soumu.go.jp/main_content/000757186.pdf.
[11] Secretariat for Science, Technology and Innovation, Cabinet Office, "Appendix 3: Results of Survey on Major Hindrances to the Promotion of AI Applications in Government Organizations," December 27, 2021. https://www8.cao.go.jp/cstp/ai/ningen/r3_3kai/siryo3.pdf

discussion at the human-centric AI Social Principles Council. This survey was conducted to "create guidelines for the use of AI by government agencies to promote the use of AI by government agencies," but only 27 organizations responded to the survey, and the number of measures was 79, although 43 organizations were targeted. Therefore, this survey is not exhaustive, and discussing the percentage is thus difficult. Again, translation (15 cases), chat bots (12 cases), and object detection (11 cases) are at the top of the list, and no type of direct decision making is expected. Therefore, it is unlikely that this study covers all AI use cases. In addition, the survey's methodology and results are not based solely on the analysis of the "impediments" of a lack of human resources and expertise, and they do not take into account how these factors relate to the legal system.

## 3. RELATIONSHIP BETWEEN ALGORITHM AND ADMINISTRATION IN CURRENT LEGISLATION

### 3.1. AI PRINCIPLES AS NON-BINDING GUIDANCE

Currently, in Japan, there is no legislation governing AI. All of the principles described in this section were proposed by a government panel of experts in an attempt to encourage subsequent discussions. Therefore, the law is not legally binding.

#### *3.1.1. Principles of Fairness, Accountability, and Transparency in Human-centered AI Social Principles*

The "Human-Centered AI Social Principles" are placed the highest among the several AI principles and guidance already mentioned in this report. Based on the report, the "AI-Ready Society" in Japan as a whole and a multilateral framework, including national and local governments, is positioned to implement the AI social principles as the guiding principles for a social framework (p. 8). The principles of AI society are: 1. The Human-Centric Principle, 2. The Principle of Education/Literacy, 3. The Principle of Privacy Protection, 4. The Principle of Ensuring Security, 5. The Principle of Fair Competition, 6. The Principle of Fairness, Accountability, and Transparency, and 7. The Principle of Innovation.

Among these, the principle of fairness, accountability, and transparency is written as follows:[12]

(6) The Principle of Fairness, Accountability, and Transparency
In an "AI-Ready Society," it is necessary to ensure fairness and transparency in decision-making, appropriate accountability for the results, and trust in the technology, so that people who use AI are not subject to undue discrimination with regard to personal background, or to unfair treatment in terms of human dignity.

- Under AI's design concept, all people are treated fairly without unjustified discrimination on the grounds of diverse backgrounds such as race, gender, nationality, age, political beliefs, religion, and so on.
- Appropriate explanations should be given on a case-by-case basis depending on the application of AI and each particular situation, including such things as when AI is being used, how the AI data is obtained and used, and what measures have been taken to ensure the appropriateness of results obtained from AI operations.

[12] Japanese version 11 p, English version 10p.

- In order for people to understand AI's proposals and make judgments on them, there should be appropriate opportunities for an open dialogue, as required, regarding the use, adoption, and operation of AI.
- Taking into account the above viewpoints and in order to use AI safely in society, a mechanism must be established to ensure trust in AI, and in the data and algorithms that support it.

The focus is on anti-discrimination and fairness, the need for disclosure and explanation based on use and context (facts of AI use, data acquisition and use methods, mechanisms to ensure the appropriateness of operation results, etc.), creating a forum for communication with people, and ensuring the reliability of data and algorithms.

Furthermore, the report recommends that, as a non-regulatory and non-binding framework, the principles of AI development and utilization, which represent the principles of AI society, be shared internationally.

*3.1.2. AI Use by Government Agencies in the AI Utilization Guidelines*

In Japan, the Conference toward AI network society,[13] which was established in the MIC in 2016, started its activities in order to present the draft R&D guidelines for international discussion. After discussing the impact and risk assessment in an AI-networked society and the arrangement of interactions among several players, the conference released the Draft AI R & D GUIDELINES for International Discussions on July 28, 2017[14] and the AI Utilization Guidelines Practical Reference for AI utilization on August 9, 2018.[15] Among the two, the AI Utilization Guidelines specify that "9-C) Ensuring transparency when AI is used in administrative bodies" is one of the three components of the Principle of 9 Transparency and provide a detailed description.

The following is a detailed explanation of the AI Utilization Guidelines (Japanese version, p. 25; English version, p. 27) and its supplementary explanation, "Detailed Explanation on Key Points Concerning AI Utilization Principles" (Japanese version, p. 39, English version, p. 41).[16]

> 9-C) Ensuring transparency when AI is used in administrative bodies
> When administrative bodies use AI, they are expected to ensure the explainability of the decision results made by an AI, according to the social context in the AI utilization with consideration of the reign of law, while ensuring administrative transparency, and keeping within the requirement of proper procedures. For improving its explainability, for example, the following methods are can be considered.
> [Example measures to improve explainability]
> • Including various social minorities in the development and design process of AI algorithms used by government agencies (co-design).

[13] https://www.soumu.go.jp/iicp/research/results/ai-network.html
[14] EN https://www.soumu.go.jp/main_content/000507517.pdf,
JP https://www.soumu.go.jp/main_content/000499625.pdf
[15] EN https://www.soumu.go.jp/main_content/000658284.pdf
JP https://www.soumu.go.jp/main_content/000637097.pdf
[16] EN https://www.soumu.go.jp/main_content/000658286.pdf
JP https://www.soumu.go.jp/main_content/000637098.pdf

• Explaining the concept of the construction of learning data (the concept of inclusion and exclusion in learning data), policy judgments made at the stage of algorithm designing, and social impact assessment by introducing AI, and auditing methods for AI.
• Concluding contracts with developers or AI service providers in a form that limits the extent to which developers or AI service providers are not able to disclose a variety of factors that explain the AI's judgment.

Based on the above, the guidelines, assuming that they are non-binding, were intended to show concrete efforts to promote transparency.

#### *3.1.3. Japan's Dominant Debate: AI Governance Theory Based on Non-binding Principles and Guidelines*

In Japan, there has been an increase in efforts to implement non-binding guidelines for regulations in the private sector. For example, the Ministry of Economy, Trade, and Industry (METI) has released "AI Governance in Japan Ver. 1.1" which was reported by an "expert group on how AI principles should be implemented." The report concludes, "From the perspective of balancing respect for AI principles and promotion of innovation, except for some specific areas, AI governance should be designed mainly with soft laws, which is favorable to companies that respect AI principles."[17] In other words, discipline based on strict laws is not the focus, and discussions at the European Commission are closely monitored.

In this report, the government's guidance on the use of AI is limited to discussing future issues and using the United Kingdom as an example[18]. Therefore, there is currently no debate in Japan that calls for the creation of an algorithmic regulatory body, either in the private sector or in administrative agencies.

### 3.2. TRANSPARENCY AND ACCOUNTABILITY FROM THE PERSPECTIVE OF ADMINISTRATIVE LAW

#### *3.2.1. General Theory of Transparency and Accountability in Administrative Law*

Can a legal norm applicable to algorithms be derived from the perspective of transparency and accountability in administrative law? In Japanese law, transparency is defined in Article 1 of the Administrative Procedure Act (Act No. 88 of November 12, 1993)[19] as "clarity in the public understanding of the content and decision-making processes involved in administrative processes." The philosophy behind this is liberalism and democracy. Initially, the law was firmly liberal, preventing citizens from being regulated by administrative activities. However, since the 2005 amendment established a public comment system for administrative standards, it is assumed to be based on democratic requirements as well.

Furthermore, in terms of democracy, accountability under administrative law can be derived from the fact that those in charge of the country's administration are accountable to the sovereign people. The law enacted in this regard is the Act on Access to Information Held by Administrative Organs (so-called "the Information Disclosure Act," Act No. 42 of May 14, 1999), Article 1.[20] This principle serves as the

[17] JP https://www.meti.go.jp/shingikai/mono_info_service/ai_shakai_jisso/pdf/20210709_1.pdf 33p,
EN https://www.meti.go.jp/shingikai/mono_info_service/ai_shakai_jisso/pdf/20210709_8.pdf 32p.
[18] Ibid., JP31p, EN30p.
[19] EN https://www.japaneselawtranslation.go.jp/en/laws/view/2874
[20] EN http://www.japaneselawtranslation.go.jp/en/laws/view/3765
Art.1 The purpose of this Act is, in accordance with the principle of sovereignty of the people, and by providing for the right to request the disclosure of administrative documents, etc., to endeavor towards greater disclosure of information held by administrative organs thereby ensuring to achieve accountability of the Government to

foundation for the accountability for the activities of governments and other institutions. In particular, the purpose of the Public Records and Archives Management Act (Act No. 66 of 2009), Article 1, is for "ensuring accountability of the State and incorporated administrative agencies, etc. to the public for their various activities in both the present and future." In the context of algorithmic accountability, the essence of these principles has remained.

However, the Administrative Procedure Act's complex set of rules raises the question of whether procedures that adhere to these principles may be used for administrative activities that include algorithms. This is because, in the first place, the regulation of procedures under the current law and its accompanying transparency are focused on individual decision-making situations.

The Showing of Grounds in the Administrative Procedure Act takes place in the case of denying dispositions upon application (Article 8(1)) or adverse dispositions (Article 14(1)). The administrative agency is obliged to disclose and explain the use of the algorithm in reaching the decision-making process. In terms of the disposition of an application, the administrative agency must establish the review standards (Article 5 (3)) in advance, which must be as specific as possible (Article 5 (2)) and made public, except in cases of special administrative hindrance (Article 5 (3)). In terms of adverse dispositions, the administrative agencies must make efforts to establish and implement the disposition standards (Article 12 (1)) that are specific as possible (Article 12 (2)).

When these review standards and disposition standards are in place, the case law sufficiently indicates the extent to which reasons must be presented. According to the Supreme Court precedents pertaining to the standard of disposition, the decision of the administrative agency was prepared with the intention of facilitating appeals by being careful and disclosing the reason for the disposition to the applicant. Therefore, it is understood that a document stating the reason must specify such reason so that the administrative agency can understand what kind of factual recognition it has agency has applied to the standard of examination based on (Supreme Court of Japan, 06.07.2011., Minshu Vol. 65, No. 4)[21].

### *3.2.2. Individual Decision: Application to Administrative Procedures Using Algorithms*

The above general theory is considered applicable to individual administrative decisions with the use of algorithms. Moreover, an academic argument[22] requires that the natural language used in the communication of administrative procedures be "concrete," based on Article 5 (2) of the Administrative Procedure Act. In this context, the obligation to disclose meta-information about the algorithmic processing becomes necessary. This meta-information, i.e., the provisions of French law, contains information about the extent and manner in which the algorithmic processing contributes to the decision, the data processed and its sources, the parameters and weighting of the processing as they relate to the circumstances of the stakeholders, the operations carried out by the processing, etc.

### *3.2.3. Disclosure in the Rule-making Phase?*

The Administrative Procedure Act only guarantees transparency at the concrete individual decision-making stage. In terms of accountability, it is unclear if these algorithms may be made public throughout the rule-making process, which occurs before particular choices are made. This perspective will be used to examine how the Information Disclosure Act operates.

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the citizens for its various activities, and to contribute to the promotion of a fair and democratic administration that is subject to the citizens' appropriate understanding and criticism.

[21] EN https://www.courts.go.jp/app/hanrei_en/detail?id=1110

[22] R. Yamamoto, Legal Issues in the Administrative Process as Information Order (Part I), *Houritsu-Jiho,* 93(8), 126, 130.

The Information Disclosure Act initially only allows passive disclosure, which requires a request for disclosure. Therefore, it cannot be implemented in the first place unless there is an opportunity to find out whether algorithms are used in the internal workings of the administration. Currently, it is up to the administration to decide whether or not to disclose administrative activities that use algorithms, and, as mentioned above, there are no explicit guidelines.

Even if it were known to the outside world that an algorithm was being used, it is unlikely that the contents would be sufficiently disclosed. Article 5 of the Information Disclosure Act, which outlines the grounds for nondisclosure, may be problematic.

The academic theory[23] states that the trade secret aspect of these should not be used as an excuse for nondisclosure. In particular, the provision in question is "information that when disclosed is likely to cause harm to the juridical person, etc. or the rights, competitive position, or other legitimate interests of the individual" (Article 5.ii.(a)) in "the information concerning a juridical person" (Article 5.ii). If the disclosure of algorithms were to fall under this clause because it would harm trade secrets, it would significantly contradict the essence of democracy. This is because a government agency could easily stop the disclosure by intervening with a private corporation.

In addition, there is a somewhat negative view regarding the appropriateness of other reasons for nondisclosure. Under Article 5 (6), the requirements for information regarding the activities or business conducted by a national government organization are quite broad. Therefore, the claims of nondisclosure on the part of administrative bodies tend to be accepted relatively easily. In addition, under Article 5 (3), there are other grounds for nondisclosure, such as security information ("harm to national security") and criminal procedure ("matters concerning the maintenance of public safety and public order").

### 3.3. ALGORITHMS FROM THE PERSPECTIVE OF PERSONAL INFORMATION PROTECTION LEGISLATION

Let us examine how the personal information protection legislation addresses the problem of algorithms and, in particular, whether data subjects should be informed that algorithms are being used.

The Act on Protection of Personal Information (APPI, Act No. 57 of 2003: Amendment of Act No. 37 of 2021) has not yet been amended to address algorithms specifically. In addition, it still does not include basic principles that represent human rights values and is only referred to as a regulation of the use of personal information.

The articles that are considered to be related to the use of algorithms are the specification of the purpose of use (private sector: Article 17, government agencies: Article 61) and notification or publication at the time of acquisition (private sector, Article 21; government agencies, Article 62). In Japan, when an issue regarding private companies using algorithms in their activities emerges, the content that has to be addressed is published in the form of revised guidelines for private companies that illustrate how the law should be interpreted, rather than through legal amendments. For example, when information, such as browsing and purchasing histories, is examined and used for advertising, or when a credit score is obtained based on behavioral history and provided to a third party, it is recommended that this purpose be specified and disclosed through notification and publication.

Furthermore, before the revision of the 2021 Act, the PPC only had authority over the private sector; therefore, there were no guidelines for the protection of personal information by administrative bodies. In January 2022, the Guidelines for Administrative Bodies were published for the first time, based on the revised Act of 2021. However, the section on specifying the purpose of use is not designed for the

[23] See, R. Yamamoto, Legal Issues in the Administrative Process as Information Order (Part I), *Houritsu-Jiho,* 93(8), 126, 129.

recent use of algorithms. It simply repeats the content of the APPI, which states that "only when the retention is necessary for performing the activities under its jurisdiction provided by laws and regulations, and shall specify the purpose of use of personal information as much as possible upon such retention." In this context, the issue should pertain to the degree of "concreteness" required in "specifying the purpose of use." However, there are still no standards for how government agencies should use AI.

In APPI, a provision system (Article 107 and below) is implemented to address anonymously processed information made by administrative bodies. However, this system is based on proposals and permissions, and the provision of such information is not considered an obligation of administrative bodies. The system was created to promote the use of data, but it does not appear to have been considered a public good or an essential facility. In addition, in the context of APPI, personal information (Article 2 (2)) must primarily focus on "a living individual" and is exempt from corporate data.

In Japan, Privacy Impact Assessments (PIAs) are also extremely limited. For example, the "Specific Personal Information Protection Assessment" under the My Number Act (Act on the Use of Numbers to Identify a Specific Individual in Administrative Procedures, Act No. 27 of 2013) only examines the risks associated with the activities of national administrative agencies and local governments related to individual numbers. In other contexts, the document presented in the debate over the revision of the law ("*Seido-kaikaku-taikou*" means outline of system reform) does not make PIAs legally obligatory and is positioned as something that businesses should work on voluntarily. Although PPC has issued a document recommending PIA initiatives, they are still far from being fully established.

## 4. THE ACADEMIC ARGUMENTS OVER ALGORITHMS AND PUBLIC ADMINISTRATION

In this section, in the context of Japanese law, the debate on the issue of substantiating transparency and accountability, as well as the use of algorithms, is discussed.

### 4.1. CHANGES IN ADMINISTRATIVE LAW THEORIES IN LIGHT OF ADMINISTRATIVE USE OF ALGORITHMS

In terms of administrative law, the implementation of algorithms by the administration has been regarded as a significant upheaval of the assumptions made in the previous administrative law, and it is necessary to re-examine the significance of the assumption by making it a subject. The provisions of the European GDPR and the Administrative Procedure Law in German Federal Law and the discussions surrounding them are widely known and referenced but omitted, and the following outlines are discussed in the context of Japan.

The following points[24] are important in relation to transparency. Algorithms are used to gain knowledge, but the creation and modification of algorithms will also affect the communication between administrative bodies and private individuals. An employee can change the direction of the communication of discussion among stakeholders, experts, and other officials within the administrative bodies, but algorithms cannot. It is possible that biases that are different from humans may emerge; therefore, it is necessary to explain the algorithm itself and its work process to ensure the possibility of reflection and trajectory correction through communication with humans. This is important in terms of the rule of law and the principle of democracy.

It also explains the need to create a system that extends past the individual decision stage. According

[24] R. Yamamoto, Legal Issues in the Administrative Process as Information Order (Part I), *Houritsu-Jiho,* 93(8), 126, 128.

to the "step-by-step transparency regime" argument, there needs to be a system of step-by-step explanations, from the announcement of the use of the algorithm itself to the presentation of the algorithm and its work process. Based on this system, as a reason presentation, the general functional model of the algorithm, the basic decision structure of the algorithm, and the factors considered to be important in the case are sufficient, and if there is an appeal, the data bank, algorithm, training program, etc. are disclosed as necessary. Therefore, administrative bodies should keep track of the parameters used to implement programs and make decisions. In addition, this concept requires timing and elements that may be directly related to how an algorithm works.

In this context, if the decision-making process of AI is not transparent, there may be insufficient effective means for ex post facto control, which might lead to violations of rights and interests that are difficult for the parties involved to notice. Therefore, the remedies available in litigation are limited. Therefore, a system of risk assessment and constant monitoring should be established, and legal remedies should be expedited.[25]

### 4.2. DISCUSSION ON AUTOMATED DECISION-MAKING

In the context of automated decision making, there is an argument to examine the ideal form of Japanese law based on the introduction of discipline in European and German law for automated decision-making.[26] The main question is whether Congress needs to establish automated decision-making as a legal concept before it may be used.

In Japan, academic theories and practices are divided on the question of whether or not a certain matter must be decided by an act of parliament (so-called legal reservation issue). The mainstream of academic theories is the theory of reservation of essentiality (the idea that if a matter is important, it should be decided by law). In contrast, the mainstream of legislative practice is the theory of reservation of infringement (the idea that the grounds for public action, including infringement of rights and imposition of duties, should be decided by law).

Based on this argument, the difference from the normal use of AI is due to the lack of administrative scrutiny, and the law should determine whether or not complete automation will be used. The reason why complete automated decision-making must be decided by law is because it relates to rights and obligations in terms of the potential of algorithms to influence the decision and the procedural burden on the addressee of the administrative decision when requesting a change to manual work. It may be concluded that this reason is given to make it acceptable to those who assume the theory of reservation of infringement and to make it clear that the implementation of the complete automated decision itself constitutes "infringement." In addition, it seems to reflect the understanding that the complete automation of public administration is not merely a matter of convenience in internal administrative processing (Harada, p. 125).

In terms of completely automated decisions, according to constitutional studies, regulations should be implemented differently.[27] First, this study highlights the difficulties in defining individual violations of rights or illegal acts and in differentiating such individual acts from the outside. Second, this study introduces the governance approach (structure-based regulation) used by the European GDPR (i.e.,

[25] H. Harada, Development of Information Technology and Administrative Law (Part II), *Houritsu-Jiho,* 92(10), 124, 125.
[26] M. Suda, Digitalization of Administrative Procedures and Legal Issues, *Monthly jurist*, vol.1556 (2021. 4), 19, 23.
[27] T, Yamamoto, A Governance of "Automated Decision-making", Journal of Information and Communications Policy, 2019 Volume 3 Issue 1 Pages 25, https://www.jstage.jst.go.jp/article/jicp/3/1/3_25/_article/-char/en

businesses themselves formulate codes of conduct, implement data protection impact assessments, and create and certify bodies, such as ethics review boards). A similar orientation can be observed in cases involving privacy under Japanese law. In particular, in terms of the use of information technology by the government, the Basic Resident Register Network Case (Supreme Court, 03.06.2008, Minshu Vol. 62, No. 3.)[28] stated that Article 13 of the Constitution guarantees "the freedom not to disclose or publish information concerning individuals to third parties without their consent" and then examined the "structure" of the Basic Resident Register Network, emphasizing that the governance structure, including "institutional measures," includes detecting rights violations through the judicial review method commonly known as "structural review."

In addition, in the context of the latest theories regarding privacy rights in Japan, there is a proposal to redefine the right to manage one's own information such that it is based on objective appropriateness rather than on self-determination and to demand appropriate handling of one's own information.[29] Although the scope of algorithm-based administration is not discussed, it can be concluded that the governance approach (structure-based regulation) and the redefinition of the right to privacy are quite compatible. Currently, Japan has no rules on for the regulation use or design, and privacy screening may provide a clue for these.

## 5. MAJOR REFORM OF ADMINISTRATIVE STRUCTURES: PERSONAL INFORMATION PROTECTION LEGISLATION AND THE DIGITALIZATION OF PUBLIC ADMINISTRATION

### 5.1. REFORM OF PERSONAL INFORMATION PROTECTION LEGISLATION

As mentioned above (2.3), the amendment to the APPI reflecting the act on the formation of digital society, promulgated on May 19, 2021, will consolidate the rules on the handling of personal information by the public bodies and local governments, which are currently stipulated in separate laws and ordinances, and will centralize the entire jurisdiction of the protection of personal information under the PPC from April 2022.

Before, the PPC has not frequently hosted expert meetings on personal information. However, the unification of the public and private sectors and the central and local governments will allow the PPC to actively provide such opportunities. As a first step, at the 195th meeting of the PPC in December 2021, it was decided to establish a "Panel of Experts on the Use of Camera Images to Prevent Crime and Ensure Safety."[30] In this context, there is a situation concerning crime prevention in the station and train cars. During the 2021 Tokyo Olympic and Paralympic Games, JR East once announced that it would use security cameras in station precincts and photos of past criminals as a security measure,[31] but the plan was cancelled due to criticism. However, since serious crimes occurred in Tokyo later, the use of camera images and facial recognition is currently being discussed once more.[32] This case focuses on the use of a facial recognition algorithm by both private enterprises and public organizations. In addition, since the

[28] Supreme Court of Japan, 03.06.2008, Minshu Vol. 62, No. 3.
https://www.courts.go.jp/app/hanrei_en/detail?id=1276

[29] T. Otonashi, Reconstructing the Right to Privacy, 2021, Yuhikaku.

[30] https://www.ppc.go.jp/aboutus/minutes/2021/211222/

[31] JR East withdrew the data without revealing the details of its source. There is no mention of the source of the data in the press release materials at the time. https://www.jreast.co.jp/press/2021/20210706_ho02.pdf Some news articles said that the information was provided by the Public Prosecutor's Office, while others said that the information was limited to mug shots collected in cases where JR East was the victim, which they originally had.

[32] See, Mainichi Japan, Do facial-recognition security cameras in Japan's stations really keep us safe?, 11.29.2021. https://mainichi.jp/english/articles/20211127/p2a/00 m/0na/011000c

local government in Japan controls the actual police force, the PPC has grown to play a significant role in this context.

### 5.2. NEWLY ESTABLISHED DIGITAL AGENCY TO PROVIDE A FORUM FOR DISCUSSION

As explained above (2.3), a number of laws and regulations pertaining to digital reform were enacted or revised in May 2021, and the Digital Agency started its activities in September. The Prime Minister, as head of the Digital Agency, established the Digital Extraordinary Administrative Research Committee to "examine and implement cross-cutting issues related to digital reform, regulatory reform, and administrative reform in an integrated manner" and started discussions.[33]

In this Committee, "digital principles" that apply to all three reforms were created, a "comprehensive review of regulations and systems" and an "examination of processes and systems for confirming the conformity of new laws and regulations with digital principles" were presented as proposed issues, and opinions were presented by experts. Based on this report, it is explained that more than 40,000 acts will be inspected for compliance with the digital principles, and the Council for Promotion of Regulatory Reform will make efforts to expand the scope of its initiatives.

The "Digital Principles" on page 5 of the draft include the principles of digital completion and automation, principles of ensuring interoperability, principles of utilization of digital common infrastructure, principles of agile governance, and principles of public–private partnerships (GtoBtoC Model). At first glance, it does not have anything on it that would support people's rights and interests, public participation, or transparency. However, in recent years, government advisory councils have quickly advanced the principle of agile governance, which offers opportunities for multi-stakeholder participation. Although the draft briefly states, "Use digital technologies for governance that allow for flexible and continuous improvement, rather than uniform and rigid governance." It is possible to include the elements of transparency and accountability discussed in this study by expanding on this implication.

In terms of agile governance in Japan, the METI "GOVERNANCE INNOVATION Ver.2: Designing and Implementing Agile Governance" report[34] is widely known. In order to realize Society 5.0, agile governance must be put into place so that multiple stakeholders may continue to update rules and systems promptly. "Agile governance" is defined as a continuous and rapid multi-stakeholder cycle of "goal setting," "system design," "operation," "description," "evaluation," and "improvement" (page iii). As opposed to the existing governance model, this legislation aims to establish a complete social system that allows for dynamic, rather than static, regulatory review. The legislation itself is considered "governance of governance."

While a number of the Digital Extraordinary Administrative Research Committee members are experts in digitization, Prof. George Shishido, a professor of public law at the University of Tokyo, is the only expert in legal concerns. In the first submission (dated November 16, 2021),[35] he insisted that we should be able to explain to society how digital change and individuals' rights and interests are related and that we should be able to actively engage countries and companies in order to realize the value. He proposed that the basic rights to participate in the digital society (personal rights in a digital society, the right to appropriate treatment through digital procedures, basic data rights (freedom from data), and the

[33] https://www.digital.go.jp/meeting

[34] https://www.meti.go.jp/press/2021/07/20210730005/20210730005.html

[35] Materials submitted by Mr. Shishido, Member of the 1st meeting of the Digital Extraordinary Administrative Research Committee,
https://cio.go.jp/sites/default/files/uploads/documents/digital/20211116_meeting_extraordinary_administrative_research_committee_06.pdf

guarantee of capacity building throughout life) should be compiled as a "digital rights declaration." In addition, his second submission (December 22, 2021)[36]pointed out that the Agile Governance Report (Ver. 1.0) clearly stated the importance of "individuals and communities," as well as companies and governments, as the governing bodies of the digital society, and urged the inclusion of ideas that are compatible with democracy and transparency.

It is unclear to what extent these proposals will be incorporated into the digital principles and the cross-sectional review of the legal system based on them, but they may be referred to in specific legal revisions.

## 6. CONCLUSIONS: SCENARIO FOR EMBEDDING PUBLIC LAW DISCUSSION INTO THE LEGAL SYSTEM

Lastly, this study examines possible scenarios for increasing transparency and control over the use of algorithms by the Japanese government.

First, the AI guidelines of national government agencies, which were originally intended in AI Strategy 2021, will show some discipline as a manifestation of the transparency principle and practice as soft law. However, according to the current survey results, the government has only examined the barriers to using AI, and the minutes of the Advisory Council do not seem to indicate a more specific framework than the utilization principle. In particular, it does not seem to necessarily assume the relationship between the principles of administrative law and the pre- and post-procedures required by the principles.

Based on the arguments in the academic theory, a drastic reform is expected. As a first step, the focus will be on whether or not transparency requirements will be included in the final draft of the "digital principles" that the Digital Extraordinary Administrative Research Committee will be considering. The basic acts of the Digital Strategy tend to place a greater emphasis on ensuring people's convenience than on the rule of law and democracy. If these viewpoints can be linked to the theory agile governance, which argues for a change to a more cross-cutting and dynamic form of governance, it may be possible to take the first step toward reform.

However, it is necessary to pass the Digital Procedure Act in its true sense rather than amending individual laws one at a time [37]. This has to take into account the theoretical arguments, i.e., the approach to disclosure in the case of using automated decisions in the individual decision-making process and the perspective of external audits in the case of using automated decisions. In other words, in light of attempts to update the administrative law on the information processing process itself, it is necessary to update the Administrative Procedure Act as the Act on General Rules for Administration. However, the concept has not yet given much attention to citizen involvement in a digital society.

Intervention is also expected in privacy-based systems. The discussion on redefining the right to privacy as "the right to receive proper handling of personal information" is drawing attention, but this

[36] Materials submitted by Mr. Shishido, Member of the 2nd meeting of the Digital Extraordinary Administrative Research Committee,
https://cio.go.jp/sites/default/files/uploads/documents/digital/20211222_meeting_extraordinary_administrative_research_committee_05.pdf

[37] Japan also has a law commonly referred to as the "Digital Procedure Law". The Official name is "Act on the Promotion of Administrative Affairs through the Use of Information and Communications Technology". Last Version: Act No. 36 of 2021. https://www.japaneselawtranslation.go.jp/ja/laws/view/4121 However, even after the 2021 amendment, the law merely regulates the application and notice of disposition procedures, and does not have provisions reflecting the academic debate as described in the text.

section focuses on the "appropriateness." The "handling mechanism" should be disclosed regardless of the level of appropriateness required. Therefore, it is likely that lawsuits will be filed based on the fact that appropriate disclosure has not been made. However, the problem is that a judicial review cannot determine specific requirements. As a result, it will be difficult to put the law into practice unless it is enacted through legislation.

The establishment of supervisory authority is likely to be a more appropriate starting point for discussion than in the past. Currently, there is neither a movement nor a suggestion that a supervisory body should be established in Japan, particularly to guarantee algorithmic transparency. This is because, until recently, there were no administrative bodies that had jurisdiction over the protection of personal information and the digitization of public administration across the public and private sectors, ministries, agencies, and national and local areas. Therefore, the existence of an algorithmic supervisory organization could not be assumed, either in terms of a forum for discussion or the possibility of a human organization that could be expected to perform such duties. Therefore, it is significant that the PPC now has cross-governmental, cross-ministerial, and cross-national authority.

In addition, the Digital Agency is attracting attention not only for its advisory and recommendation authority for the unification of the system but also for securing specialized personnel. MIC has been assisting local governments in using AI, but the role of the Digital Agency is expected to grow. Given that it is desirable to establish a framework for maintaining institutional and systemic transparency from the introduction stage onward, rather than simply recommending it, advice on the design of legal systems is expected, not just from the perspective of convenience. In this process, if PPC and the Digital Agency are able to gain credibility as regulators, then the debate about algorithms as regulators may finally become a reality.

Note: This study was written with a base date of January 28, 2022.

After this date, the "AI Strategy 2022" was published in April 2022.[38] However, compared to the AI Strategy 2021, the number of pages has been reduced, and at least the contents mentioned in this chapter (digital government in the AI era) have not been updated.

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[38] From the Cabinet Office https://www8.cao.go.jp/cstp/ai/index.html, you can access the "AI Strategy 2022" not only the Japanese version of the text, annexes, and summary, but also the English translations of the text and summary, unlike the AI Strategy 2021.

# Japan

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## 1. Introduction

Compared to other developed countries, Japan has been reluctant to utilize environmental taxes to combat climate change. It had a period of success as a top-runner of an 'energy-efficient' economy since the oil crisis of the 1970s, which was attributed to the business sector's efforts. However, this success has become a liability, as Japan adheres to 'voluntary efforts' by businesses rather than deploying regulatory measures and economic (negative) incentives.[1] On the contrary, Japan extensively relies on subsidies. The result is sobering. In terms of carbon productivity (GDP/$CO_2$ emissions), Japan falls behind majority of OECD countries, staying at the bottom group with the U.S. and the U.K. Besides, the difficult financial situation of Japan, reflected in its extraordinary level of public debt, does not allow for largesse. At present, the fiscal policies in Japan are more important as a means of raising revenue for environmental policies rather than as a negative incentive for reducing $CO_2$ emissions.

## 2. The Legal Framework for the Climate Change Mitigation

### 2.1. The Overall Framework of Japanese Environmental Law

The Constitution of Japan of 1946 has no explicit provisions for environmental protection. Nor do the relevant legislations that comprise a 'constitution in the substantive sense.' Accordingly, the highest legal norm regarding environmental protection in the Japanese legal system is the *Basic Act on the Environment* (Act No.91 of 1993). Although it is called the *Basic Act*, it has an equivalent force of law to other statutory laws. It is considered as having the status of 'guiding' the subsequent legislations and administrative actions.

There has been a legal question of whether the Constitution still protects certain environmental rights despite the absence of explicit text. Some scholars advocated this position on the ground of the constitutional bill of rights, such as the right of personal dignity (Art. 13) and the right to live (Art. 25). However, the judicial case law is reluctant to recognize such a generic environmental right beyond the narrowly defined subjective rights of the individual.[2] Article 3 of the *Basic Act* declares the legal value of environmental conservation as a public good not reducible to individual interest, but it also clarifies that the law does not adopt the concept of 'environmental rights' as advocated in the legislative process. The *Basic Act's* focus was rather to set the basic principles of sustainable development and 'environmental public interest,' which reflected the heightened awareness of the global environmental crisis exemplified by the 1992 UN Earth Summit.

The enactment of the *Basic Act* of 1992 was a turning point in Japan's environmental law and policy. Before the enactment, the fundamental source of law in the environmental law field was the *Basic Act on Pollution Control Measures* (Act No.132 of 1967), which was replaced by the *Basic Act* of 1992.

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[1] T. Otsuka, *Kankyo-ho (Environmental Law)*, 4th ed., Yuhikaku, Tokyo 2020, p.784.

[2] Supreme Court Judgement of the First Petty Bench, March 30, 2006, 60-4 Minshu 948;
In this judgment, while recognizing that the interest in enjoying a good environment is legally worthy of protection, the Court leaves the matter to the national and municipal legislative process, rather than the constitutional protection by the Judiciary.

That preceding Act targeted pollution control, in which the actual victims were identifiable. As the extension of ordinary tort law, the Act was able to rely on private law concepts and systems (with proper modification) for anti-pollution policy measures. Japanese law indeed did well on this front, and it even introduced a pollution charge in the 1970s; the 'Imposition on Pollution Load' was set forth by the *Act on Compensation for Pollution-related Health Damage* (Act No.111 of 1973). It was a mechanism to finance the funds for medical treatment and compensation to bereaved families of air and water pollution victims by obliging the polluting businesses to pay the 'imposition' in proportion to the amount of pollutant ($SO_x$) emitted by such business. Thus it was meant not to be an ex-ante incentive but rather to be an ex-post remedy measure. Nevertheless, the imposition ended up so high as to give businesses an incentive to prevent pollution because the cost of providing remedies to victims grew beyond the legislature's original intention.[3] To the contrary, when it comes to the 'global' environmental problems, such as climate change, Japanese law is quite reluctant to employ effective measures, including environmental taxes.

### 2.2. Law and Policy for Climate Change Mitigations

When it comes to the global warming challenges, Japan's first option has been the reliance on voluntary reduction efforts (particularly by the business sector).

#### 2.2.1. The Legal Framework

At the center of this field of law is the *Act on Promotion of Global Warming Countermeasures* (Act No.117 of 1998) [hereinafter *APGWC*], which sets the legal framework for climate change mitigations. The *APGWC* provides legal definitions for key concepts such as 'global warming' and 'greenhouse gases' (GHGs).[4] The term 'global warming' is constrained to the climate change attributable to human activities, whereas 'climate change'[5] includes both anthropogenic changes (i.e., 'global warming' as above defined) and those attributable to natural causes.[6] The core of *APGWC* is to impose on businesses the duty of calculating and reporting their GHG emissions; the Government then compiles the reported data and makes them public. This system aims to establish a foundation for voluntary efforts by making businesses understand their own emissions and encourage them to reduce GHG emissions by making their performance visible to consumers. On the other hand, regulatory measures, which are widely used in pollution control, have rarely been employed in this field.

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[3] See, T. Otsuka, *Kankyo-ho (Environmental Law)*, 4th ed., Yuhikaku, Tokyo 2020, p.116

[4] Article 2(1) of the *APGWC* defines 'global warming' as 'the phenomenon in which the temperature of the earth's surface and atmosphere rises incrementally, affecting the planet as a whole, as a result of the concentration of greenhouse gas in the atmosphere being increased by greenhouse gases generated from human activities', and the *Act* lists the following substances as 'greenhouse gases' (GHGs): (i) carbon dioxide ($CO_2$); (ii) methane ($CH_4$); (iii) nitrous oxide ($N_2O$); (iv) hydrofluorocarbons specified in Cabinet Order; (v) perfluorocarbons specified in Cabinet Order; and (vi) sulfur hexafluoride ($SF_6$).'

[5] Climate Change Adaptation Act (Act No. 50 of June 13, 2018)), Article 1. This Act is aimed to address the issues of 'adaptation,' a term legally different from 'mitigation.' For the Japanese law purpose, 'adaptation means to assess the effects of climate change (e.g., increased flooding, adverse effects on crops, protection of biodiversity, etc.) and to set the government with a plan to address these effects; specifically, for the government to provide information based on scientific findings to local governments and businesses. See, T. Otsuka, *Environmental Law*, 4th ed., Yuhikaku, Tokyo 2020, p.781.

[6] Ministry of Environment of Japan, Official commentary on the Climate Change Adaptation Act (2018), p.20. [Referring to IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland.*]

Interestingly, the Polluter-Pays-Principle (PPP), which was so emphasized in the context of Japan's pollution control policy, has little presence in the Japanese policy measures for climate change mitigations. The internationally shared concept of PPP was indeed introduced in Japan in its early stage, and then this country developed the concept in its own way. The PPP internationally means that the polluter should bear the 'costs of pollution prevention and control measures', but not necessarily the remedy for the victims. While the Japanese PPP obliged the polluter to bear the costs of environmental protection *and* the costs of environmental restoration and the damage to the victims, which the OECD recommendation in 1972 suggested merely as a progressive trend. The early legislation in the 1970s[7] materialized the PPP *à la japonaise*. The emphasis was put on the ex-post-bearing costs and remedies to public pollution, confirmed by Article 37 of the *Basic Act on the Environment*, rather than on the ex-ante incentive as economic instruments.

Interestingly, the *Basic Act* distinguishes 'global environmental conservation' (including climate change mitigations) from 'environmental pollution' (Article 2), and Article 37 of the *Act* does not cover the former. In short, economic measures, including environmental tax/charge, are not linked to the PPP in Japanese legislation.[8] Moreover, the positive incentives (subsidies) are predominantly favored by the Japanese legislature, despite its oft-criticized shortfalls compromising the PPP. Although the PPP is said to be one of the guiding principles of Japanese environmental policy, legally it has little bite.

**2.2.2. Mitigation Target – No Direct Link to the Fiscal Policies**

In the Japanese administrative state, government policies are usually implemented under the parliamentary legislation that sets basic policies, and it is the government action plans that determine the actual content and process of the policies. This norm also applies to the climate change mitigation policy. Therefore, while the legislation sets the principle,[9] it is the Government (the Cabinet) that formulates such action plans named '*Basic Environment Plan' and 'Global Warming Countermeasures Plan'* [hereinafter, *GWCP*],[10] the latter of which defines the responsibilities of the national Government, local governments, businesses, and citizens, to achieve the mitigation goal for the purpose of *APGWC*. According to this latest *GWCP*, announced in 2021 by the Suga administration, Japan aims to reduce GHG emissions by 46% by 2030 (compared to the 2013 level). Administrative planning, rather than legislation, is frequently used in Japan because it gives the Government considerable flexibility. However, it has the disadvantage that the rights and obligations of private parties are not defined at the planning stage, making its legal control difficult.

Given the ambitious mitigation target, it is surprising that the *GWCP* only briefly touches on the environmental fiscal policies. That is, the *Plan* only states that the Government will 'continue to consider' the option of introducing a carbon tax, probably because the tax compromises the economic growth strategy, the administration's signature policy. It neither attaches much importance to the already existing

[7] *The Act on Entrepreneurs' Bearing of the Cost of Public Pollution Control Works* (Act No.133 of 1970) and *The Act on Compensation for Pollution-related Health Damage* (Act No. 111 of 1973).

[8] It should be noted, though, that the most influential treatise on environmental law by Professor Tadashi Otsuka associates the economic measures with the PPP. So the Japanese legislature deliberately severs the link between them.

[9] The 2021 amendment of *APGWC* inserted a new article 2-bis, based on the goals of the Paris Agreement, so as to set a new legislative principle of 'realizing the zero-carbon society by 2050.'

[10] Cabinet decision on October 22, 2021. As for the former *PGWC* (as of 2016), see https://www.gov-online.go.jp/eng/publicity/book/hlj/html/201609/201609_01_en.html

tax measures, such as the 'greening tax system' and the Tax for Climate Change Mitigation (to be detailed in 3.2.2.3. below). Furthermore, the *GWCP* is silent about the anticipated level of reductions to be achieved through these tax measures.

This marginalized status of environmental taxes in climate change mitigation can also be observed in Article 22(2) of the *Basic Act*. Article 22 covers both positive and negative economic incentives (the latter implies, though not so mentioning, environmental taxes) and dictates that, before introducing negative incentives, appropriate studies shall be conducted on their impact on Japan's economy and that efforts shall be made to obtain public understanding and cooperation for such negative incentives. This perplexingly discouraging provision reflects Japan's persistent reluctance toward environmental taxes, which will be discussed in section 3.

## 3. Fiscal Policies in the Measures for the Climate Change Mitigations

Japanese law has been quite reluctant to employ environmental taxes as a policy measure for climate change mitigation. It is in stark contrast to the relatively long history of the policy idea of environmental taxes. The Ministry of Environment (MOEJ) already started officially discussing carbon taxes in 1992 (likely inspired by the UN Earth Summit) by setting up its first study group, and a series of succeeding researches and proposals have been made public since then. Nevertheless, Japan's reluctance has not changed. This can be explained by historical, political, and institutional factors (1). As a compromise, MOEJ has taken a modest path by 'greening' the existing tax system while avoiding a wholesale restructuring of the tax system (2).

### 3.1. Why Japan Is So Reluctant to Environmental Taxes?

The MOEJ's proposals for environmental/carbon tax have always been deflected. Even now, there is no 'official' carbon tax in Japan. The direct cause for this is the strong resistance by the MOEJ's rival within the government, i.e., the *Ministry of Economy, Trade, and Industry (METI)*, which consistently advocates for the Japanese business sector's international competitiveness. However, this kind of dissenting voice is commonplace in other countries, so we need an explanation for why it is so dominant in Japan. We can conjecture that several idiosyncratic factors in Japan might contribute to this stalemate.

#### 3.1.1. Historical Legacies

Japanese industry had successfully weathered the oil crisis of the 1970s through energy-saving technological innovations and, as its byproduct, advanced its competitive position in the global economy. However, this glorious memory seems to have led us to the Innovator's Dilemma, i.e., the loss of motivation to engage in disruptive technological innovations. For instance, Japanese automobile industry was successful in the fossil fuel era with its energy-efficient technologies. However, such strength seems to make them adhere to the hybrid vehicles, which are still compatible with internal combustion engines, and such adherence keeps Japan's carmakers from fully engaging in the next competition stage in electric vehicles, where they are falling behind its global competitors.

Another legacy of the oil crisis was that securing a stable supply of cheap energy sources for electricity became the top national priority, which has preserved Japan's dependence on nuclear power

plants and a reluctance (by electric power companies) to invest in then-unreliable renewable energy.[11] The Fukushima nuclear disaster in 2011 could have been a golden opportunity for a disruptive policy shift toward renewable energy, but eventually, the economic concerns –short-term power supply insecurity and high costs of renewable energy – kept Japan from taking a radical turn. On the contrary, Japan became even more dependent on fossil fuels (Natural gas and coal).[12] Under these circumstances, it is politically difficult to introduce a substantial level of carbon tax.

### 3.1.2. Political Constellation

Another possible explanation is the absence of a major political party in Japan that actively advocates for environmental taxes, such as the Green Party in Germany. While there are eco-conscious pressure groups such as environmental NGOs and consumer groups, they are not powerful enough in the political competition. The majority of Japanese labor unions, which are normally the constituents of progressive parties, had their own weakness; that is, they are not industry-wide unions but enterprise-based unions. Thus they do not support environmental causes that may compromise their own corporate performances. One example is that Japan's leading leftist party, the Constitutional Democratic Party of Japan (Rikken-Minshu), hesitates to clearly state the 'anti-nuclear power' policy in its platform, even though such policy would please their left-wing constituents, for the reason that such policy would disturb labor unions of electricity and heavy manufacturing industries.

It is often the case in Japan that the government-made commitment to international agreement pushes the domestic political stalemate. The Kyoto Protocol and the Paris Agreement certainly changed the power balance in domestic politics, as above mentioned in the context of statutory development. However, none of these international environmental treaties oblige Japan to utilize taxes or economic instruments,[13] so the Government can say that Japan can comply with these international commitments by way of its preferred options: a mix of voluntary efforts and positive incentives (subsidies).

### 3.1.3. Institutional Factors

If a proposal for environmental tax should ever be realized, it must pass the legislative process. Tax law is routinely amended in Japan, as is often the case with many jurisdictions, so its legislative process is highly systematized. The tax legislative process often begins within the Government with the submission of 'tax amendment requests' to the Ministry of Finance (MOF) by other ministries, such as MOEJ and METI, which corresponding interest groups normally back up. Only those requests accepted by MOF and approved by the Cabinet thereafter become parts of the tax amendment bill sponsored by the Cabinet.[14] Furthermore, to obtain Cabinet approval, which is a prerequisite for any legislative proposal to become a Cabinet-sponsored bill, a proposal must gain consensus among all Cabinet

[11] Furthermore, before global warming became an issue, hydropower resource development (dams) was criticized as a prime example of natural environmental destruction. Currently, Japan is trying to promote renewable 'small-scale' hydropower (below the generating capacity of 30,000 kW), which has a low environmental impact.

[12] The energy source for electricity in 2010 was: Natural gas: 29%, Coal: 28%, Nuclear energy 25%, Hydropower 7%, other renewable energy 2%; in 2019, it has become: Natural gas 37%, Coal 32%, Other renewable energy 10%, Hydropower 8%, Nuclear energy 6%.

[13] According to the MOEJ website, Japan is a party to more than 10 multilateral environmental treaties, including the Paris Agreement, several bilateral environmental protection agreements, and a framework for informal international cooperation (the Acid Deposition Monitoring Network in East Asia (EANET)), but no taxes or special charges have been used for the purpose of these agreements, nor any amendments have been made on the tax system.

[14] It is an established constitutional interpretation that the Cabinet has the authority to submit a legislative bill to the National Diet for deliberation (Article 5 of the Cabinet Act (Act No.3 of May 3, 1947).

members (including the Minister of METI, who normally opposes any substantial environmental tax). This makes it extremely difficult for any MOEJ-endorsed eco-tax reform proposal to become a Cabinet bill, in the continuous rejection by the METI.

Besides, not as a matter of constitutional requirement but of political reality, important bills must be scrutinized and approved by the coalition ruling parties before being finalized as the Cabinet sponsored bill (so-called *preliminary review system*). This practice must appear odd to the readers, but a certain institutional necessity justifies it. Under the Japanese Constitution, the Cabinet has no formal authority over the National Diet's deliberation process (in contrast to the case of the French Constitution of 1958, Article 49-3), so it needs to secure the support of the ruling party to the Cabinet sponsored bill in advance of the bill submitted to the National Diet. At the cost of policy integrity, this preliminary review system enables the Cabinet to foresee the successful approval of the National Diet.

The members of the National Diet (including opposing parties) may also submit tax amendment bills, but the law[15] imposes a harder condition for the submission of fiscal bills since tax amendments inevitably affect revenue estimates and budgeting. Should a bill pass this threshold, the ruling party members, who have a chance to reflect their interests in government bills by way of the informal review system, would reject such bills. This restriction practically excludes the possibility of eco-tax reform driven by a small group of environmentalist members of the National Diet.

These very high political and institutional obstacles probably explain the absence of litigation that constitutionally challenges fiscal policies for climate change mitigations, which we will discuss in the next subsection. However, before proceeding, it should be noted that the political constellation has been different in some local governments. For instance, Tokyo Metropolitan Government introduced, by the Governor's initiative, the 'greening vehicle tax' in 1999,[16] ahead of the national-level eco-friendly vehicle tax reform in 2001. In contrast to the national-level environmental tax policy-making process, local governments can quickly move if the governors' leadership favors such reform. However, they have to face the limits of local government authority within the Japanese legal system, in which the Constitution grants self-governance authority (including establishing new taxes) to the local Government but at the same time requires localities to comply with the national law, which already limits the leeway of local tax legislation.

### 3.2. The (Un)Use of Fiscal Policies for the Climate Change Mitigations

#### 3.2.1. 'Taxes' and 'Fiscal Policies' in Japanese Law

Japanese legal system does not give a legal definition of 'fiscal policies,' but as discussed below, the term 'tax' has a specific constitutional meaning, to be distinguished from other levies (fees, charges, etc.). The primary purpose of 'taxes' is to secure fair tax revenues by allocating tax burdens on the ground of taxpayers' ability to pay. A tax with 'green' incentives is not constitutionally prohibited unless it has no reasonable chance to raise revenue. So far, such an extreme case has never been tested in reality.[17]

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[15] National Diet Act (Act No.79 of May 3, 1947), article 56 requires a larger number of fiscal bill-sponsoring members than that for normal bills.

[16] As we will discuss in 3.1.1.(A)(2), vehicles are subject to multi-level (national, prefectural, and local) and multi-phase (acquisition and maintenance) taxation.

[17] Although practically unimaginable, let us suppose that an extremely high rate of environmental tax is somehow introduced on a certain type of activity/substance. Given the case law-invented definition of ‘tax’ for the constitutional purpose (article 84) as ‘a mandatory payment imposed, by the state or local governments for the

In Japan, Tax Constitutional Principles consist of two pillars: The principle of Legality (which is similar to *le principe de légalité* in France) and the Principle of Equality. As for Equality, the judicial precedence shows extreme deference to the legislative branch;[18] no judicial precedents ever struck down tax statutes as unconstitutional based on the equality principle. Indeed, the Principle of Legality is somewhat interpreted by precedents to imply a kind of 'parliamentary sovereignty in tax matters.' Given this constitutional setting, it is almost unthinkable (indeed, no cases ever) that any environmental taxes are to be struck down as unconstitutional. Such environmental tax with 'actual bite' would be checked beforehand in the political process. The genuine touchstone for environmental tax in Japan is not the Constitution (or tax principles) but the legislative process.[19]

### 3.2.2. Environmental Fiscal Policies

#### 3.2.2.1. Disparity between Positive and Negative Incentives

In contrast to its reluctance to use negative incentives (see 2.2.2 above for their marginalized status in the *Basic Act*), the Japanese legislature actively deploys positive incentives, i.e., direct subsidies and tax expenditures, for the purpose of environmental policy. They are supposed to encourage eco-technology innovation and the development of new products without increasing the burden on incumbent firms (but possibly alienating new entrant firms) and to change consumer behavior (with regards to transportation, houses, energy conservation, and renewable energy) without disturbing households' budget, thus suitable to the Government's emphasis on the voluntary actions. However, such an approach has proved to be inadequate for changing behaviors, and as a result, it has delayed Japan's climate change mitigations.

#### 3.2.2.2. MOEJ's Strategy – Greening the Existing Tax system

In the face of political resistance, the MOEJ attempts to canalize the domestic policy discourse by 'interpreting' the existing tax system in the light of 'greening the tax system.' According to this discourse, the taxes on fossil fuels and vehicles with environmental impacts, which were originally intended as revenue-raisers based on the ability to pay indicated by energy and automobile consumption, should be now re-interpreted and reinvented as a 'green' tax by modifying the tax rate structure in proportion to GHGs and pollutant emissions. Two such examples are the *Tax for Climate Change Mitigation (TCCM)* and the recent 'greenifying' development of Vehicle Taxes, detailed in section 4. Such a 'stealth' approach made certain progress.[20]

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purpose of financing the government expenditure, universally on everyone who meets certain criteria, not as a payment for services', extremely high ('confiscatory' or 'suffocating') tax seems to fail to qualify as 'tax' (since we would reasonably anticipate little revenue from such tax, failing to meet the 'financing the government expenditure' criterion); then such economic measures shall be scrutinized not as 'tax' (enjoying the highest judicial deference) but as 'regulation', subject to the normal judicial review on the proportionality test.

[18] Supreme Court, Judgement of Grand Bench, March 27, 1985,39-2 Minshu 247.

[19] And given the unfriendly political atmosphere against environmental taxes in Japan, MOEJ becomes very prudent to check the legal risks of proposed economic instruments. For instance, MOEJ formed a study group of jurists at MOEJ, which issued in 2012 a fairly detailed report on the possible constitutional challenges in the design options of the cap and trade mechanism.

[20] However, we should be concerned with the over-use of the 'environment-related tax' concept. For instance, some local governments impose a levy on industrial waste disposal businesses for their amount of waste. MOEJ counts them as part of its 'environment-related tax' list. However, for these local tax measures, waste reduction is a secondary effect, and the main purpose is to cover the cost of proper disposal of industrial waste. Another example is *Forest Environment Tax*, which is a surtax on municipal poll taxes, and the revenue of the tax is to finance the

#### 3.2.2.3. *Tax for Climate Change Mitigation (TCCM)*

Here, it is worth mentioning the *TCCM*) the first 'genuine' environmental (carbon) tax in Japanese law introduced in 2012. Its tax rate is designed in proportion to the $CO_2$ emissions, as opposed to the case with other fossil fuel taxes. Moreover, the revenues from *TCCM* are earmarked for financing climate change mitigation measures.

However, the *TCCM* is not characterized as a 'carbon tax in the domestic context.'[21] Without having any place in the *GWCP* nor the *Basic Act* of 1992, the *TCCM* is merely categorized among 'special tax measures' (Tax Expenditures) compiled in t*he Act on Special Measures Concerning Taxation.*[22] Article 90-3-2 of this Act characterizes the *TCCM* as a special exception for the normal tax rate of the Petroleum and Coal Tax, rather than clearly stating it as a central piece of Japan's climate change mitigation policy. As we will discuss below, the tax rate of *TCCM* is still too low to give enough incentive, so the main ambition of the *TCCM* is to raise additional tax revenue for policy measures for climate change mitigation.[23]

## 4. An Overview of Economic Instruments for the Climate Change Mitigations

The Japanese legislature and government have so far preferred positive incentives, such as direct subsidies and tax expenditures, to negative incentives, typically environmental taxes. Neither favored are legally binding regulations in climate change mitigation; the most characteristic of Japan's approach is the dominance of 'soft' methods that encourage voluntary actions for climate change mitigation by firms and households. The following sections are divided into Tax Measures (4.1.), Tax Expenditures and Subsidies (4.2.), and Other Instruments (4.3.).

### 4.1. Tax Measures[24]

Tax measures for climate change mitigation consist of (1) taxes on energy/fuel, (2) taxes on vehicles, and (3) a PPP-like charge focused on pollutant emission (already discussed in 1.4. above). We will discuss the first two categories.

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development of forests serving as $CO_2$ sinks. It has no incentive effect but solely raises revenue earmarked to a certain (not necessarily the best) measure for climate change mitigations.

[21] The *GWCP* can read to exclude *TCCM* from a carbon tax, which is yet to be examined. Interestingly enough, the MOEJ dubs the *TCCM* as 'carbon tax' on its English version website (https://www.env.go.jp/en/policy/tax/env-tax.html) but never uses the term 'carbon tax' in the Japanese language publication.

[22] Japanese tax law system segregates 'exceptional tax measures' (e.g., tax expenditures) from the 'normal' tax rules and compiles these 'exceptional measures' into the 'Act on Special Measures Concerning Taxation', isolated from the 'normal' tax acts such as the Income Tax Act, Corporate Tax Act, etc.

[23] The Cabinet's 'Fifth Basic Plan for the Environment' (April 17, 2018) mentions that the *TCCM* revenue should be used for various measures to reduce energy-derived $CO_2$ emissions, without setting a clear goal of reduction via negative tax incentive. The relevant tax statute provides that the entire tax revenue from the petroleum and coal tax first belongs to the Treasury's General Account, but then to be re-allocated to the Special Account for Measures for Energy 'so as to finance the cost of measures for energy security measures and energy system upgrading measures' (Article 90 of the Act on the Special Accounts). Surely the 'Energy System Upgrading Measures' includes various policy measures to promote the transition to energy decarbonization, but the 'energy security measures' are those aimed at 'ensuring stable and low-cost supplies of oil, combustible natural gas, and coal,' which are in tension with decarbonization.

[24] MOEJ website publishes the English-version list of the environment-related tax system in Japan. https://www.env.go.jp/en/policy/tax/env-tax/20120814a_ertj.pdf

### 4.1.1. Taxes on Energy/Fuel

#### 4.1.1.1. The System of Fossil Fuel Taxes

There have been a variety of taxes on fossil fuels (gasoline, petroleum gas, diesel fuel, aviation fuel, coal, petroleum products, and liquefied natural gas). Initially, these taxes targeted the tax-bearing capacity of economic activities using fossil fuels; that is, they were unrelated to $CO_2$ emission reductions.[25] These tax systems aim to shift the tax burden to the downstream users of fossil fuels (business firms and households) by taxing the upstream suppliers (oil importers/refineries), as they are normally big companies and serve as s a credible point of tax collection. Indeed these taxes generate massive tax revenue (recently, the average annual revenue of around 4 trillion JPY). It is true that these taxes still have certain incentive effects for $CO_2$ emission reduction by making fuel consumption more expensive for firms and households, but their tax rates are not designed to be aligned with $CO_2$ emission.

We can find an interesting case study where 'greening fuel taxes' was at odds with the initial justification for such taxes. The gasoline tax was introduced in 1958; at that time, the tax was justified as a special contribution borne by automobile users to finance road construction and maintenance; it was a kind of benefit taxation. In 1974, the tax rate was more than doubled to meet the then-urgent need for accelerating road construction. Such an increased rate was called the 'provisional' tax rate, implying an exceptionally justified burden only for the time being, but since then, it has remained intact. Finally, circa 2010, when the era of massive road construction ended, and the abundant gasoline tax revenue was accused of being wastefully spent on unnecessary roads, people began to discuss converting the tax from earmarked revenue to general account revenue and rolling back the 'provisional' tax rate which had lost its justification by now. As fuel costs are always a serious concern for small businesses and poor households, such a proposal would have been highly welcome by voters. However, this seemingly popular proposal did not carry the day, by being debunked from three different angles: (1) local governments complained that it would significantly reduce their tax revenues because part of the gasoline tax revenue is to be transferred to local governments; (2) a group of taxpayers (automobile users) contended that the gasoline tax could not be justified anymore if the benefit principle is abandoned, and (3) environmentalists criticized the gasoline tax cut of undermining the climate change mitigation efforts.[26] This three-corned battle was ended by the emergence of unexpected financial needs: The Great East Japan Earthquake of 2011. As the disaster claimed the bill for restoration projects of tens of trillion JPY, the political agreement was reached to extend the gasoline tax 'provisional' rate and to turn the tax revenue from specific funds to general purpose funds.

#### 4.1.1.2. The *TCCM* – Design and Effects

As mentioned above, the *TCCM* was introduced as a special surtax to the Petroleum and Coal Tax of this category. Nevertheless, in contrast to the original Petroleum and Coal Tax, the *TCCM* rate is designed to be proportional to the amount of $CO_2$ emissions.[27] Though it is the first 'pure' environmental tax in Japan, there are certain limitations reflecting the political reality surrounding environmental taxes

[25] The petroleum and coal tax, for example, applies the lowest tax rate to coal, the most 'polluting' fuel in terms of $CO_2$ emissions.

[26] The study group of MOEJ estimated that if the provisional fuel tax rate were abolished starting in 2012, $CO_2$ emissions would increase by approximately 12.7 million tons of $CO_2$ in 2020 (equivalent to 1% of the 1990 level of energy-originated GHG emissions).

[27] Specifically, the tax burden for each type of fossil fuel is set to be equal to 289 JPY per ton of $CO_2$ emissions. As a result, coal has the heaviest tax burden, and LNG has the lightest tax burden, in proportion to the $CO_2$ emission per unit.

in Japan.

First, the tax rate is not high enough to sufficiently incentivize behavioral changes.[28] According to the MOEJ's estimate at the time of introduction,[29] the *TCCM* would achieve a 0.5%~2.2% reduction of $CO_2$ emissions in 2020, compared to the 1990 level, but most of such effect would come from revenue effect by virtue of specially earmarked *TCCM* revenues, which is estimated to amount to 262 billion JPY per year, for financing climate change mitigation measures. Besides, there are no statutory goals of emission reduction to be reached by *TCCM*, and to the reporter's best knowledge, there is no official evaluation of its policy effect to date. Such a low *TCCM* tax rate certainly saves the Tax from possible legal challenges should it be at a significant rate. However, this 'marginal' status of *TCCM* in the Japanese tax system and the absence of full-scale eco-tax reform make it unrealistic to discuss the chance of a 'double dividend' in Japan.

#### 4.1.2. Taxes on Vehicles

Taxes on automobile owners have been imposed by the national, prefectural, and municipal governments in various forms and constitute an important source of revenue. In 2017, the national and local governments generated 2.5 trillion JPY of revenue from these taxes, an especially important source for local governments.

Previously, automobiles were subject to (a) automobile acquisition tax (at the prefectural level), (b) automobile weight tax (at the national level), automobile tax (at the prefectural level), and light automobile tax (at the municipal level) periodically during the period of ownership. The recent increase of VAT to 10% in 2019[30] led to the change in this long-lasting tax landscape. The MOEJ has long advocated 'greening the vehicle tax,' while the business sector wanted to mitigate the VAT hike's negative impact on the automobile market. As a result, the 2019 amendment of vehicle taxes abolished (a) the automobile acquisition tax while (b) reducing the overall rate of automobile tax but simultaneously introducing an 'environmental performance-based rate' in addition to the normal tax rate of automobile and light automobile taxes. According to this additional rate, Electric Vehicles are taxed at 0% (of the vehicle price), while vehicles that meet the FY2020 fuel efficiency standards will be taxed at 2%, and vehicles that only meet the FY2015 fuel efficiency standards will be taxed at 3%. This 2019 amendment can be explained as hitting the balance between three goals – greening vehicle tax, conserving the important revenue source for local governments, and keeping the domestic automobile market afloat (note the dominant importance of the automobile industry in the Japanese economy). This example provides us with a good understanding of how environmental tax is positioned in Japan.

### 4.2. Tax Expenditures and Subsidies

As repeatedly mentioned, Japan prefers direct subsidy and tax expenditures in its climate change mitigation efforts. Examples include the preferential depreciation rule in the corporate tax depreciation for environment-related investments, property tax reduction for renewable energy power generation

[28] And even with this modest rate, in order to weather the political opposition, the legislator opted for a phased introduction; the tax rate was set at 1/3 of the normal statutory rate for the first 18 months, then was raised to 2/3 of the normal rate for the next 24 months, and finally reached the normal rate in 2016, 4 years after the introduction of the tax.

[29] https://www.env.go.jp/en/policy/tax/env-tax/20121001a_dct.pdf

[30] The VAT rate was only 5% until 2014; the rate was raised to 8% in 2014, and then the normal rate became 10% in 2019.

equipment, special income tax credits, property tax reduction for energy-saving home renovations, and special exemption of gasoline taxes for bioethanol blended gasoline. Tax Expenditure works on the existing collection mechanism for energy and vehicle taxes. They are, in most cases, robust against tax avoidance, as taxable 'upstream' firms tend to be large and easily regulated by the authorities. However, if the integrity of eco-technical information reporting is compromised, there will be a problem.[31]

An interesting recent development is noticed in the taxation of owner-occupying houses. Traditionally, the Japanese tax law has offered a number of favorable tax treatments for house construction and acquisition for political reasons. They include preferential treatment under capital gains tax; the gift tax reduction if the gifted funds are to acquire a donees' primary home, to name a few. Then, recent tax amendments have concentrated such preferential treatments solely on those qualified houses that meet energy-saving performance standard certifications. This is another example of a (politically) successful environmental policy being in tandem with (a politically strong) industrial policy. This new tax rule would incite a demand for high-spec (expensive) houses, which creates a new lucrative business opportunity for the housing industry. At the same time, we should note that this would exclude lower-income individuals, who cannot afford these high-quality but expensive houses, from these tax largess.

### 4.3. Other Instruments

Other instruments used/discussed in Japan are road pricing (4.3.1.), cap and trade (4.3.2.), and the FIT (Feed-in-Tariff) regime (4.3.3.). We shall briefly examine each of them.

#### 4.3.1. Road Pricing

Although some provisional usages of road pricing on the expressways can be found,[32] the Government is yet to begin the in-depth discussion on the possible introduction of the road-pricing mechanism.

#### 4.3.2. Cap and Trade Mechanism

The 'cap and trade' mechanism has been known since the 1990s. However, such a mechanism has rarely been implemented in Japan, probably due to the absence of the national level mandatory reduction of GHG emissions. The sole obligation imposed by *APGWC* is for businesses to measure the exact amounts of GHG emissions and report and publish them. Without regulatory coercion, business firms are unlikely to have an incentive to voluntarily pay for a carbon price.

Tokyo offers the lone exception in this context. Tokyo metropolitan government introduced its cap and trade mechanism in 2008 and has implemented it since 2010. This mechanism works by virtue of the accompanying regulatory mechanism imposing the duty of emission reporting and reduction on large-scale business establishments (those consuming the above threshold level[33] of fuel, heat, and electricity), then allowing those businesses to trade the amount of $CO_2$ emissions they have reduced

[31] In recent years, there was a scandal in which an automobile manufacturer (Mitsubishi Motors) reported fabricated data on its vehicles' fuel economy performance. The company's customers who benefited from a reduced tax rate, based on these false data of 'eco-friendly vehicles', must return the tax erroneously reduced to the tax authority. Of course, consumers were not to be blamed for this falsification. Thus the car company paid the tax shortfall to the Government on behalf of its customers.

[32] The first case was in the Osaka region, then recently (temporarily during the Olympic Games) introduced in the Tokyo area.

[33] The threshold is set at 1,500kl, calculated as crude oil equivalent $CO_2$ emission.

beyond the required level.

Japanese national Government also endorses the 'J-Credit Scheme.'[34] When businesses voluntarily reduce emissions by installing energy-saving equipment, switching to renewable energy, or forest management, the Government certifies the amounts of emission reduction and issues tradable credits. Credits are expected to have value for purchasers since the credits are applied to the reduced amount for the purpose of reporting and publication duty under *APGWC*. Certified credits purchased can be counted as an 'emission reduction effort,' which may have the advantage of corporate PR. There is no regulation to set the 'hard' obligation to emission reduction; participation in the J-Credit Scheme is voluntary and is merely an extension of the voluntary action plan. Effective carbon pricing that combines environmental taxes and emissions trading at the national level (backed by enforcement) has also begun to be considered at the national level but, as of this writing, has not yet been materialized.[35]

**4.3.3. The FIT (Feed-in-Tariff) regime**

In order to encourage the introduction of renewable energy sources, the FIT regime was introduced in 2012[36] that requires electric utilities to purchase renewable energy (i.e., solar, wind, small-scale hydropower, geothermal, and biomass) at a fixed procure price.[37] Those who intend to supply renewable energy electricity conclude a contract with an electric utility after receiving government certification of generating facilities. In principle, the electric utilities are obligated to conclude a contract to supply electricity at a government-fixed procure price. The electric utilities may pass the costs of the FIT regime onto the consumer price in the form of 'FIT surcharge,' which is set by METI (FIT Act, Articles 31 and 36). The Fit surcharge was originally 0.22 JPY/kWh, but as of 2022, it increased to 3.45 JPY/kWh. This rise is due to the massive increase in the supply of solar power, induced by the excessive incentive provided by the regime, which also caused collateral damages to the environment, such as forestry destruction. By the nature of the electric power supply system, solar power generation exceeding the demand level at the same point in time will be just wasted unless efficient and affordable storage batteries are in place.[38]

This problem led to the recent amendment in 2021, which introduced a new FIP (Feed-in Premium) regime on top of the existing FIT regime. This new mechanism adds a certain amount of premium to the market price of electricity as the purchase price for renewable energy electricity, encouraging investment

[34] https://japancredit.go.jp/english/

[35] The incumbent Kishida administration announced in June 2022 its plan to issue the so-called 'Green-Transformation Bond', a government bond whose proceeds are earmarked for investments in technology and transformation toward a low-carbon society; interestingly, this new bond is said to be redeemed by the new revenue source based on a certain kind of carbon pricing, either a carbon tax or auctioning emission permits. As of this writing, no concrete plan has been made public.

[36] Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities (Act No.108 of 2011), now renamed to 'Act on Special Measures Concerning Promotion of Electricity from Renewable Energy Sources' (hereinafter *FIT Act*)

[37] Each year, the METI sets and announces the procurement price per kWh of renewable electricity for each type of electricity generation and its applicable period, then the price is periodically reviewed by an expert committee.

[38] The excessive investment in solar panels, which are typically installed in mountain areas, now causes forest destruction and consequential landslides damaging to the downstream residents. Some local governments are recently seeking to tax these solar panels so as to discourage unchecked development and to finance disaster prevention. Such local tax initiatives must get the approval of the Minister of Internal Affairs before taking legal effect. As of fall 2022, such approval is suspended, as the Minister considers that a further discussion between the local government and the potential taxpayers (solar power generating business owners) is due.

to increase supply during periods when electricity is often in short supply (i.e., the market prices are high). The fixed price in the FIT regime gives no incentive for businesses to invest in additional facilities (such as storage batteries) to cover the supply shortage in such' peak time', while the FIP gives such incentive, as the premium is added on the already high price (due to the tightness of the electricity market). It is expected to control the ever-increasing FIT surcharge (hence the burden on businesses and households) by rationalizing the incentive structure.

## 5. Policy Challenges for Japan

Japan has been reluctant to introduce a significant level of carbon taxes due to political resistance backed by international competitive concerns. Due to a modest tax burden, Japan has not so far experienced legal and social resistance against the environmental fiscal policies, as was the case with other jurisdictions such as ‘Gilets Jaunes’. Nevertheless, such a 'soft' approach kept Japan’s industry and society from taking a necessary transformation toward the approaching zero-carbon era. Japan is finally heading toward a more active deployment of environmental taxes or the carbon pricing mechanism. In that course, however, we have to address three difficulties; the first one is common to all the countries, while the latter two are idiosyncratic to Japan.

The first challenge is how to bring desirable effects of environmental taxes while mitigating their adverse distributive effects on low-income households. The key seems to be the tax-price elasticity. Where alternative (eco-friendly) technologies and activities are expensive or otherwise difficult (i.e., tax-price elasticity is low), imposing environmental taxes does not necessarily achieve behavioral changes (emission reduction). Rather, it would end up with an increased tax burden on taxpayers (firms and households),[39] which would give rise to distributive concerns such as the fuel poverty problem (and political resistance). For this reason, we believe that the negative incentives via environmental tax need to be pursued in tandem with the diffusion of alternative technologies encouraged by regulations and subsidies. The introduction of the FIT regime, which sought to increase the supply of renewable energy and lower its price, was consistent with this principle. However, it is difficult to put this principle into practice, as the recent legislative struggles suggest.

The second challenge is how to escape from the path-dependency trap. Even eleven years after the Fukushima Nuclear Disaster, Japan's energy policy has still been partly paralyzed, as we cannot reach a national decision on the treatment of nuclear power. In the short run, nuclear power might give a quick panacea and 'cheaply' achieve $CO_2$ emission reduction, but this would bring us another mid-long term environmental challenge of nuclear wastes, let alone the potential of another disaster. This indecisive attitude is dragging down measures to promote renewable energy. Indeed, renewable energy development has been delayed due to various difficulties, including inefficient investment, the resistance of existing power companies to the connection of renewable power suppliers to the transmission network, and conflicting interests against the expansion of renewable energy plants. As a result, Japan's low carbon price elasticity means that measures to strengthen environmental taxes to raise the price of carbon and

[39] For example, in rural areas without public transportation and whose income levels tend to be low, the enhanced tax on fuel is more likely to result in an increased burden on households than a decrease in fossil fuel use, or rural inhabitants must accept a significant decline in living standards due to reduced mobility. We cannot reasonably expect a drastic change in behavior unless electric vehicles become more affordable and feeding stations become more accessible in rural areas.

encourage investment to increase carbon productivity will mean a higher tax burden for companies and households rather than emission reductions and will likely invite political resistance. It will be necessary to resolve the bottlenecks concretely.

Another challenge that Japan faces is its shrinking population. Especially in depopulated rural areas, public transportation can no longer support the population, and the dependence on automobiles is rather increasing. Unless electric vehicles become dramatically affordable and the vehicle-electricity supply infrastructure is improved (which is also difficult in rural areas), the modal shift will be delayed, emission reductions in the transportation sector will not progress, and political resistance to fuel price hikes due to fossil fuel taxation is likely to intensify. Policies that encourage the concentration of people in urban areas will also be needed, though it is in tension with individual freedom of movement. Policy innovations that cover a wide range of areas will be necessary. The biggest challenge is whether a win-win scenario can be created. Investment in a new industrial structure that responds to global warming will revitalize Japan's stagnant economy and society with a declining birthrate and an aging population.

# On the Today's Law of Criminal Investigation in Japan: An Overview

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## I. Public Authorities Entitled to Carry Out Investigations and Private Prosecution System in Japan

In Japan, Japanese criminal procedure law (from now on JCPL) grants investigative authorities to judicial police (art. 189II of JCPL) and public prosecutors (art. 191I). Under the public prosecutor's supervision, the public prosecutor's assistant officer also can carry out an investigation. And they have special units in their organization for exceptional cases which require expertise. For example, the Japanese national police agency has a special department for cybercrime (it is called as "サイバー警察局 saibā-keisatsu-kyoku[1]"), and the Japanese prosecutor's office has a special department (it is called 特別捜査部 or 特捜部 tokubestu-sousabu or tokusoubu[2]") for "economic crimes," including white-collar crime and corruption. Some statutes grant criminal investigative authority to other public officials, such as drug enforcement officers, coast guard officers, and labor standards inspectors, only for some particular offenses (art. 54 of narcotics and psychotropics control law, art. 14 of Japanese coast guard agency law, and art. 102 of Labor standards law).

The relationship between traditional police and drug enforcement office is collaborative, and they conduct joint investigations and exchange officers between them. There is no formal coordination system in Japan, but as always for Japanese public authorities, they communicate with each other, primarily via the exchange of their officers. But the number of these officers who can conduct special investigations is far smaller than traditional police[3], and most cases are investigated only by police and the prosecutor's office.

Since there is no private criminal prosecution system and the power to prosecution is monopolized by the public prosecutor (art. 247 of JCPL) in Japan, criminal investigation and prosecution authorities are monopolized by public authority.

The only exception to the monopoly is red-handed arrest. JCPL allows anyone to implement red-handed arrest (art. 213 of JCPL).

## II. Court's Authority to Acquire Evidence at the Investigation Stage or Its Controlling Activities in Relation to Evidence Examined by Other Entities

Since the adversarial system is adopted by JCPL, it is understood that the court cannot carry out criminal investigation on its own initiative, though the legal text seems to allow the court to initiate the investigation. However, on the request of the public prosecutor, the court can carry out an investigative interview with a witness when the witness, who obviously has the knowledge essential to prove a crime, refuses to be interviewed by the public prosecutor, public prosecutor's assistant, and judicial police

[1] *See* https://www.npa.go.jp/bureau/cyber/index.html
[2] *See* https://www.moj.go.jp/keiji1/kenji_m03
[3] The number of Japanese police officers is about 300,000 (national and local) https://www.npa.go.jp/hakusyo/h25/honbun/html/p6110000.html. The number of drug enforcement officers is only 296 https://www.ncd.mhlw.go.jp. The number of the coast guard is 14328 https://www.kaiho.mlit.go.jp/info/books/report2021/html/ninmu/ninmu21_01.html. The number of labor standards inspectors is 3018 https://www.mhlw.go.jp/bunya/roudoukijun/kantoku01/dl/r02.pdf.

officer (art. 226 of JCPL) or he/she may change his/her statement at trial (art. 227 of JCPL).

In Japanese criminal procedure, the warrant requirement is essential for the court to control investigative activities.

According to art. 33 of the Japanese constitution (herein after JC), except to red-handed arrest, public authorities must acquire a judicial warrant, which specifies his/her offense, in order to arrest a suspect. Based on this article, JCPL requires probable cause for normal arrest warrant (art. 199 of JCPL) and sufficient doubt for emergency arrest for limited felonies (art. 210 of JCPL).

Japanese constitution also requires a judicial warrant for search and seizure, which specifies the place and object of such activities and is based on probable cause (art. 35 of JC). According to this article, JCPL requires a judicial warrant for search, seizure, seizure with request for materializing, and compulsory inspection (art. 218 of JCPL).

According to the case law, if public authorities intentionally fail to obey the warrant requirement, the evidence acquired by the investigative activities which violate the requirement should be excluded from trial[4]. Therefore, the Japanese supreme court adopted so-called "exclusionary rule". But the evidence can be acquired from independent activities of illegal investigation is not necessarily excluded from trial[5].

Some scholars argue that the specification of the object described in the search and seizure warrant is not enough, especially for digital evidence, because there is no procedure designed for digital data, and only information media, including personal computers and smartphones, are subject to seizure. It means that once public authorities acquire a seizure warrant for information media, they can read, analyze, and use all the data contained in it without any supervision[6].

And since the court's interpretation of the scope of the warrant requirement is complicated and confusing, it is often very difficult to find that public authorities intentionally fail to obey the warrant requirement when new technologies, which may infringe privacy, are employed during the investigation. Some scholars also criticize this difficulty in applying the exclusionary rule because the rule is the primary legal device for judicial control over investigative activities[7].

In Japan, there is no procedural right to challenge the admissibility of evidence at the investigative stage for a suspect and their legal counsel. Only after the prosecution a defendant and their council can file a motion to exclude at trial or pre-trial procedure.

## III. Principles of Acquiring Evidence at the Stage of Investigation

As described in section II, the warrant requirement is a fundamental legal principle to control investigative activities, and both JC and JCPL describe the principle.

As well as warrant requirement, restriction over compulsory disposition is essential in JCPL. According to art. 197I of JCPL, compulsory disposition may not be employed unless special provisions, that have been established in JCPL, allow the authorities to conduct. And according to the case law of Japanese Supreme Court[8], compulsory disposition is an investigative measure which infringe the

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[4] *See* Judgement of Japanese Supreme Court 1978.9.7. *Keisha* 32-6-1327, Judgement of Japanese Supreme Court 2003.2.14. *Keisha* 57-2-121, Decision of Japanese Supreme Court 2009.9.28 *Keishuu* 63-7-868

[5] *See* Decision of Japanese Supreme Court 1988.9.16 *Keishuu* 42-7-1051

[6] *See* Tatsuhiko Inatani, PRIVACY PROTECTION IN CRIMINAL PROCEDURE-TOWARD DUE PROCESS ON DELIBERATIVE DEMOCRACY（『刑事手続におけるプライバシー保護–熟議による適正手続の実現を目指して』）(Kohbundo 2017), 339-341

[7] *See id.* at 33-35

[8] *See* Decision of Japanese Supreme Court 1976.3.16. *Keisha* 30-2-187

fundamental rights protected by JC, including right to privacy[9]. Therefore, if the employed measure is classified as compulsory disposition, then such measure is prohibited and illegal except the case where it is established by special provision in JCPL and authorities obey the provision during such investigation. According to influential commentaries, compulsory disposition should be placed under the warrant requirement based on the interpretation of JC[10], and if unwritten compulsory disposition is carried out, the fruit of such investigation should be excluded. And it is also argued that this principle of restriction over compulsory disposition is derived from art. 31 of JCPL, which generally protects due process for anyone in criminal procedure[11].

However, the distinction between compulsory dispositions and non-compulsory ones are often ambiguous and confusing, especially in the case where emerging technologies that may infringe privacy are employed by investigative authorities. Previously the special provision for compulsory inspection is applied to various investigative steps which utilize emerging technologies, because the definition of compulsory inspection is very broad (to recognize objects through the action of the five senses). However, in the case where police employed GPS ("Global Positioning System") for monitoring the activities of suspects, the Japanese Supreme Court didn't allow such activities under the normal inspection warrant and required the establishment of a novel special provision for controlling such activities[12]. This direction is welcomed in the sense that "abusive" applications of inspection provisions, which eventually relax the restriction over compulsory steps too much, finally ended. But the criterion for the distinction remains still very ambiguous and confusing. Therefore, some scholars argue that it is time to rethink about the legal structure for regulating investigative activities, which is well designed for reducing the risk of abuse or misuse of investigative authorities[13].

A right to access the evidence acquired by public authorities at the investigative stage is not assured in Japanese criminal procedure because of its adversarial character. Defendant and their council can only access the evidence through the disclosure process according to the provisions from art. 316-14 to art. 316-27 of JCPL. Defendant and their council can file the motion to disclosure based on the list of evidence possessed by the prosecutor (art. 316-14 II of JCPL). Therefore, after the prosecution, a defendant and their council can access the necessary evidence. And since the duration of pre-trial detention is limited (maximal 23 days in total) in Japanese criminal procedure (art. 203, 204, 205, and 208 of JCPL), and the right to appoint and access legal counsel for a detained suspect is assured by JCPL (art. 39 of JCPL) and JC (art. 34I of JC) as well as the right to challenge the probable cause of their detention (art. 82I of JCPL and art. 34I of JC). It is fair to say that in Japanese criminal procedure, the principle of the equal arm is largely secured.

While it is worth noting that in some pathological cases, investigators had caused serious problems in interrogating suspects, however, thanks to the introduction of mandatory recording during interrogation for serious offenses (art. 301-2) in 2019, in most cases, the right against self-incrimination (art. 38 of JC) and the right to remain silence (art. 311 of JCPL) of suspect seems now protected more appropriately than before.

In addition to the mandatory recording, introducing assistance of legal counsel during interrogation at the investigation stage has been a hot topic, but the opinions of specialists are still divided on this issue.

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9 *See* Judgement of Japanese Supreme Court 2017.3.15 *Keishuu* 71-3-13
10 *See* Inatani *supra* note 6, at 65-69
11 *See id.* at 280-300
12 *See* Judgement of Japanese Supreme Court 2017.3.15 *Keishuu* 71-3-13
13 *See* Inatani *supra* note 6 at 18-35, 85-94

In general, except in the case where emerging technologies or digital evidence matter as described above, the balance between probing truth and protecting the fundamental rights of suspects and defendants appropriately remains in Japanese criminal procedure.

In Japanese law, the self-incriminating transaction between suspects or defendants and the prosecutor is generally prohibited by the case law of the Japanese Supreme Court[14]. There exists a simplified procedure based on the confession of defendants for limited minor offenses (art. 291 of JCPL). If this provision is applied, the prosecutor doesn't need to obey strict rules of evidence, including hearsay rules (art. 320 II of JCPL), and many other relevant provisions are not applied (art. 296, 297, 300-302, 304-307, and 307-2 of JCPL). In the summary trial proceeding for obvious and petit offenses (from art. 350-16 to 350-29 of JCPL), based on the confession of the defendant, the court should immediately decide the case after a simple examination of evidence.

However, the simplified process is not popular in Japan, because in most cases court must examine almost all the evidence, and many defendants have the impression that they are not fairly treated compared to normal proceedings[15]. Even in the summary trial proceeding, the defendant must be assisted by legal counsel and can always file to motion which requires the court to refer the case to normal procedure. In fact, given the character of the summary process, the Japanese Supreme Court observes that the process does not induce false confession and does not violate the right against self-incrimination[16].

Generally, in Japan, the alternative procedure to the normal criminal trial proceeding is limited in terms of quantity as well as quality. Therefore, procedural rights protected in normal procedure and regulation over the investigation are not materially infringed.

## IV. Identifications of Risks of Violating Freedom in the Acquisition of Evidence by Law Enforcement Authorities

In JPCL, the risk of abuse and misuse of investigative authorities, which may infringe on free and open democracy, is regulated by the warrant requirement and special restriction over compulsory dispositions, as already mentioned in section III. And sting operation is allowed in limited situations where these measures are indispensable and don't violate the target's will materially[17].

Investigative steps acquiring biological evidence from the body of the suspect are also strictly regulated by the warrant requirement. For example, according to the case law, compulsory disposition for acquiring urine from the body of the suspect is only available as the ultimate measure, and the warrant for this procedure can be issued only under the condition that this warrant should be executed under the supervision of a physician[18].

If these regulations are violated intentionally by public officials, then evidence acquired by the illegal investigation is excluded, or the charge against the defendant is dismissed by the court.

Regarding biological evidence, there is an important exception to the warrant requirement, which is collecting the suspect's waste disposed of in a public place[19]. In this case, law enforcement officers can use DNA samples contained in such a waste for DNA testing and can also register the result on the

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14 *See* Judgement of Japanese Supreme Court 1995.2.22 *Keishuu* 49-2-1
15 *See* Tadashi Sakamaki, Criminal Procedure (2nd ed.)（『刑事訴訟法　【第 2 版】』）(Yuhikaku 2020), 451
16 *See* judgement of Japanese Supreme Court 2009.7.14 *Keishuu* 63-6-623
17 Decision of Japanese Supreme Court 2004. 7.12. *Keishuu* 58-5-333
18 *See* judgement of Japanese Supreme Court, 1980.10.23 *Keishuu* 34-5-300
19 *See* judgement of Japanese Supreme Court, 2008.4.15 *Keishuu* 62-5-1398

DNA database without meaningful regulation of the statute. These activities are regulated only by the inner regulation of the police. Therefore, some argue that the unregulated situation violates the principle of restriction over the compulsory dispositions and due process because JCPL and JC obviously require the regulation of statute enacted by the legislator for compulsory dispositions that risk free and open democracy[20].

So far in Japan, scientific evidence is not privileged in the fact-finding process, given the cases where suspicious scientific evidence eventually led to the conviction of the innocent[21]. Of course, reliable scientific evidence can be introduced to the trial, including DNA testing, but Japanese judges are generally very careful to review its admissibility, which requires the examiner's competence, scientific accuracy and reliability for the method, and appropriate procedure for scientific examination[22].

And in some cases, scientific experiments and examinations, carried out by experts appointed by defense counsel, finally proved the defendant's innocence. Most important examples are found in child abuse cases where the scientific reliability of so-called shaken baby syndrome is denied repeatedly by many courts[23].

In Japan, some critical dispositions are only applicable for serious offenses, including emergency arrest (art. 210), wire-tapping (art. 212-2 of JCPL and Interception of Communication for Crime Investigation Act), and GPS tracking[24]. These investigative steps seem well-regulated, at least when law enforcement officials acquire evidence. However, as mentioned in sections II & III, investigative efforts for digital proof and the utilizing emerging technologies are still not regulated well.

## V. Inviolable boundaries in the acquisition of evidence by law enforcement authorities

Article 36 of JC prohibits any torture conducted by public officials. This article is established in light of the worst experience of abuse of police power during WWII. Therefore, any investigative measures classified as torture are strictly prohibited, and the fruits of such activities are never allowed in the trial, with no exception.

And according to the influential commentary, the investigative steps which shock the consciousness should be treated as torture. Therefore, investigative steps which invade or risk the body or health of a suspect, like a stomach pomp[25], should be treated as torture[26] in Japanese law.

## VI. Conclusion

As explained above, Japanese criminal procedure law generally strikes a good balance between probing truth and protecting the fundamental rights of suspects and defendants in the course of acquiring evidence.

However, some exceptions exist. Notably, investigative steps for digital evidence are problematic because Japanese criminal procedure law does not have a particular disposition for digital data, and

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[20] *See* Inatani *supra* note 6, at 330-333
[21] *See* https://www.npa.go.jp/bureau/criminal/sousa/torishirabe/houkokushogaiyou.pdf
[22] *See* Sakamaki, *supra* note 15, at 504-506
[23] *See, e.g., the judgment* of Osaka High Court 2019.10.25, Osaka High Court 2020.1.28, and the decision of Osaka High Court 2020.2.6.
[24] *See* Judgement of Japanese Supreme Court 2017.3.15 *Keishuu* 71-3-13
[25] *See* Rochin v. California, 342 U.S. 165 (1952)
[26] *See* Masahito Inoue, Compulsory Disposition and Non-Compulsory Disposition (new ed.)（『強制捜査と任意捜査　【新版】』）(Yuhikaku 2014), 12

information media is still the object of seizure. The Japanese government now tries to digitally transform its whole administrative structure, and criminal justice is no exception. In fact, the legislation committee of specialists ("**法制審議会**" Hōsei-Shingikai) now starts to reflect on the digital transformation of criminal procedure law[27], but the discussion is very primitive, and most of the current provisions regulating search and seizure will remain[28]. These outdated provisions should be amended as soon as possible given the risk of dragnet search of personal data because now smartphone contains digital data which relates to all aspect of our daily activities and may reveal any sensitive information. If the purpose of the warrant requirement is the prohibition of general search and seizure, then the current practice of seizure, which targets informational media as a whole instead of particular digital data, should be regulated more appropriately.

Another problem is regulating investigative activity after the acquisition of personal information. There is no meaningful regulation for police and prosecutor when they possess, analyze, and use personal data once it is acquired. But this unregulated situation, including the situation surrounding DNA testing and the DNA database, maybe a door to the "hyper-panopticon" in the digital era and serious risk of abuse and misuse of personal data.

As mentioned above, it seems a critical timing to rethink the legal structure for regulating investigative activities, which is well designed for reducing the risk of abuse or misuse of investigative authorities, through not only legal devices but also technical devices like AI and IoT, which allows us to monitor the activities of investigators and track the journey of evidence.

And in order to make the legal system possible to accompany with radical development of informational technologies, including AI, IoT, and other emerging technologies, we need a more dynamic legal system which appears through fruitful collaboration between judicial body and legislator based on a more politically sensitive constitution than now[29].

[27] *See* https://www.moj.go.jp/shingi1/housei02_003011_00002
[28] *See* Ministry of Justice of Japan, the Summary Report of the Special Study Group for Utilizing Informational Technologies in Criminal Procedure (2022), https://www.moj.go.jp/content/001368581.pdf
[29] *See* Inatani, *supra* note 6, at 339-43

# Domestic Social Structures That Contribute to the Realization of Sustainable Development: Perspectives from the State of Distributive Justice in Japan[1]

**Kanami ISHIBASHI, Yasue MOCHIZUKI,**
**Akiko TOI, Koichi OWASHI, Yuko OSAKADA,**
**Noriko OKUBO and Marie TOMITA**

**Chapter**



## I. Introduction: Sustainable Development and Distributive Justice*

Half a century has passed since the adoption of the Stockholm Declaration on the Human Environment in 1972. During this period, international regimes for environmental protection have been greatly strengthened. Principles and concepts of international law conducive to environmental protection have been developed, and many multilateral agreements have been concluded.

One of the concepts that has developed significantly is definitely 'sustainable development'. And there can be no dispute that this principle is now at the very core of international environmental law. Professor Barral, who is undoubtedly the foremost scholar on sustainable development, has stated in this regard, 'The rise of sustainable development as a central theme of modern international legal discourse has occurred over an extraordinarily compact period of twenty to thirty years at the end of the 20th century, and it is to this day undeniably dominating legal thinking in the fields of economic, social and environmental relations'.[2]

On the other hand, the definition of this principle remains ambiguous, and its place in international law and its implementation are not well established.

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[1] This paper is based on the report Yasue MOCHIZUKI, Kanami ISHIBASHI, Akiko TOI, Koichi OWASHI, Yuko OSAKADA, Noriko OKUBO and Marie TOMITA 'Distributive Justice and Sustainable Development: Japan', which was submitted to the International Law Session of the General Congress of the IACL in 2022. The revisions have been made in the context of the state of distributive justice in Japan and its impact on the realization of sustainable development.

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[2] Virginie Barral, 'The Principle of Sustainable Development,' in Ludwig Krämer and Emanuela Orlando, eds., *Principles of Environmental Law*, Edward Elgar 2018, 103-114.

As for definitions, the Brundtland Commission report's definition of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[3] is constantly cited. And even after three summits, the Rio in 1992, the Johannesburg in 2002, and Rio+20 in 2012, attempts to further clarify or elaborate this definition have not been successful. For example, the ILA 2002 New Delhi Declaration's 'Principles of International Law on Sustainable Development' provided a comprehensive framework. And many scholars have analyzed the content of sustainable development respectively. However, the reality is that it is still abstract and lacks clarity. For these reasons, most observers agree that the status of 'sustainable development' as customary international law has not yet been established.

On the other hand, it does not follow, then, that sustainable development is not implemented on international or national dimension. In this sense, the ambiguity of the definition has not directly affected implementation. Nevertheless, the implementation situation will still be very different, depending on how the essential elements of sustainable development are to be viewed. Here, following Professor Barral's way of perceiving sustainable development, three elements can be identified: (1) intra-generational equity, (2) inter-generational equity, and (3) integration. According to her, pursuing intra-generational equity and inter-generational equity independently will not lead to sustainable development. Only when intra-generational equity and inter-generational equity are properly integrated, she says, development undoubtedly will be sustainable.[4]

If so, to achieve sustainable development within a country, it is necessary to build a social structure that ensures the adequate realization of each of its components, intra-generational and inter-generational equity, and the proper integration of intra- and inter-generational equity.

The purpose of this paper is to examine how these three components are achieved and integrated in the Japanese social structure, and to understand the state of achievement of sustainable development in Japan and its challenges. Based on the premise that intra-generational and inter-generational equity are components of the more fundamental concept of 'distributive justice', legal systems and policies that realize distributive justice in practice are included in the evaluation as expressions of distributive justice, even when intra-generational and inter-generational equity are not directly mentioned in their wording.

In Chapters 2 and 3, we will examine sustainable development and distributive justice in Japan, followed by a discussion of the status of intra- and inter-generational equity in Japan in Chapters 4 and 5, and in Chapter 6, we will examine whether indigenous peoples in Japan receive consideration in terms of intra- and inter-generational equity. Chapter 7 examines whether distributive justice, including that for non-human entities, is achieved within the social structure. Environmental justice, one of the ultimate forms of distributive justice, is generally considered to be based on the idea that humans are the subjects of protection and enjoyment of the environment (so-called 'anthropocentrism'). In this paper, however, we take the view that distributive justice should be extended to non-human entities (so-called 'ecocentrism'), and in this Chapter 7, we attempt to examine the social structure of Japan from this perspective as well. Chapter 8 examines the manifestations of Japan's distributive justice in its external relations, and Chapter 9 points out the implications of distributive justice considerations in the achievement of the Sustainable Development Goals (SDGs), which is also important from the perspective of this paper since the implementation of the SDGs will affect the realization of sustainable development. Through these considerations, we draw conclusions about how distributive justice in Japan is contributing to or posing challenges for the realization of sustainable development.

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[3] World Commission on Environment and Development, *Our Common Future* (Montreal 1987), 51.

[4] Supra note 2, 107-108. See Also, Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *European Journal of International Law* 377, 400.

## II. Sustainable Development in Japan*

### 1. Concept

In the Japanese legal system, reference to sustainable development can be found in (a) legislative provisions, (b) policy documents and (c) others. There is no mention of sustainable development in the Constitution of Japan, and no court judgements indicating sustainable development as ground in the jurisprudence.[5] In Japanese law 'sustainable development' exists as a legal principle, a framework for action or a legal objective, but its format is unclear. 'Sustainable development' does not exist as a prescriptive rule for adjudication. In this regard, it can be said that the implementation of sustainable development is supposed to be ensured by administrative rather than judicial bodies. Although there is no administrative body dedicated to sustainable development, in the context of the implementation of the SDGs, the SDGs Promotion Headquarters has been established in the Cabinet.

The most important law referring to sustainable development is the Basic Act on the Environment, Act No.91 of 1993. Article 4 of the Act stipulates that, '[e]nvironment must be conserved with the aim of building a society in which a healthy and productive environment is sustained and sustainable development is achieved by promoting sound economic development with low environmental loads; by reducing the environmental loads caused by socio-economic and other activities as much as possible; and by taking an voluntary and proactive action for environmental conservation based on the fair allocation of roles between all people; and with the aim of preventing a hindrance to the environmental conservation based on the broad-based scientific knowledge'. The wording, 'a society in which…sustainable development is achieved' is in line with the sustainable development in Principle 4 of the Rio Declaration on Environment and Development (Rio Declaration). 'Sustainable development in this context is an integrated concept taking into consideration all environmental, economic and social sustainability', and intends to integrate sustainable development into domestic law.[6]

Sustainable development has been incorporated into other Basic Acts, or laws that set forth the objectives and principles of policy or system. As of November 2021, of the 53 Basic Acts, 18 include provisions on sustainability such as in their objectives and concepts.[7] However, these references take many forms, and not many incorporate the concept of sustainable development as found in international law, integrating the three factors of environment, economy and society as does the Basic Act on the Environment.[8] For example, the Basic Act on Ocean Policy, Act No. 33 of 2007 states that the

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[5] Academic research in Japan on sustainable development has been conducted from legal, political (policy), economic and philosophical perspectives. (a) 'The Significance and Status of Sustainable Development in Japanese Law: From the Perspective of Environmental Sustainability' and (b) 'Legal Challenges for Sustainable Development' both by Professor Noriko Okubo, one of the co-authors of the current study, may be referred to as representative works in the legal field. Her articles examine how sustainable development is incorporated into the Japanese domestic legal system, as well as the issues it faces and as such they may be of most interest to the current study.

[6] N.Okubo, 'The Significance and Status of Sustainable Development in Japanese Law: From the Perspective of Environmental Sustainability' (2015) 81 *The Sociology of Law* 140, 151.

[7] N.Okubo, 'Legal Challenges for Sustainable Development,' (2021) 49(4) *Environmental Information Science* 8, 12. The Basic Law on the Formation of a Digital Society was passed in 2021, which has no provision on sustainable development.

[8] Supra note 6, 143. According to Okubo, Basic Acts which incorporate sustainable development equivalent meaning to Basic Act on the Environment are limited to following laws: Basic Act on Establishing a Sound Material-Cycle Society, Act No.110 of 2 June 2000 (Article 3), Food, Agriculture and Rural Areas Basic Act, Act No.106 of

international framework on 'the sustainable development and use (of ocean)' under international law (Articles 1 and 28) will be followed, but it does not use that particular term, referring to 'sustained development and use' instead. The wordings suggest that the Act provides for the 'sustainable use' as does the Basic Act on Biodiversity among others.[9]

The category (c) others may include ordinances legislated by local governments. Some local government ordinances refer to sustainable development, but their numbers are not many. Sustainable development may be mentioned in (1) basic concepts and development ordinances (Osaka City, Sapporo City, etc.), (2) ordinances on education for the promotion of sustainable development (ESD) (Okayama City, etc.), (3) ordinances on tourism (Yamaguchi Prefecture, etc.), (4) ordinances related to promotion of small and medium-sized businesses (Yokohama City, Aomori City, etc.), (5) ordinances related to promotion of agriculture (Nanporo Town), (6) ordinances on the protection of biodiversity and wildlife (Okayama City, etc.), (7) ordinances related to renewable energy (Hachijo Town, etc.) and others, but they all remain mere references as part of the objectives, goals and basic concepts of the ordinances. As many local governments today engage in initiatives on SDGs, there are numerous ordinances related to SDGs.

It is noteworthy that none of these incorporations of sustainable development lack a definition of what sustainable development is. In other words, Japan does not have its own definition of sustainable development in its law. The Basic Act on the Environment is legislated based on the 'sustainable development' advocated by the Brundtland Commission in 1987 and formulated in the 1992 Rio Declaration,[10] but does not use the term 'sustainable development' itself, speaking of 'a society in which a healthy and productive environment is sustained and sustainable development is achieved by promoting sound economic development with low environmental loads' instead.

But on the other hand, it is unclear whether the legal system reflects the concept of 'sustainable development' as synonymous with the concept of 'sustainable development' under international law after detailed deliberations on the definition of the concept and its contents (various principles constituting sustainable development) and its qualitative transformation. As mentioned above, even the Basic Act on the Environment, which is understood as clearly reflecting the idea of 'sustainable development' as generally formulated in the international community, adopted the wording, 'a society that can develop in a sustained manner' and its contents have been changed in the routine amendments of the Basic Environment Plan.[11] The term, 'a society that can develop sustainably' may be also used. Also, the Basic Act on Ocean Policy recognizes the 'sustainable development' under the United Nations Convention on the Law of the Sea as its objectives, but uses the term 'sustained development' for its domestic goals, perhaps indicating that an incorporation of 'sustainable development' under international law is being avoided. There are also other laws in the country, as represented by the Basic Act on Biodiversity that use the term 'sustainable use'. This term is likely to have been influenced by the concept of sustainable development under international law, but as there is also a concept of 'sustainable use' in international law, it is more likely that this has had a more direct influence.

16 July 1999 (Article 4), Forest and Forestry Basic Act, Act No.161 of 9 July 1964 (Article 3), Basic Act on Energy Policy, Act No.71 of 14 June 2002 (Article 1), Basic Act on the Advancement of Utilizing Geospatial Information, Act No.63 of 30 May 2007 (Article 3).

[9] Ibid., 144.

[10] Following the definition of 'sustainable development' proposed by the 'UN Commission on Environment and Development' (Brundtland Commission) in 1987, the concept of 'sustainable society' has been the basic direction set out in the 'Basic Environment Act' (Act No.91 of 1993) and subsequent Basic Environment Plans. The Basic Environment Plan, Cabinet decision on 17 April 2018.

[11] The translation of the phrase is translated by the author, which is quite true to the original Japanese text. For English legal texts translated by the Japanese government, see the internet site 'Japanese law Translation'.

**2. Case law adjudicating based on sustainable development**

There is no domestic case law adjudicating on sustainable development. In Japan, sustainable development is a legal principle, a legal framework or a legal objective and not a prescriptive rule, and therefore not recognized as being justiciable or applicable in a court. Sustainable development has been brought up in arguments in some cases related to environment, but it has never been invoked as grounds for judgement.

**3. Linkages between Sustainable Development and Distributive Justice in Japan**

Because the manner in which the concept of sustainable development appears in Japanese laws, its definition and explanations are unclear, it may be difficult to derive a general link between sustainable development and distributive justice in Japan. However, it should be pointed out that there is an important example of aspiring simultaneously to intra-generational and inter-generational equity which can be considered as components of distributive justice in a law referring to sustainable development. For example, Article 3 of the Basic Act on the Environment stipulates that '[t]he environment must be conserved appropriately so that the current and future generations can enjoy the blessings of a healthy and productive environment, and the environment that is the basis of human survival can be sustained into the future'. The Basic Environment Plan, as adopted by the Cabinet Decision on 16 December 1994 also states, that '[i]t is the present generation's obligation to pass on to the future generations a well conserved and healthy environment, both globally and domestically. This obligation applies to all humankind. As for Japan, we must change our society to a sustainable one that generates little burden on the environment, while at the same time promoting international activities for conserving the global environment'.

## III. Distributive Justice in Japan*

**1. Concept**

The concept of distributive justice in the Japanese legal system has been fostered in relation to Article 25 of the Constitution calling for a welfare State (*Sozialstaat*).

First, Article 25 paragraph 1 of the Constitution ensures a minimum standard of wholesome and cultured living as a right to life, and its second paragraph provides for the State's responsibility related to the improvement of social welfare, social security and public health. Therefore, distributive justice is discussed mainly in relation to social welfare and social security,[12] and freedom of business (Articles 22 and 29) which form the basis of the freedom of economic activities is interpreted as allowing active and policy-based regulation by the government under the vision of the welfare State for the purpose of eliminating inequality. However, these discussions are not directly linked to just distribution of environmental goods or services. A right to environment has been advocated as a right of all persons to enjoy and control a healthy environment as a principle to eliminate unfair distribution of environmental

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12 Y.Shionoya, Y.Sugimura and R.Goto (eds), *Fukushi no Kokyo Tetsugaku (Public Philosophy on Welfare),* Tokyo University Press 2004; Y.Hiroi (ed), *Kankyo to Fukushi no Togo Jizoku Kanou na Fukushi Shakai no Jitsugen ni Mukete (Integration of Environment and Welfare: Towards the Realization of Sustainable Welfare Society)*, Yuhikaku 2008.

risks.[13] In an academic discussion, the idea of a right to environment is understood as being recognized based on Article 25 and the right to pursue happiness under Article 13 of the Constitution. In the context of sustainable development discourse, it has been pointed out that distributive justice should be understood as a normative concept with 'both vertical and horizontal expansion' including intra-generational and inter-generational equity.[14]

**2. Realization of Distributive Justice**

Consideration of the principle of distributive justice in Japanese law is primarily left to the discretion of the legislature and the executive, while the courts remain cautious in applying the legal principle.

As noted earlier, the right to a minimum standard of living under Article 25 of the Constitution, the legal basis of distributive justice, is interpreted as being merely a declaration of political and moral responsibility of the State, and not as a recognition of a concrete right of claim for individuals.[15] Claims regarding specific benefit standards have been admitted at times,[16] but even in those cases, the courts tend to be reluctant to determine on the constitutionality of the relevant legislative and administrative acts, and broad legislative and executive discretion has been recognized.[17]

A right to environment has been argued as a right to claim injunction to remove or prevent obstruction, but the courts have not indicated their position on whether this may constitute grounds for claims for injunction under substantive law.[18]

The realization of distributive justice in Japan is not through the application of law by the judiciary, but through Japan's environmental policy, which is led by the executive branch (including cases where laws are enacted at the initiative of the executive branch).

Environmental policy in Japan has sought to ensure rebalancing of unfair distribution of environmental burdens on an ad hoc basis, mainly for the purpose of prompt response to severe pollution.

Prior to the enactment of the Basic Act on the Environment, Act No.91 of 1993, rectification of unequitable distribution was sought through (a) strengthening of government regulatory powers by enactment of anti-pollution laws, and (b) establishment of principles of remedies for victims through jurisprudence. Regarding (a), in 1970, the provision on the need for harmony between environmental conservation and economic development, which in effect favored the latter, was deleted from the Basic Law for Environmental Pollution. The Law is made clear that its objective was the prevention of damage to human health and living environment. With the amendment of related laws and regulations, the regulatory powers of the government were strengthened. As for (b), the tort law model was modified based on justice and equity to the extent that the victims were provided effective remedies through the case laws involving the four major diseases caused by pollution. The 'principle of providing remedies to victims without establishing liability' was included in the Act on Compensation for Pollution-related Health Damage, Act No.111 of 5 October 1973, and led to the introduction of the no-fault liability for

[13] Study Group of the Osaka Bar Association on the rights to environment, 'Kankyoken Kakuritsu no Tame no Teigen'(Recommendations towards the establishment of the rights to environment, 1973) (2006) 4 *Readings on Environment* 291, 310.

[14] T.Kira, 'Sedaikan Seigiron: Shourai Sedai Hairyogimu no Konkyo to Hani' (Theory on the inter-generational justice: the ground and the scope of the obligation to consider future generations) (2006) 119 (5/6) *Kokka Gakkai zasshi: The journal of the Association of Political and Social Science* 383.

[15] Supreme Court Judgement, 24 May 1967, Case (Gyo Tsu) No.14 (1964) [Asahi Case].

[16] Supreme Court Judgement, 7 July 1982, Case (Gyo Tsu) No.30 (1982) [Horiki Case].

[17] Ibid.

[18] Sendai District Court Judgement, 31 January 1994, Case (Wa) No.1852 (1981) [Onagawa Nuclear Power Case, first instance].

health damages in the Air Pollution Control Act No.97 of 10 June 1968 as well as the Water Pollution Prevention Act, Act No.138 of 25 December 1970.[19]

Since the enactment of the Basic Act on the Environment in 1993, the rebalancing of unfair distribution of environmental burdens has been systematically ensured based on the fundamental principles of environmental law.

For example, the Basic Act on the Environment prescribed the polluter-pays principle (Article 8 paragraph 1 and Article 37), and other specific laws related to air, water quality, soil contamination, waste and recycling among others were adopted based on the same principle. The precautionary principle contributing to the avoidance and reduction of environmental risks has also been accepted as principles of environmental law.[20] However, it is unclear whether this could develop into concrete standards for determining enforcement of adjudication instead of remaining mere legislative guidelines.

**3. Functions and Limits of Distributive Justice**

An important role of distributive justice in terms of environmental protection is to incorporate consideration for vulnerable populations and communities into environmental law and policy. In the so-called NYMBY litigations, for example, in which constructions of waste processing, nuclear power plants and other facilities are disputed, requests for injunctions have been admitted based on personality rights,[21] and balance between the demands of equity and justice in environmental disputes is ensured through mitigating the plaintiff's burden of proof based on equity between asymmetrical parties, namely the neighboring residents and operating entities, that may otherwise be subject to unequal power relations.[22]

However, in general, the Japanese legal system does not envision ensuring a balance between justice and the environment based on typical categorizations of vulnerability, such as race, gender, indigenous peoples, and poverty (For distributive justice with respect to indigenous peoples, see VI). Thus, there are limits to the extent to which vulnerable peoples and communities can seek to achieve distributive justice in terms of environmental protection. Achieving distributive justice through litigation is particularly difficult. There are three factors impeding access to justice for environmental harm in Japan.

First of all, 'objective litigation' which is an action filed by a person or organization based on their status that is irrelevant to their personal legal interest, is not permitted in the area of environment.

Secondly, the scope of standing (locus standi) is narrowly construed and limited to actual physical harm including harm to life. On the threat to violation of life and health posed by climate change, individuals are not recognized as having standing, as the protected interest 'should be pursued in the overall policy as part of the general public interest'.[23] As 'objective litigation' is not recognized, public interest organizations cannot become plaintiffs, either.

Thirdly, the courts take a 'judicial passivist' approach and have a tendency to avoid judicial decisions, partly because of its closed nature of judicial system, emphasizing legal stability.

Moreover, the realization of distributive justice through policy is also not institutionally ensured. It

[19] Notice on enforcement of the Act on Compensation for Pollution-related Health Damage (related to expense sharing) (Kan Ho Ki) No.108 (issued on 21 October 1971); Article 25 of the Air Pollution Control Act, Act No.97 of 10 June 1968; Article 19 of the Water Pollution Prevention Act, Act No.138 of 25 December 1970.

[20] Article 3 of the Basic Act on the Environment; The Basic Environment Plan (revised in 2006/2012), Article 4 of the Basic Act on Biodiversity.

[21] Supreme Court Judgement, 7 July 1995, Case (O) No.1503 (1992) [National Rote 43 Case]; Kanazawa District Court Judgement, 24 March 2006 [Unit 2 of the Shiga Nuclear Power Injunction Case].

[22] Supreme Court Judgement, 29 October 1992, Case (Gyo Tsu) No.133 (1985) [Ikata Nuclear Power Case].

[23] Osaka District Court Judgement, 15 March 2021, Case (Gyo Tsu) No.184 (2018) [Kobe Climate Case].

is highly doubtful that environmental policies are designed to ultimately achieve distributive justice.

In fact, in the implementation of energy policy, there are cases in which the balance between environment and justice is suspect.

(1) To ensure distributive justice for regions where renewable energy infrastructures are to be introduced, submission of the residents' views is permitted in the environmental impact assessment. Other measures are also taken, such as reginal zoning system and modifications of licensing requirements under the Act on Promotion of Global Warming Countermeasures amended in May 2021, but it remains to be seen whether the newly introduced mechanisms would effectively rectify the risk imbalance among regions.[24]

(2) For the disposal of high-level radioactive waste, the Designated Radioactive Waste Final Disposal Act explicitly requires geological disposal stating that it is 'important from the perspective of generational responsibility' and sets forth procedures for applications from local municipalities. But without serious public discussions on the issue, procedures to introduce disposals are proceeding in underpopulated areas without sufficient guarantees to ensure procedural justice.[25]

### 4. Concerned Situations of Distributive Justice in Japan

There is concern that Japanese law is not up to international standards with respect to the realization of distributive justice. This is deeply related to the fact that distributive justice in Japan has been fostered without the influence of international law, or has developed while avoiding its influence.

Prior to the Basic Act on the Environment, there was hardly any influence of international law on distributive justice in domestic law. The principle of provision of remedies to victims was developed in the domestic legal process, and is based on the principles of justice and equity inherent in private law.

In Japan, the right to environment is recognized based on the Constitution in academic discourse, but this has not been established in the jurisprudence. Influence of international law is quite limited, even when recent developments are taken into account.

## IV. Distributive Justice in Japan: Aspects of Intra-generational Equity*

Distributive justice in Japanese law, as already mentioned, finds its source in the demand of the social state in Article 25 of the Constitution. Therefore, intra-generational equity, which constitutes distributive justice, can naturally be based on Article 25 of the Constitution as its source.

How is this demand embodied in the environmental protection aspect?[26]

The right to pursue happiness under Article 13 and the right to a minimum standard of living under Article 25 of the Constitution are considered to be the basis of 'the right to environment' in Japan (Article 13 for the civil right aspect and Article 25 for the social right aspect),[27] which may also be considered a reflection of the principle of intra-generational equity.

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[24] There are, however, local government ordinances that contribute to this matter. See the cases of Iida City, Nagano Prefecture Ordinance on the sustainable local development by introducing renewable energy (2015); Anan City, Shiga Prefecture Ordinance on the local natural(renewable) energy (2012).

[25] K.Homma, 'Sustainability and democracy for energy: using applying for research "nuclear waste in Suttsu Town"' (2021) 12 *The Annual journal of Graduate School of Economics, Hokkai-Gakuen* 1, 10.

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[26] Other than those related to environmental protection, there are provisions in that substantially reflect the principle of intra-generational equity using constitutional provisions as grounds. For example, in the area of taxation, 'the principle of equity in tax burden' is taken into consideration, based on the equality principle under Article 14 of the Constitution. This may be considered to be a form of intra-generational equity recognized in the Japanese laws.

[27] N.Ashibe, *Constitutional Law, 6th ed*. Iwanami shoten 2016, 271-272.

Articles 3 and 4 of the Basic Act on the Environment may also be given as examples of reflections of the principle of intra-generational equity in law.

**1. Distributive Justice to Achieve Sustainable Development**

The principle of intra-generational equity is legally recognized in Japanese law in the context of achieving sustainable development. For example, Article 3 of the Basic Act on the Environment stipulates that '[t]he environment must be conserved appropriately so that the current and future generations can enjoy the blessings of a healthy and productive environment…' and recognizes that intra-generational equity along with inter-generational equity are principles of environmental conservation. In Article 4, the Act further notes in the context of achieving sustainable development, '[e]nvironment must be conserved with the aim of building a society in which a healthy and productive environment is sustained and sustainable development is achieved…by taking a voluntary and proactive action for environmental conservation based on the fair allocation of roles between all people…' clearly stating that it seeks to achieve sustainable development ('a society in which…sustainable development is achieved') through intra-generational equity.

Intra-generational equity is reflected in Articles 3 and 4 of the Basic Act on the Environment based on the Rio Declaration of 1992, and this incorporation is fully influenced by international law. And giving further concrete content to this framework is the polluter-pays principle, which contributes to the allocation of environmental goods and resources, and distribution of environmental burdens (conservation, management, restoration, compensation).

The polluter-pays principle became established as the global environment issue attracted attention and pollution became a problem in Japan after the 1960s. In 1973, the Act on Compensation for Pollution-related Health Damage, Act No. 111 of 5 October 1973 was enacted which prescribed that the polluters bear the costs. Laws related to environment since then have recognized the polluter-pays principle. For example, in a dispute involving the rescission of a decision to bear the costs of pollution prevention for dioxin contaminated soil, the judgement clarified the relationship between the land in question and the cost bearer, and determined who would bear the costs to what extent.[28]

The core of the legal frameworks in the Japanese legal system for allocation of environmental goods and resources as well as environmental burdens (conservation, management, restoration, compensation) mentioned above is the polluter-pays framework.[29] This framework is being further strengthened today. The development of the Extended Producer Responsibility (EPR) may be noted as an important trend in particular. According to the definition of the OECD, it is 'a policy approach under which producers' responsibility – financial and/or physical – is extended to cover the lifecycle of the product to the post-

[28] Tokyo District Court Judgement, 26 December 26 2019, Case (Gyo Tsu) No.645(2014).

[29] The main frameworks in the Japanese legal system for the allocation of environmental goods and resources as well as environmental burdens are those based on (1) polluter-pays principle, (2) beneficiary-pays principle and (3) public burden principle.

The details of (1) the polluter-pays framework are as follows.

(a) Compensation for damages (Article 25 of the Air Pollution Control Act No. 97 of 10 June 1968 and the Act on Compensation for Pollution-related Health Damage, including both before and after the event);(b) Imposition of cost arising from the consequences of administrative regulation (Article 22 paragraph 2 of the Basic Act on the Environment);(c) Imposition of cost arising from the consequences of adopting measures imposing financial burdens (Article 22 paragraph 2 of the Basic Act on the Environment);(d) Polluter-pays principle in public works projects (Article 22 paragraph 2 of the Basic Act on the Environment);(e) Imposition of burden based on the social responsibility of the project (Article 37 of the Basic Act on the Environment, imposed after the event).

The polluter-pays framework through imposition of economic burden in (c), includes introduction of discriminatory taxation (tax relief for low-pollution, fuel-efficient cars) and charging for waste disposal and environmental tax (such as industrial waste disposal tax of local governments).

consumption stage'. According to this approach, the polluter-pays principle will be expanded, and matters that were formerly under public burden would be processed within the polluter-pays framework.

The polluter-pays framework is strengthened in other ways for example, in the design of the framework on the polluter-pays principle in which the owners' liabilities would arise only when the principle does not function (Soil Contamination Countermeasures Act), or the increase in funding systems for cases in which seeking liability is difficult because the polluter is unknown.

**2. Environmental Taxation**

In addition, environmental tax systems and subsidy systems for environmental protection contribute to the realization of intra-generational equity, which constitutes distributive justice.

There is a system of environmental taxation in Japanese law. The tax for global warming response measures would be such a system. The purpose of this tax is to promote reduction of carbon dioxide emissions from fossil fuels using the economic incentive through taxation and use the revenues to strengthen carbon dioxide emissions reduction from energy production including measures for renewable energy and energy saving.

The tax for global warming countermeasures requires broad, thinly-spread and fair burden sharing among all fossil fuel users depending on environmental burdens, based on benefit, and reflects the principle of formal equality.

However, substantive equality is taken into consideration in implementation, and the distribution of environmental burdens based on formal equality is further adjusted. In introducing the tax, the measures including the following in particular, were taken.[30]

(a) Tax rates would be gradually increased so that it would not cause sudden burden increase.

(b) Necessary tax exemptions and refund measures would be taken in certain areas.

(c) Measures would be taken to reduce fuel production and distribution costs, to stabilize supply, and to conserve energy in distribution and transportation.

(d) Support measures taking underpopulated or cold-weather regions into consideration would be implemented.

It should be noted that in Japanese environmental policies, policies to subsidize carbon dioxide reduction based on the 'Outline of Subsidies for Carbon Dioxide Emissions Reduction Projects' is more mainstream than taxation. This is because expenditures on environmental measures are expected to be more effective in achieving carbon dioxide reduction than taxation.[31]

**3. Environmental Justice**

Condemning environmental injustice in the distribution of environmental goods and demanding rectification can be seen as the ultimate form of pursuing inter-generational equity in terms of environmental protection. However, 'environmental justice' is not prescribed in Japanese law either as principles or legal objectives, it is difficult to analyze this concept.

Environmental justice can be considered to have (1) a distributive justice aspect that requires equal distribution of environmental burdens, and (2) a procedural justice aspect that requires the democratic participation of citizens in the region in the decision-making process of environmental policies.[32] For

[30] Ministry of the Environment, 'Chikyu Ondanka Taisakuzei to Tansozei ni Tsuite' (Global Warming Countermeasures Tax and Carbon Tax).

[31] K.Shinohara, 'Kankyozei Chikyu Ondanka Taisakuzei to Enerugi-kankeishozei ni Tsuite' (Environmental Tax (global warming tax) and energy-related taxes, National Tax Agency).

[32] H.Kumamoto, '"A chain of Injustice": An Environmental Justice Perspective on the US Base and Henoko, Nago-city' (2008) 14 *The Japanese Association for Environmental Sociology* 219, 233.

(1), as noted above, the Constitution of Japan requires the achievement of distributive justice based on the right to a minimum standard of living or right to environment (argued on the basis of the right of pursue happiness), and a right to environmental goods may be considered to be recognized as a human right. However, the legal system does not provide concrete judicial remedies based on the right to environment, and there is a huge obstacle to its achievement.

Regarding (2), although it is not from the perspective of achieving environmental justice, access to justice is recognized in the form of access to environmental information, participation in the implementation of EIA, and compensation claims for environmental damages or request for injunction. Therefore, there may be a possibility that environmental justice would be achieved indirectly through these procedures.

However, it cannot be expected to address the power structure that produce injustice. The most typical authority that holds power is the government, but it is extremely difficult to declare measures taken by the government to be unjust and demand their correction.

In the case of the partial relocation of the heliport and other facilities from the US Marine Corps Air Station at Futenma, Ginowan City, Okinawa Prefecture to Henoko in Nago City, it has been pointed out that there is a structural failure to allow the views of residents of the area to be reflected in the acceptance of the facility that would cause nuisance.[33] This may indeed be a typical example in which procedural justice is not achieved. Because legal standing in environmental litigation is construed very narrowly, the possibility of achieving environmental justice through litigation would be extremely limited.

On the other hand, if the entity holding the power is a local government, it may still be possible. In the realization of environmental justice in the form of allowing participation in environmental impact assessment procedures, there have been cases where residents' requests have been granted. For example, in the Chuo Shinkansen Project, consultations were held between residents and JR Tokai based on the Shizuoka Prefectural ordinance on environmental impact assessment.

## V. Distributive Justice in Japan: Aspects of Inter-generational Equity*

### 1. The Concept of Inter-generational Equity Linked to Sustainable Development

There is no provision prescribing inter-generational equity under the Constitution of Japan. As noted in III, distributive justice in the context of environmental protection is reflected in the right to environment based on Article 25 on the right to a minimum standard of living and the right to pursue happiness under Article 13 of the Constitution. But this reflection does not include 'inter-generational equity' and is limited to 'intra-generational equity'.

Although Article 11 of the Constitution includes the provision, 'fundamental human rights…shall be conferred upon the people of this and future generations', this Article is part of the general provisions for the subsequent provisions on fundamental human rights. The phrase 'people of this and future generations' is understood as indicating the 'inherent character' of the fundamental human rights and is not considered to imply inter-generational equity.

Where, then, does the aspect of inter-generational equity that constitutes distributive justice appear in Japan? It exists precisely in the context of achieving sustainable development. For example, Article 3 of the Basic Act on Environment stipulates, that '[t]he environment must be conserved appropriately so that the current and future generations can enjoy the blessings of a healthy and productive environment…'

[33] Ibid.

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and recognizes both inter-generational and intra-generational equity as objectives of environmental conservation.

The reason why inter-generational equity in Japan is strongly linked to sustainable development and exists solely in that context is that the concept of inter-generational equity was introduced from international law, along with the concept of sustainable development.

In Japan, the legal systems for environmental protection developed initially as the pollution problem worsened during the period of rapid economic growth, and the way it developed may be seen as being uniquely Japanese. During this period, there is almost no influence from international law in the context of inter-generational equity. As noted in II, distributive justice in Japan existed as a concept under the Constitution that seeks to achieve intra-generational equity, but inter-generational equity is not implied in these provisions.

When the Basic Act on the Environment was adopted in 1993, the idea of 'inter-generational equity' was incorporated in the Japanese law. Based on Principle 3 of the Rio Declaration of 1992 which states, '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations', Article 3 of the Basic Act included the provision stipulating, '[t]he environment must be conserved appropriately so that the current and future generations can enjoy the blessings of a healthy and productive environment'. Because the concept of inter-generational equity is not redefined in Japanese law, it can be said that the 'inter-generational equity' concept in international law is directly incorporated in Japanese law.

**2. Case Law Relating to or Encompassing the Rights of Future Generation**

There are cases in which the rights of future generations were argued in courts, but none in which such rights were recognized. For example, regarding requests for injunction against the operation of nuclear power plants, even in cases where such injunctions were granted on the basis of the right to personality, none included consideration for 'rights of future generations' (case of requests for injunction against operation of reactor Nos. 3 and 4 of the Oi Nuclear Power Plant).

In this case, the plaintiffs argued that as spent nuclear fuel or high-level radioactive waste is dangerous and their permanent management is unrealistic, it is unacceptable that such negative legacy left to posterity is further increased through the operation of the nuclear power plant in question. To this, the court just noted that 'the reason for the injunction was that the destination for disposal of the high-level nuclear waste was yet to be decided, the danger of the material was extremely high, and given that it would take tens of thousands of years for the danger to disappear, the issue of this disposal would impose a heavy burden on future generations (Nos.3 and 4). It is questionable whether this court in charge of the request for injunction based on the legal rights of the current people is qualified to decide this issue of utmost gravity on the responsibility of our generation to future generations.

**3. The Future of Inter-generational Equity in Japan**

At the present stage, distributive justice in Japan does not sufficiently take inter-generational equity, namely the rights and interests of future generations into consideration. However, there is a possibility that the situation may improve.

One sign of this, among many others, is that the consideration for inter-generational equity may be legislated in law. For example, the fifth Basic Environment Plan, Cabinet decision on 17 April 2018, which is the most recent policy on environment, states that 'appropriately reflecting interests of future generations in decision-making, progress can be made to enhance national measures and to strengthen international cooperation'.

## VI. Status of Distributive Justice with Respect to Indigenous Peoples: Intra- and Inter-generational Equity*

### 1. Special Tension and Conflict Faced by Indigenous Peoples

As mentioned earlier, one important reason for seeking distributive justice in environmental protection is consideration for indigenous peoples. In Japan, however, there is no legal system to realize distributive justice for indigenous peoples, and it can be said that sufficient consideration has not been given to them in practice.

Tensions and conflicts between intra- and inter-generational needs may theoretically arise regarding climate change. In Japan, indigenous peoples are also likely to be vulnerable to climate change and thus face particular tensions and conflicts, as demonstrated by the many climate change lawsuits filed in other countries today. However, in reality, neither the intra-generational equitable distribution of environmental resources nor the necessity of environmental conservation for future generations is established as legal interests that constitute the basis of their claims, and the tensions/conflicts are therefore not dealt with in the Japanese legal system.

In the Japanese legal system, there is no formal/legal solution in the Constitution, laws or jurisprudence to balance any tensions or disputes between intra- and inter-generational needs that may arise.

### 2. Issues involving the people of Ainu

This section will focus on the issues involving the people of Ainu, the indigenous people in Japan. The Human Rights Committee and the Committee on the Elimination of Racial Discrimination have also called for the recognition of the people of Ryukyu and Okinawa as indigenous peoples,[34] but their community will not be dealt with here. How the Japanese legal system balances the rights of indigenous or traditional communities and environmental conservation may be indicated as follows from the example of the Ainu people. To date, collective rights of Ainu people are not recognized in Japan, while environmental conservation has been used as grounds to restrict the culture of Ainu people throughout history. In that sense, the rights argued by the Ainu people are at a tension in relation to environmental conservation, but it is not clear whether there is a conflict between intra- and inter-generational equity. I will give concrete examples to explain.

The Japanese government has long failed to recognize the Ainu as an indigenous people of Japan. In the third report submitted to the Human Rights Committee in 1991, the Japanese government admitted that the Ainu was a minority group for the first time,[35] but even after that, the government did not recognize the Ainu as an indigenous people. In the judgment of the Nibutani Dam case of 27 March 1997, the Sapporo District Court recognized the Ainu people as an indigenous people and recognized the right of individuals belonging to the Ainu to enjoy their culture based on Article 27 of the International Covenant on Civil and Political Rights and Article 13 of the Constitution of Japan.[36] In

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[34] Committee on the Elimination of Racial Discrimination, Concluding observations on the combined tenth and eleventh periodic reports of Japan, UN Doc. CERD/C/JPN/CO/10-11(2018) paras. 17-18; Human Rights Committee, Concluding observations on the sixth periodic report of Japan, UN Doc. CCPR/C/JPN/CO/6 (2014) para. 26.

[35] Human Rights Committee, Third periodic reports of State Parties due in 1991: Japan, UN Doc. CCPR/C/70/Add.1(1991) para. 233.

[36] See also T.Kiriyama and Y.Osakada, 'The Ainu in Japan: The Ainu and International Law' (2017) 63(4) *Journal of Law and Politics of Osaka City University* 105, 116.

May 1997, the Ainu Culture Promotion Act (ACPA) was adopted, but the government still did not recognize the indigenous status of the Ainu people.

After the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in September 2007, the plenary sessions of both House of Representatives and the House of Councillors of the Diet unanimously adopted the Resolution to Demand the Recognition of the Ainu as an Indigenous People on 6 June 2008. In response, the then Chief Cabinet Secretary Machimura released a statement stating that the government recognized that 'the Ainu are an indigenous people who have lived around the northern part of the Japanese Archipelago, especially in Hokkaido, with a unique language as well as religious and cultural distinctiveness'. Since then, the Act on the Promotion of Measures to Realize a Society Where the Pride of Ainu Is Respected (the Ainu Policy Promotion Act) entered into force in May 2019 and ACPA was abolished. The Ainu Policy Promotion Act gave legal recognition to the indigenous status of the Ainu for the first time, but no collective rights of the Ainu have been recognized.[37]

Indeed, since the Meiji period, Japan has gradually prohibited the Ainu people from fishing salmon in the rivers on the grounds of environmental conservation,[38] and this continues to date (Article 109 paragraphs 1 and 2 of the Fishery Act, Article 28 of the Act on the Protection of Fishery Resources). Violators will be punished (Article 43 No.2 of the Act on the Protection of Fishery Resources). However, in Hokkaido, salmon fishing may be permitted for traditional ceremonies with the permission of the Prefectural Governor (Article 52 of the Hokkaido Fisheries Adjustment Regulation).

But in September 2019, an Ainu man from Monbetsu, Hokkaido, fished salmon without applying for permission from the Prefectural Governor, claiming that salmon fishing was an indigenous right, and was interrogated by the Hokkaido Police.[39] His case was sent to the prosecutors for suspicion of violation of the Hokkaido Inland Fisheries Adjustment Regulation, but the Asahikawa District Public Prosecutor's Office later decided not to prosecute.[40] In August 2020, a local Ainu group in Urahoro, Raporo Ainu Nation, filed suit for the recognition of fishing rights of the Ainu, and the case is pending in the Sapporo District Court.[41]

The Ainu Policy Promotion Act does not recognize salmon fishing rights of Ainu people, but calls for consideration in granting permission under the Fishery Act and the Act on the Protection of Fishery Resources (Article 17 of the Ainu Policy Promotion Act). Since April 2021, the Hokkaido Prefecture has relaxed the application procedures for salmon fishing for traditional Ainu ceremonies. Until then, the application to the Prefecture had to include a list of names of all people participating in the fishing. Under the revised procedures, for salmon fishing projects that were included in the regional plans for promotion of designated Ainu policies, submission of list of names of participants was no longer necessary, when a municipal officer was named as the person in charge.[42]

As discussed above, although there may be some consideration for the culture of Ainu people in

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[37] For details, see Y.Osakada, 'An examination of arguments over the Ainu Policy Promotion Act of Japan based on the UN Declaration on the Rights of Indigenous Peoples' (2021) 25(6) *International Journal of Human Rights* 1053, 1069.

[38] S.Yamada, *Kindaihokkaido to Ainuminzoku: Shuryoukisei to Tochimondai (Modern Hokkaido and the Ainu: Hunting Regulations and Land Issues)*, Hokkaido University Press 2011, 164 and 170.

[39] C.Yamashita, 'Ainu association chief objects to criminal accusations over salmon fishing' *The Mainichi* 16 September 2019.

[40] Reuters, 'Ainu ga Sake Mukaeru Gishiki, Hokkaido' (The Ainu's ceremony welcoming the return of salmon, Hokkaido) 5 September 2020.

[41] Reuters, 'Ainu group's fishing lawsuit is first to seek confirmation of indigenous rights' *The Japan Times* 17 August 2020.

[42] The Sankei News, 'Ainu no Sakeryou, Youken Kanwa, Meibo no Teishutu Fuyou ni' (Mitigating the requirements for the Ainu's salmon fishing. No longer necessary to submit a list of fishers) 24 March 2020; Hokkaido Shimbun Press, '"Ainu Sake Ryo" Yoken Kanwa' (Relaxation of requirements for 'Ainu's salmon fishing') 25 March 2020.

Japan, collective rights of the Ainu people are not recognized, and instead, their culture is restricted on the grounds of environmental conservation.

## VII. Distributive Justice and the Interests of Non-humans (ecocentrism)*

In Japan, there is no incorporation of distributive justice-based considerations for non-human entities from the perspective of ecocentrism. Recognizing the subjectivity of the environment and nature would recognize so-called 'ecocide' and right of nature, both of which are not found in the Japanese legal system.

### 1. Ecocide

Concepts of ecocide or damages to environment has not been introduced in the Japanese legal system. There are systems related to environmental restoration and its cost burden (for example the Soil Contamination Countermeasures Act), but unlike in Europe and the US, there is no grounds for liability for damages to environment.

Moreover, for damages to human health, the Act on Punishment of Crime to Cause Pollution Harmful for Human Health has been enacted already in 1970, prescribing sanctions for employees and business entities of factories and others that caused the damages to health. There are specific laws such as those on waste management that have sanctions for violation of environmental laws. For example, the Waste Management and Public Cleansing Act provides that a fine of 300 million yen maximum may be imposed for inappropriate waste disposal (Article 32 paragraph 1 No. 1).

### 2. Rights of Nature

There is no provision in the Constitution or other laws in Japan recognizing rights of nature. The Basic Act on Biodiversity stipulates the responsibilities of the State and other entities to protect biodiversity (Article 4 and subsequent articles), but its objective is not to recognize the rights of nature.

Several lawsuits on rights of nature such as those with the Amami rabbit (Pentalagus furnessi) (Kagoshima District Court judgment, 22 January 2001) or Tundra bean goose (Tokyo High Court judgment, 23 April 1996) as plaintiffs were filed but all of them were dismissed for reasons including that a non-human natural object lacks the legal capacity to be party to a lawsuit.

In relation to animal welfare, the Act on Welfare and Management of Animals sets forth as its goal the creation of a society in which humans and animals live together (Article 1), and that 'no one shall kill, injure or inflict cruelty on animals without due course, and must take appropriate care of them by taking their behavior into account, while giving consideration to the coexistence of humans and animals (Article 2).' For killing or causing injuries to animals, Article 261 on the crime of causing damages to property of the Penal Code will apply. The Article applies to a 'person who damages or injures property' and draws a distinction between damages to an inanimate object and injuries to animals (crime of inflicting injuries on animals). However, under the Civil Code, animals are treated as personal property, and wild animals are treated as ownerless objects. This means that animals are objects, not subjects of rights. There has been a case in which compensation was awarded to the owner for his attachment to the pet which died due to a wrongful act by another person (Fukuoka District Court judgment, 29 June 2018), but there have been no cases in which a violation of rights or compensation for damages of the animals themselves has been recognized.

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Similarly, there are no laws explicitly providing for the rights of future generations. For example, Article 3 of the Basic Act on the Environment stipulates that environmental conservation must be appropriately conducted so that 'the current and future generations can enjoy the blessings of a healthy and productive environment' but this is formulated as a responsibility of State and other entities and does not recognize the rights of future generations.

Moreover, environmental public interest litigation or group action has not been introduced in Japan, so environmental organizations or youths cannot bring legal action on behalf of the interests of nature or future generations. The need for such procedures has long been pointed out, but has not happened.

## VIII. Japanese Distributive Justice in External Relations: Progress in Intra-generational Equity [*]

While domestically the consideration of distributive justice faces many issues to be dealt with, in external relations there is a partial shift from the recognition of the need for interdependence to a more advanced recognition of the need for solidarity in environmental obligations, and it can be seen that distributive justice is increasingly being considered in terms of intra-generational equity.

### 1. Global Interdependencies

The Japanese legal system acknowledges the global interdependencies upon which sustainable development is premised as a basic principle. Among the 53 Basic Acts, the Basic Act on the Environment and the Basic Act on Biodiversity explicitly refer to interdependencies. The Basic Act on Establishing a Sound Material-Cycle Society, Act No. 110 of 2 June 2000, the Fisheries Basic Act, Act No. 89 of 29 June 2001, the Basic Act on Energy Policy, Act No. 71 of 14 June 2002, the Basic Act on Ocean Policy, the Basic Act for the Promotion of Biomass Utilization and the Basic Act on the Water Cycle includes references to international assistance and cooperation.

The Basic Act on the Environment provides for the 'Active Promotion of Global Environmental Conservation through International Cooperation' (Article 5) and 'International Cooperation for Global Environmental Conservation, etc.' (Section 6), in which the State is to provide an assistance to environmental conservation in developing regions in particular, and to take necessary measures to promote other international cooperation (Article 32).

The Basic Act on Biodiversity states that '[t]aking into consideration that the Japanese economy and society are carried on in a close mutual dependence relation with other countries, it is important for Japan to play a leading role in the international community to ensure biodiversity'.

Among the specific laws, for example the Act on the Promotion of Global Warming Countermeasures, Act No. 117 of 9 October 1998, which ensures the implementation of the Kyoto Protocol to the United Nations Framework Convention on Climate Change also implies interdependence.

### 2. Obligation of Environmental Solidarity towards Developing Countries/the Global South

The Japanese legal system does not explicitly stipulate on obligations of environmental solidarity towards developing countries/ the Global South. 'Exporting of pollution' or pollution caused by activities of Japanese businesses in countries with more lenient environmental regulations compared with Japan indicates that Japan did not share the awareness on obligations of solidarity under environmental law in its relationship with developing countries. The aims of pollution measures under the Basic Law for

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Environmental Pollution are the protection of health and conservation of the living environment of the people, but its scope was limited to Japan. Measures to counter pollution were taken domestically, while activities abroad by Japanese businesses remained unregulated. Some of them included projects covered by the Official Development Assistance.[43]

Amid these circumstances, awareness on the obligation of solidarity related to environmental matters gradually emerged and this led to new developments. One of this is the use of the environmental impact assessment mechanism. Businesses implementing projects abroad or those involving Official Development Assistance were required to implement environmental impact assessments and endeavor to give proper consideration to the environment. Under the Basic Act on the Environment, the environmental impact assessment was legally mandated as a measure for the State as a whole (Article 20), and the Environmental Impact Assessment Act, No. 81 of 13 June 1997 was legislated. This became the basis for further development.

Since then, the obligation of environmental solidarity has developed to the point where it is seen as a part of a more comprehensive obligation of solidarity. The 2019 Guidelines for Environmental and Social Considerations of Japan International Cooperation Agency (JICA) calls for 'Environmental and Social Considerations' (ESC) including social considerations for resettlement of residents caused by the projects, measures for infectious diseases such as HIV/AIDS, children's rights, and consideration for indigenous people and women, as a precondition for granting government development assistance.[44] The Guidelines are designed with a strong awareness for ensuring and implementing obligations of solidarity on matters including the environment, so that when there is no ESC, the project is not implemented,[45] or even if implemented, if any damages (including potential damages) arise from noncompliance of the Guidelines, objection procedures for residents of the aid recipient countries are provided.

However, this obligation cannot be seen as being based on the awareness that it is an international obligation of intra-generational equity. This is because Japan has been quite reluctant in incorporating the concept of intra-generational equity under international law into domestic laws. For example, the obligation of intra-generational equity required by multilateral environmental agreements in general are not addressed even by the domestic laws for the implementation of the agreements. The United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement all stipulate obligations of technical and financial assistance to as well as capacity building for developing countries based on intra-generational equity, and Japan's response has been as follows. (a) The Act on Promotion of Global Warming Countermeasures, Act No.117 of 9 October 1998 which is the domestic law for implementing the Kyoto Protocol has no corresponding provisions; (b) the Climate Change Adaptation Act, Act No.50 of 13 June 2018 for the Paris Agreement does include provisions on the promotion of technical assistance and capacity building (Article 18), but it does not reflect the awareness that developed countries bear a greater responsibility in the determination of emissions reduction goals.

### 3. Laws for International Redistribution of Environmental Resources, Burdens and Responsibilities

[43] One example is air and heavy metal pollution caused by Philippine Associated Smelting and Refining Corporation, sponsored by Japanese enterprises and financed by Japanese ODA.

[44] JICA, 'Kankyo Shakai Hairyo Gaidorain ni Kansuru Yoku Aru Mondo Shu' (Frequently Asked Questions on Guidelines for Environmental and Social Considerations) 20 July 2011, revised 5 February 2016.

[45] Japan International Cooperation Agency (JICA), 'Guidelines for Environmental and Social Considerations' April 2010.

There is no provision explicitly referring to international redistribution of environmental resources, burdens and responsibilities, but Japan provides funding and institution-building that contribute to redistribution, and there are related laws.

First, Japan contributes to the international redistribution of environmental resources, burdens and responsibilities by providing funding through international organizations. For example, it funds the Green Climate Fund (GCF) established by COP16 (2010) of the United Nations Framework Convention on Climate Change (UNFCCC) based on the Act on Funding for the Green Climate Fund and Related Measures, Act No.24 of 20 May 2015 to support greenhouse gas reduction and climate change adaptation in developing countries.

Japan also has various mechanisms that contribute to redistribution in technology transfer. The Joint Crediting Mechanism (JCM) set up by Japan has attracted attention in particular. Unlike the Clean Development Mechanism (CDM) introduced under the Kyoto Protocol, JCM is implemented based on bilateral Aide Memoire on the Joint Crediting Mechanism, enabling a more direct distribution of the reduction outcomes achieved in cooperation with the developing country between the two countries that made the reduction efforts.[46]

For Green Financing, unlike the EU, Japan has not formulated any standards. The fifth Basic Environment Plan, 2018 which is a policy document, refers to the trends in the expansion of ESG (environment, society, governance) investment, and points out the need for promotion and expansion of ESG investment by creating a green economic system through financing as specific development of environmental policy.[47] The Long-term Strategy under the Paris Agreement, decided by the Cabinet in 2019,[48] included promotion of Green Financing as one of the crosscutting policies to be focused on. The Ministry of Environment published the Green Bond Guidelines to increase recognition of as well as further expand issuance and investment in Green Bonds in 2017, which was revised in 2020.

The legislations of laws and formulations of strategies and guidelines explained above were all steps taken by Japan to implement treaties or to participate in international frameworks. Japan's contribution to international redistribution of environmental resources, burdens and responsibilities are made on the basis of international law or international frameworks.

For example, the Act on Funding for the Green Climate Fund and Related Measures (2015) was legislated to implement the UNFCCC with the objective of taking measures to contribute funds to the GCF which had been entrusted with the running of the funding mechanism under UNFCC and to ensure smooth implementation of the Convention.

And the adoption of JCM as a bilateral aide memoire was one of the initiatives for the implementation of the Kyoto Protocol and the Paris Agreement. Decision 1/CP18 of the COP18 acknowledged, 'that Parties, individually or jointly, may develop and implement various approaches, including opportunities for using markets and non-markets…bearing in mind different circumstances of developed and developing countries'[49] and the JCM is one of the 'various approaches' taken.

Moreover, the Green Bond Guidelines as soft law has been drafted and revised taking the Green Bond Principles of the International Capital Market Association into consideration.

In its external relations, Japan is naturally expected to act in accordance with international standards. Perhaps for this reason, the intra-generational equity of distributive justice in external relations is quite

[46] As of November 2021, Japan establishes JMC with 17 countries.
[47] 'The Basic Environment Plan', Cabinet decision on 17 April 2018.
[48] The Government of Japan, 'The Long-term Strategy under the Paris Agreement' June 2019, Cabinet decision, 11 June 2019.
[49] FCCC/CP/2012/8/Add.1, 28 February 2013.

well developed compared to the intra-generational equity framework within Japan.

## IX. Distributive Justice in Japan's Implementation of the Sustainable Development Goals (SDGs): Intra- and Inter-generational Equity*

### 1. Concept *

The SDGs are political goals and are not legally binding in Japan. Therefore, there is no law to implement the SDGs nor judicial decisions based on SDGs. However, this does not mean that the SDGs are not being implemented. There are various guidelines, action plans, projects, and measures for implementation by national administrative bodies. Also, at the local government level, there are laws (ordinances) regarding implementation.[50] Through these, efforts are being made to achieve the SDGs, and since some of them are aimed at achieving distributive justice, it is necessary to examine their contents.

In 2016, the Japanese government established the SDGs Promotion Headquarters, a Cabinet body, which is headed by the Prime Minister and all ministers as its constituent. In the same year, SDGs Implementation Guiding Principles was adopted by the SDGs Promotion Roundtable Meeting, a sub-committee of the Headquarters, consisting of governmental officials and stakeholders. The document was finally adopted by the SDGs Promotion Headquarters. The Principles is a mid-to-long term national strategy for implementing the SDGs by 2030 and later revised in 2019. Under the Principles, the SDGs Action Plan has been adopted annually since 2017. The Plan is a short-term strategy which includes concrete measures the government need to take every year.

At the local government level, the SDGs are increasingly being implemented by ordinance with respect to the SDGs. This is based, for one thing, on strong government demand. As for local measures, the Cabinet aims to mainstream the SDGs and to have 60% of the local governments by fiscal year 2024 to engage in revitalization of the local communities by utilizing the SDGs. Measures such as 'Regional Revitalization SDGs', the selection of 'SDGs Future Towns', 'the local revitalization public-private sector cooperation platform' and 'SDGs Finance for regional vitalization' are financially supported by the national government.

There are local ordinances related to the implementation of SDGs.[51] These ordinances were adopted to give legal backing to SDGs-related projects. Local ordinances are likely to increase in number, as these projects are expanding.

For example, in Shimokawa, Hokkaido, an ordinance 'SDGs promotion in Shimokawa' was adopted in 2019. In its second article, it clearly stipulates that the SDGs will be the basis for the future vision of the town.

This concept of sustainable development and equity may be unique, as it seeks to simultaneously achieve intra-generational and inter-generational equity by preserving the local community as a whole.

### 2. Achievement of the Goals including a Reference to Equitable Access, Allocation, Distribution

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* Marie TOMITA, specially appointed professor, Asia University.

50 M. Makise, 'Chiho Jichitai ni Okeru SDGs no Genjo to Tenbo' (Current status and prospects of SDGs in local governments) (2020) 1 *Shakai Joho Kenkyu* 28.

51 Ibid.

**or Sharing of Resources***

Japan is in the process of achieving the SDGs and is rated as 'SDGs achieved' or next to excellent, 'challenges remain' for Goal 4.7 and Targets 6.1 and 6.2.

In this case, it can be said that intra-generational equity has been realized among distributive justice. In addition, as mentioned below, with regard to Targets 6.1 and 6.2, Japan's realization of distributive justice extends to its external relations as well, through the activities of JICA and other organizations. On the other hand, for Targets 2.5 and 15.1, which are based on the Convention on Biological Diversity, the Nagoya Protocol, and the Convention-based Aichi Targets, the evaluation for Target 2.5 was 'significant challenges remain', the second lowest rating.[52] The evaluation for Target 15.1 was the lowest with 'major challenges remain', indicating that the result is not satisfactory.[53]

As for Goal 4.7, in 2002 the then prime minister introduced the so called 'Koizumi Initiative', and proposed the Decade of Education for Sustainable Development (DESD) at the World Summit on Sustainable Development. Since then, Japan has been supporting and implementing Education for Sustainable Development (ESD). The Act on Enhancing Motivation on Environmental Conservation and Promoting of Environmental Education was enacted in 2003, and was later revised in 2011, as Act on the Promotion of Environmental Conservation Activities through Environmental Education (Promotion of Education). This Act is the domestic legislation of the ESD.[54] In 2012, Act on Promotion of Consumer Education was enacted which also stipulates education related to consuming.

In 2005, the Japanese government established an inter-ministerial meeting on the UNDESD. The Second Basic Plan for the Promotion of Education was stipulated in 2013. From 2020, new curricula in kindergarten, elementary and junior high and high schools have been implemented that incorporate ESD so that education for 'those who are creating a sustainable society' can be achieved.[55]

As for Goal 6.1, under the Water Supply Law (2019 revised), universal access of safe drinking water (Article 4) is ensured. The price of provided drinking water is strictly managed and discrimination is forbidden (Article 14). Therefore, in Japan, safe drinking water is provided to nearly 100% of those living in its territory.

Meanwhile, JICA has been engaged in providing knowledge of Japan's water business in many developing countries. Japan is also playing a leading role with the Global Environment Strategies (IGES)

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* Yasue MOCHIZUKI, professor, Kwansei Gakuin University (paras.1-2) and Marie TOMITA, specially appointed professor, Asia University (paras.3-7).

[52] There are related national laws in the field of biodiversity. After the Rio summit, Japan has enacted the Basic Environment Law in 1994, and in 2008, it has enacted the Basic Act on Biodiversity. As for measures, Japan has ratified the Nagoya Protocol in May, 2017. Prior to the ratification of the Protocol, the Japanese government issued the Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (so called ABS Guidelines) in order to implement the Protocol and to promote measures of benefit sharing from the genetic resources. According to Japan's national report on the Protocol's implementation, the achievement of target 13, which is related to Goal 2.5, was achieved partially and further action was required. The National Biodiversity Strategy of Japan 2012 to 2020 sets forth the basic policy in this field as well. According to the Strategy, there are more than 60 domestic laws that is related to biodiversity.

[53] The Japanese government, based on the Forest and Forestry Basic Law, has adopted the Basic Plan of Forest and Forestry which promotes comprehensive and systematic measures dealing with forests and forestry. Based on the Basic Plan, the National Forest Plan has been stipulated. One of the examples of action related to this target would be the International Partnership of Satoyama Initiative (IPSI), established in 2010 at the 10th Conference of the Parties to the Convention on Biological Diversity (CBD COP 10), held in Nagoya, initiated by the Japanese Ministry of the Environment Ministry and the United Nations University Institute for the Advanced Study of Sustainability (UNU-IAS).

[54] N.Okubo, Supra note 6, 148.

[55] Japanese National Commission for UNESCO, 'Implementation Plan for Education for Sustainable Development in Japan' (The Second ESD Implementation Plan) 2021.

alongside Water Environment Partnership in Asia (WEPA), an initiative the Japanese Ministry of Environment proposed during the third World Water Forum in Kyoto, 2003.

As for Goal 6.2**,** everyone in Japan has access to a safe and clean toilet. There are still problems to be solved, such as guaranteeing safety, especially from sex abuses, at shelters situated after natural disasters, and situating more non-gender toilets in public places.

## 3. Participatory Rights as One of the Means of Implementing the SDGs in Japan*

Procedural guarantees of the right to participation are an important means of incorporating distributive justice into the implementation of the SDGs.

There is no specific legal system of participatory rights for the implementation of SDGs in Japan. Regarding participatory rights on environmental issues, the implementation of SDGs is ensured by exercising rights based on procedural laws which are available for environmental issues in general.

Environmental issues in general can be addressed by (1) the right to request disclosure of information (see the series of lawsuits for disclosure of information on global warming prevention), (2) the right to participate through environmental impact assessment (see the lawsuit against Kobe Steel's coal-fired power plant), and (3) the right of access to judicial proceedings.

There are examples of local government ordinances stipulating the participatory rights in the implementation of the SDGs. For example, the town of Shimokawa, Hokkaido, stipulates the Shimokawa Town Basic Autonomy Ordinance. It provides the right of residents to know the information held by the town and its council (Article 5), the right of citizens to participate in the management of the town government (Article 7), and information disclosure (Article 21), with the aim of realizing a sustainable local society. As for another example, Okinawa Prefecture has clearly recognises that environmental impact assessment is essential in realising the SDGs.

## 4. Impediments and Other Driving Forces*

There are impediments in Japan’s legal system regarding the implementation of SDGs. First and foremost, since the SDGs are soft law, they do not impose legal obligation on Japan to implement them. Therefore, even if violations occur, or the Goals are not implemented, one cannot resort to legal proceedings.

The most serious impediment to the implementation of the SDGs in Japan’s legal system would be the inadequacy of participatory rights (see 3 above). Japan is not a signatory to the Aarhus Convention and has not been able to establish a system of participatory rights which meets the international standard. For example, regarding access to information, while it is possible to request disclosure of information toward the national and local governments under the Act on Access to Information Held by Administrative Organs (1999) and the access to information ordinances, it is not possible to request disclosure of information by private businesses, unless otherwise provided for. In addition, as mentioned above, access to justice is always faced with difficulties, as the scope of standing is strictly limited and objective litigation is not permitted under Japanese law.

While this is not necessarily a way to achieve distributive justice, there is another factor that contributes to the implementation of the SDGs in Japan. There is a strong perception that inter-sectionality is a key element in the implementation of the SDGs, both at the (1) intra-governmental (inter-ministerial) level and (2) between the government and the private sector.

(1) The inter-sectionality at the intra-governmental (inter-ministerial) level is ensured through the

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SDGs Promotion Headquarters established within the government. This Headquarters, headed by the Prime Minister, promotes the implementation of the SDGs in a comprehensive and effective manner through close coordination among relevant administrative agencies.

(2) The inter-sectionality between the government and the private sector is fostered through the 'Roundtable for the Promotion of the Sustainable Development Goals (SDGs)', which consists of representatives from government, NGOs, NPOs, experts, the private sector, international organizations, and various groups. It functions as a forum for the exchange of opinions on the formulation and implementation of guidelines.

Thus, Japan's high level of awareness of the importance of collaboration in the implementation of the SDGs becomes an important driving force in implementing SDGs.

## X. Conclusions*

From the above analysis, we found that distributive justice in Japan still faces many and serious challenges.

For example, in terms of intra-generational equity, which constitutes distributive justice, the polluter-pays principle established under Articles 3 and 4 of the Basic Environment Law can be evaluated as one of the representative legal mechanisms in Japan. This principle contributes significantly to the allocation of environmental goods and resources and the distribution of environmental burdens (conservation, management, restoration, and compensation).

However, other than this system, the following serious issues must be mentioned.

(1) 'Environmental rights', which are supposed to be the basis for the realization of distributive justice, are not recognized as judicial rights, but are only asserted to exist based on academic theories. Japan has shown its reluctance to the recognition of environmental rights in the international sphere, and there seems no grounds for early recognition of environmental rights in the future.

(2) Due to the vulnerability of their position and the recognition of indigenous rights in international human rights, the indigenous peoples of Japan, the Ainu people, should receive priority consideration based on distributive justice. However, in fact, they have not been given such consideration and the social structure continues to be one in which no consideration is given to them.

(3) Ecocentrism, which extends considerations based on the distributive justice to non-human entities, is still in its infancy in Japan.

(4) In external relations, for example, the UNFCCC, the Kyoto Protocol, and the Paris Agreement are all important multilateral environmental agreements that establish obligations to provide technical and financial assistance and capacity building to developing countries based on intra-generational equity, but Japan has not enacted implementing legislation to address these obligations as a party. That is, (a) the Law on the Promotion of Global Warming Countermeasures enacted to implement the Kyoto Protocol does not contain explicit provisions on this obligation, and (b) the Law on Climate Change Adaptation No. 50 of 13 June 2018, the implementing law of the Paris Agreement, provides for the promotion of technical assistance and capacity building (Article 18), but does not reflect the recognition that, as one of the developed countries, they bear significant responsibility for determining emission reduction targets.

(5) In terms of the inter-generational equity aspect, at this stage, there is no legal system or implementation framework, with only reference to it as a concept in court cases or plans at the policy

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level to appropriately reflect the 'benefits of future generations' in decision making.

(6) With regard to the SDGs, the right to participation, which is an important means of implementing distributive justice, has not been secured as a system dedicated to SDGs implementation, and participation is required only through the general legal framework, but such access to the judicial system in particular is severely limited in terms of standing.

In Professor Barral's framework, distributive justice, i.e., the appropriate development and integration of intra-generational and inter-generational equity frameworks within the social structure of a nation, are factors that contribute to the realization of sustainable development in that nation. From this aspect, the distributive justice situation in Japan may not fully function as a driving force for sustainable development in the country and, therefore, needs to be improved.

One promising possibility for distributive justice in Japan is the 'Future Generations Bill' currently being considered for submission to the Diet, prepared by the opposition parties,[56] and the 'Future Generations Commission' that will be established based on that bill. This is modeled after the 'Well-being of Future Generations (Wales) Act 2015'[57] in Wales, UK. The Wales Future Generations Act is highly respected for its achievements, including the reversal of a government highway construction project after an examination by the Future Generations Commissioner.[58]

If the new Bill is adopted and a new mechanism is successfully introduced, it would be a major step forward in improving the situation of distributive justice in the Japanese social structure and, from the perspective of this paper, would greatly contribute to the realization of sustainable development.

[56] Tokyo Shimbun, 19 December 2022, 'Future Generations Committee in the Diet', available at: https://www.tokyo-np.co.jp/article/220750.

[57] Available at: https://www.futuregenerations.wales/about-us/future-generations-act/.

[58] Sophie Howe, the first statutory Future Generations Commissioner of the Act, explained the impacts of the legislation on life in Wales. One of cases she mentioned as follows: 'In transport, where money that would have been spent on a motorway through a nature reserve is being invested in sustainable travel instead after the commissioner galvanised opposition to the road, with a pause on new road building.' Available at: https://www.futuregenerations.wales/news/wales-where-well-being-isnt-just-a-buzz-word-its-the-law-reflects-on-seven-years-of-its-world-leading-future-generations-act/.

# INTERNATIONAL JURISDICTION AND GOVERNING LAW IN TORT CASES IN JAPAN

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## 1. INTRODUCTION

Consider the following three questions based on hypothetical cases. First, suppose that a Japanese company exports its products to a foreign country that infringe the patent rights registered in that foreign country. How do Japanese courts determine the applicable law when the holder of the foreign patent files a lawsuit for damages against the Japanese company?[1] Second, take the converse situation. Suppose that a Japanese patentee brings an action for damages against a foreign manufacturer exporting goods to Japan, which infringe a Japanese patent. In this action, can the Japanese courts assume international jurisdiction? Third, suppose that a foreign resident uploads a Japanese *manga* onto the internet without permission and the Japanese artist files a lawsuit for damages in a Japanese court against the foreign resident. Would the Japanese court have international jurisdiction? If so, how is the governing law to be determined? Can the court grant damages for the infringement of the artist's intellectual property rights worldwide?

This Report will examine Japan's rules of international jurisdiction (i.e., jurisdictional rules)[2] and rules for determining applicable law (i.e., conflict-of-law rules)[3] in respect of claims for damages based on torts relating to multiple countries, especially from the perspective of the 'localisation of damage'. In so doing, this Report will set out the relevant Japanese statutory law, as well as court decisions and academic opinions construing those statutory provisions. The following should be borne in mind: (i) The primary source of law in Japan is statutory law.[4] (ii) In practice, courts articulate the scope of statutory provisions by interpreting them. (iii) When courts construe statutory provisions, they usually do not just take into account records of legislative debates[5] and previous court decisions, but they also consider academic opinions as to how those provisions should be understood.

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[1] See Judgment of the Supreme Court, 26 Sep. 2002, *Minshu* 56-7-1551, whose English translation is available at <https://www.courts.go.jp/app/hanrei_en/detail?id=619>. Some Supreme Courts Judgments in English translation are available at the Japanese court's website: <https://www.courts.go.jp/app/hanrei_en/search?>.

[2] On Japanese rules on jurisdiction in civil and commercial matters in general, see, e.g., Kazuaki Nishioka and Yuko Nishitani, *Japanese Private International Law* (Hart, 2021) [hereinafter cited as 'Nishioka and Nishitani'], pp.37-67; Kzsuaki Nishioka, Japan, in Anselmo Reyes and Wilson Lui (eds.), *Direct Jurisdiction: Asian Perspectives* (Hart, 2021), p.85 et seq.; Koji Takahashi, The Jurisdiction of Japanese Courts in A Comparative Context, in *Journal of Private International Law*, vol.11, No.1 (2015), p.103 et seq.; Yuko Nishitani, International Jurisdiction of Japanese Courts in A Comparative Perspective, in *Netherlands International Law Review*, No.60 (2013), p.251 et seq.; Masato Dogauch and others, New Japanese Rules on International Jurisdiction: Part One and Part Two, in *Japanese Yearbook of International Law* [hereafter cited as '*JIYL*'], vol.54 (2011), p.260 et seq. and Vol.55 (2012), p.263 et seq.

[3] On Japanese rules on private international law/conflict of laws in general, see, e.g., Jun Yokoyama, *Private International Law in Japan* (Kluwer, 2017); Nishioka and Nishitani, supra note 2.

[4] Article 76(3) of the Constitution of Japan states that 'All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws'. The word 'Laws' means the bills passed by the Diet. See, Article 59(1) of the Constitution.

[5] Minutes of parliamentary proceedings, although in Japanese only, are available on the websites of the Diet, i.e., the House of Representatives and the House of Councillors. In order to understand the law's purposes, the Legislative Council's minutes, which in practice discussed the drafting of the legislation, are essential. The minutes of the Legislative Council, in Japanese only, are available on the Ministry of Justice's website. In addition, books written by Ministry of Justice officials outlining the discussions leading up to the legislation and explaining the purpose of the articles are also helpful for legal interpretation. See footnotes 6 and 7.

Japan's international jurisdiction rules for civil and commercial matters are found in Articles 3-2 to 3-12 of the Code of Civil Procedure (hereinafter 'CCP'), which were inserted by the 2011 amendment of the CCP.[6] The conflict-of-law rules are contained in the Act on General Rules for Application of Laws (hereinafter 'AGR'),[7] which was enacted in 2006 and completely revising the previous Statute Law on Private International Law (known as the *Horei*). This Report will examine Japanese international jurisdiction and conflict-of-law rules for torts by focusing on discussions of those rules in recent court decisions[8] and academic writings.

## 2. JURISDICTION OVER AND THE LAW APPLICABLE TO TORT

### 2.1. JURISDICTIONAL RULES

The CCP sets out various jurisdictional grounds under the basic guiding principles of a 'fair balance between the parties' and a 'proper and expeditious proceeding'.[9] The Japanese courts have 'general jurisdiction' if the defendant's domicile in the case of natural persons or the defendant's principal office in the case of corporations or other entities is in Japan (Article 3-2).[10] As to 'special jurisdiction,' Japanese courts have jurisdiction over actions for the payment of money if the defendant has attachable property in Japan (Article 3-3(iii)).[11] The CCP sets out other special jurisdictional bases, such as the place of performance of the relevant contractual obligations for claims relating to contracts (Article 3-3(i)),[12] the place of an office for actions relating to business conducted at that office (Article 3-3(iv)),[13]

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[6] Act No.109 of 26 June 1996, as amended. For an explanation by the Ministry of Justice official in charge of international jurisdiction rules newly established in the 2011 amendments to the CCP, see Tatsubumi Sato and Yasuhiko Kobayashi (eds.), *Ichimon-Itto: Heisei 23 nen Minji-sosho-ho tou Kaisei - Kokusai Saiban Kankatsu Housei no Seibi [A Question-and-Answer on the 2011 Amendments to the Code of Civil Procedure, etc. -Enactment of Law on International Jurisdiction]* (Shojihomu, 2012) [hereinafter cited as 'Sato and Kobayashi'].

[7] Act No.78 of 21 June 2006. For an explanation and a commentary by the Ministry of Justice official on the 2006 AGR, see Kunio Koide (ed.), *Ichimon-Itto: Atarashii Kokusaishiho - Ho no Tekiyo ni kansuru Tsusoku-ho [A Queition-and-ANSWER: New Private International Law - Commentary on the Act on General Rules for Application of Laws]* (Shojihomu, 2006) [hereinafter cited as 'Koide-2006'] and Kunio Koide (ed.), *Chikujo Kaisetsu: Ho no Tekiyo ni kansuru Tsusoku-ho [Article-by-article Commentary: The Act on General Rules for Application of Laws (Revised Edition)]* (Shojihomu, 2015)[ hereinafter cited as 'Koide-2015'].

[8] There are 81 cases reported in the three major Japanese case law databases, i.e., 'Westlaw Japan', 'LEX/DB Internet' and 'D1-Law.com', concerning Article 3-3(viii) of the CCP and Articles 17 to 22 of the AGR as of 31 December 2022, to which this Paper refers.

[9] For an overview of Japanese jurisdictional rules, see Masato Dogauch, New Japanese Rules on International Jurisdiction: General Observation, in *JYIL*, vol.54 (2011), p.260 et seq.

[10] Article 3-2 states that '(1) The courts have jurisdiction over an action that is brought against a person domiciled in Japan.... (3) The courts have jurisdiction over an action that is brought against a corporation or any other association or foundation whose principal office or business office is located in Japan....'

[11] Article 3-3(iii) states that 'an action on a property right may be brought before a Japanese court if the subject matter of the claim is located within Japan, or if the action is a claim for the payment of monies, and seizable property of the defendant is located within Japan (except when the value of such property is extremely low.' For this provision, see Kazuhiko Yamamoto, International Jurisdiction Based on the Location of Property, in *JYIL*, vol.54 (2011), p.311 et seq.

[12] Article 3-3(i) states that 'an action on a claim ... involving a contractual obligation may be brought before a Japanese court if the contractually specified place for the performance of the obligation is within Japan, or if the law of the place adopted under the contract gives a place within Japan as the place for the performance of the obligation.' For this provision, see Akira Saito, International Civil Jurisdiction Based on the Place of Performance Obligation Relating to A Contract, in *JYIL*, vol.54 (2011), p.295 et seq.

[13] Article 3-3(iv) states that 'an action against a person with an office or a business office, which is filed in connection with the business conducted at that person's office or business office may be brought before a Japanese court if said office or business office is located within Japan.' For this provision, see Yoshiaki Nomura, Activity-Based Jurisdiction of Japanese Courts - A Bold but Unnecessary Departure, in *JYIL*, vol.55 (2012), p.263 et seq.

the location of real property for actions relating to that property (Article 3-3(xi)).[14] Parties may also agree on the country in which they are to file an action (Article 3-7).[15]

Jurisdiction based on the plaintiff's domicile (*forum actoris*) is generally not accepted. Such ground would be contrary to the basic principle of a fair balance between the parties. However, plaintiff's domicile is exceptionally allowed as a basis for jurisdiction in cases of consumer contracts because of the need to protect the vulnerable (Article 3-4(1)).[16]

It is worth noting that, even when the Japanese court has jurisdiction over an action, it may dismiss an action without prejudice if it finds that there are special circumstances such that, if the court were to conduct a trial and determine the action, there would be a violation of the basic principles of a fair balance between the parties and a proper and expeditious proceeding (Article 3-9).[17]

#### *2.1.1. Scope of Article 3-3(viii) of the CCP: Interpretation of 'an action relating to a tort'*

In tort cases, Article 3-3(viii) of the CCP states that '(viii) an action relating to a tort may be filed with the courts of Japan if the place where the tort occurred is located in Japan (excluding cases where a harmful act was committed in a foreign country but where the occurrence of the consequence of said act in Japan was not normally foreseeable)'. This provision sets out the place where the tort occurred, i.e., 'the place of tort', as the jurisdictional basis for tortious claims. Thus, a plaintiff may bring an action relating to a tort dispute before the Japanese court if the place of the tort in Japan, even if the defendant's domicile or principal office is not in Japan.

The concept of 'an action relating to a tort' is one of international civil procedure law and should therefore be uniquely determined from the standpoint of international civil procedure law. The same expression is used in Article 5(ix) for domestic venue rules, to which the Japanese courts often resorted in determining international jurisdiction prior to the enactment of Article 3-3(viii). It is accordingly suggested that earlier cases relating to Article 5(ix) can help to interpret the scope of Article 3-3(viii).[18] In addition, Article 709 of the Japanese Civil Code (JCC) regulates substantive tortious law.[19] Therefore, at least in relation to core concepts, the concept of 'an action relating to a tort' should be interpreted in a similar manner as under the JCC. However, since international jurisdiction rules cover cases involving

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[14] Article 3-3(xi) states that 'an action related to real property may be brought before a Japanese court if the real property is located within Japan.' This rule sets out 'additional' jurisdiction over real property disputes. It is unique compared to the rules in other states, which provide 'exclusive' jurisdiction over real property disputes.

[15] Article 3-7 states that '(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts. (2) The agreement, as referred to in the preceding paragraph, is not valid unless it is made regarding actions based on a specific legal relationship and executed by means of a paper document.' For this provision, see Shunichiro Nakano, Agreement on Jurisdiction, in *JYIL*, vol.54 (2011), p.278 et seq.

[16] Article 3-4(1) states that 'An action involving a contract concluded between a Consumer ... and an Enterprise ... (..."Consumer Contract"), which is brought by the Consumer against the Enterprise, may be filed with the Japanese courts if the Consumer is domiciled in Japan at the time the action is filed or at the time the Consumer Contract is concluded.' For this provision, see Tadashi Kanzaki, Jurisdiction over Consumer Contracts and Individual Labor-Related Civil Disputes, in *JYIL*, vol.55 (2012), p.306 et seq.

[17] Article 3-9 states that 'Even when the Japanese courts have jurisdiction over an action ..., the court may dismiss the whole or part of an action without prejudice if it finds that there are special circumstances because of which, if the Japanese courts were to hear the case, it would be against fair balance between the parties or a proper and expeditious proceeding, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances.'

[18] See Nozomi Tada, International Civil Jurisdiction Based on the Place of the Tort, in *JYIL*, vol.55 (2012), .p.291.

[19] Article 709 of the Civil Code entitled 'Damages in Torts' states that 'person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.'

more than two countries and foreign law may be the governing law in some cases, the concept as found in the CCP may not be wholly identical to that in the JCC, so that the former be a somewhat looser concept than the latter.

From these reasons, 'an action relating to a tort' in Article 3-3(viii) should be read as referring to an action based on the victim's claim arising from an injury of the victim's legal interest caused by the harmful act of the tortfeasor. The expression would then cover all tortious claims for damages based on alleged illegal acts as defined under foreign or Japanese laws, irrespective of the type of tort involved. For example, the expression would extend to personal injury or death and loss or damage to property caused by traffic accidents, defective products, environmental damage or other acts; defamation and the infringement of privacy, personality or moral rights;[20] loss of consortium or interference with the peace of family life;[21] the violation of contractual rights by third parties; the infringement of intellectual property rights (such as patent,[22] copyright,[23] etc.); unfair competition[24] or acts restricting free competition; economic or financial loss caused by aspersions against one's business reputation,[25] fraud[26] or similar acts.[27]

Insofar as remedies are concerned,[28] the rule in Article 3-3(viii) covers not only claims for damages but also claims for an injunction. The Supreme Court has held that 'the "action relating to a tort" in Article 3-3(viii) of the CCP is not limited to actions based on torts as prescribed in the Civil Code but is also understood to encompass actions for injunction brought by persons whose rights and interests have been or are threatened to be infringed by harmful acts'.[29]

Further, the majority view among academics regards Article 3-3(viii) as extending to negative declarations of liability. The minority view, however, opposes this as it would encourage tortfeasors strategically to initiate legal proceedings in their own state.[30]

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[20] See, e.g., Tokyo District Court, Judgment, 9 July 2018, 2018WLJPCA07098001; Tokyo District Court, Judgment, 15 February 2017, 2017WLJPCA02156012; Tokyo District Court, Judgment, 30 November 2016, 2016WLJPCA11308017; Supreme Court, Judgment, 10 March 2016, 2016WLJPCA03109002; Tokyo District Court, Judgment, 21 October 2013, 2013WLJPCA10218001.

[21] See, e.g., Tokyo District Court, Judgment, 5 September 2014, 2014WLJPCA09058010; Tokyo District Court, Judgment, 28 October 2013, LEX/DB25515556.

[22] See, e.g., Intellectual Property High Court, Judgment, 30 September 2021, LEX/DB25571845; Tokyo District Court, Judgment, 7 March 2019, 2019WLJPCA03079004; Intellectual Property High Court, Judgment, 4 March 2019, 2019WLJPCA03049001; Intellectual Property High Court, Judgment, 25 December 2017, LEX/DB25449188; Tokyo District Court, Judgment, 27 July 2017, LEX/DB25448855; Tokyo District Court, Judgment, 28 April 2015, 2015WLJPCA04289015.

[23] See, e.g., Tokyo District Court, Judgment, 16 July 2014, 2014WLJPCA07169006.

[24] See, e.g., Yokohama District Court, Judgment, 6 August 2014, 2014WLJPCA08066003.

[25] See, e.g., Tokyo District Court, Judgment, 20 June 2016, 2016WLJPCA06208005; Supreme Court, Judgment, 10 March 2016, 2016WLJPCA03109002; Tokyo District Court, Judgment, 21 October 2013, 2013WLJPCA10218001.

[26] See, e.g., Tokyo District Court, Judgment, 22 November 2018, 2018WLJPCA11228013; Tokyo District Court, Judgment, 24 April 2018, 2018WLJPCA04248014; Tokyo District Court, Judgment, 13 September 2017, 2017WLJPCA09138010; Tokyo District Court, Judgment, 14 April 2017, 2017WLJPCA04146008.

[27] For cases using Article 5(ix) to determine international jurisdiction before the enactment of Article 3-3(viii), see Tada, supra note 18, pp.291-297.

[28] There is a debate about whether or not Article 3-3(viii) covers claims for indemnification between joint tortfeasors. Tada, supra note 18, p.295, answers positively, while Nishioka and Nishitani, supra note 2, p57 and others negatively.

[29] Supreme Court, Judgment, 24 April 2014, *Minshu* 68-4-329. In a claim for an injunction, courts treat latent damage as similar to actual damage for jurisdiction purposes if the claimant establishes the probability of the damage.

[30] Nishioka and Nishitani, supra note 2, p.57; Tada, supra note 18, pp.296-297. Most cases followed the majority view. See Intellectual Property High Court, Judgment, 4 March 2019, 2019WLJPCA03049001; Intellectual Property High Court, Judgment, 25 December 2017, LEX/DB25449188; Tokyo District Court, Judgment, 27 July 2017, LEX/DB25448855.

### *2.1.2. Interpretation of 'the place where the tort occurred'*

The rationale for 'the place where the tort occurred' as the basis for jurisdiction is twofold. First, the rule promotes a proper and expeditious proceeding as the likelihood is that the relevant evidence will be found in the place where the harm took place.[31] Second, the rule secures a fair balance between the parties because it gives the victim an alternative venue, subject to the tortfeasor reasonably foreseeing that harm might occur in the relevant place.[32] By these perspectives, the rule should refer to the place where the elements satisfying the objective requirements of the tort occurred.

With complex torts, i.e., the place where a harmful act was committed ('the place of the act' or *locus delicti commissi*) and the place where the consequence of the harmful act occurred ('the place of the result' or *locus damni*) may be in two different countries. Both courts and academics unanimously consider that, by the expression 'the place where the tort occurred,' Article 3-3(viii) is referring to either place. This means that, when (for example) defamation is caused by dispatching a document from one state to another, the Japanese court will have jurisdiction if the place of dispatch or the place of destination is in Japan.

In determining 'the place of the act' (*locus delicti commissi*), the expression ‘act’ embraces intentional and negligent acts and covers positive conduct as well as omissions. Further, since relief under Article 3-3(viii) includes pre-emptive injunctions against those who threaten or are likely to infringe a person’s rights by wrongful conduct,[33] it would be reasonable to conclude that the expression 'the place of the act' covers the place where a harmful act is likely to be committed.

On the other hand, in determining 'the place of the result' (*locus damni*), the court will decline jurisdiction when the result in Japan was not normally foreseeable (the foreseeability requirement). This foreseeability requirement reflects the basic principle of a fair balance between the parties, considering that a defendant who could not foresee the occurrence of a result in Japan will bear the heavy burden of appearing before a Japanese court. An additional consideration is that, if the result lacks foreseeability, the relevant evidence will usually not be located in the place of the result.[34]

There is academic opinion which argues: '[I]t is not convincing to only consider foreseeability as a decisive factor in the delicate rule of the place of tort. It could be appropriately considered as one of the factors in the context of the "special circumstances" exception under Article 3-9, which makes it possible to flexibly resolve a jurisdictional problem in matters of tort'.[35] Nonetheless, the majority view asserts that where the jurisdiction of Japanese courts is not routinely extended on the grounds of lack of foreseeability, this should be clarified as a requirement in order to increase legal certainty.[36]

The decisive factor for the purposes of assessing whether the foreseeability requirement has been met, is geographic location rather than the occurrence of the result itself. For example, if a plant with a fungus unknown to science is sent from country A to Japan and the fungus infects someone in Japan, the

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[31] Tada, supra note 18, p.290, explains that 'the courts at the place of tort usually the most appropriate for deciding the case on the grounds of easy access to evidence or ease of taking evidence because this is usually where the majority of evidence important to or decisive for the case will be, such as witnesses or things to be examined'.

[32] See Sato and Kobayashi, supra note 6, p.68. In addition, the following two reasons are alleged: foreseeability for the tortfeasor and the public policy implications for the country where the tort was committed. See Tada, supra note 18, p.290.

[33] See Supreme Court, Judgment, 24 April 2014, *Minshu* 68-4-329.

[34] See Tada, supra note 18, pp.299-300.

[35] Tada, id., pp.300-301. It is also noteworthy that the Supreme Court has recognised the jurisdiction of Japanese courts for defamation on the internet because articles written in English are accessible from Japan without reference to the foreseeability of the consequences in Japan. See Supreme Court, Judgment, 10 March 2016, 2016WLJPCA03109002.

[36] Sato and Kobayashi, supra note 6, p.70.

actual harm may be unforeseeable but, since the defendant sent the plant to Japan, the occurrence of some outcome in Japan would be foreseeable.

It is irrelevant whether the tortfeasor could personally have foreseen the result in Japan. Instead, foreseeability is judged objectively, taking into account all the circumstances of the tort (including the tortfeasor's position, the nature and manner of the tortious act and the damage, and any other surrounding factors) to achieve a fair balance between the parties.[37]

#### *2.1.3. Establishment of jurisdictional grounds and foreseeability*

To determine whether Japan has international jurisdiction, the court examines evidence *ex officio* (CCP Article 3-11).[38] This may require the facts alleged by the plaintiff to be taken as established for the purposes determining whether a Japanese court has jurisdiction when a tort action is brought. This could lead to the court finding international jurisdiction despite the plaintiff having pleaded wholly baseless factual allegations. The question then arises as to what level of proof is required before international jurisdiction can be determined on the facts alleged by the plaintiff.

In this regard, the Supreme Court has held that it is unnecessary to 'prove the existence of a tortious act with a certain degree of certainty based on a *prima facie* proof. Instead, in principle, it is sufficient if it is proved that the defendant's act in Japan caused damage to the plaintiff's legal interests'.[39] Therefore, when a tortious action is brought to a Japanese court under Article 3-3(viii), the plaintiff must prove an objective factual situation that damage was caused to the plaintiff's legal interests by the defendant's act in Japan or that damage occurred in Japan by the defendant's act.

On the other hand, the defendant tortfeasor must prove that the occurrence of the result in Japan was not foreseeable. Thereafter, the court will usually decide whether the occurrence of the result in Japan was normally foreseeable based on the facts of each case.

### 2.2. CONFLICT-OF-LAW RULES

The law applicable to tortious acts, is governed by AGR Articles 17 to 22.

Article 17 of the AGR sets out the law governing the existence and effect of claims in tort, Article 18[40] in product liability, and Article 19[41] in defamation. Articles 18 and 19 are the leges speciales in relation to Article 17.[42]

Article 20[43] (an escape provision) contains an exceptional reference to the law of the place with

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[37] Sato and Kobayashi, id., p.71.

[38] Article 3-11states that 'A court may conduct an examination of the evidence *sua sponte* with regard to matters that concern the jurisdiction of the Japanese courts.'

[39] Supreme Court, Judgment, 8 June 2001, *Minshu* 55-4-727.

[40] Article 18 (Special Provisions for Product Liability) states that 'Notwithstanding the preceding Article, where a claim arises from a tort involving injury to life, body or property of others, caused by a defect in a product ... that is delivered, against a producer ..., the formation and effect of such claim shall be governed by the law of the place where the victim received the delivery of the product; provided, however, that if the delivery of the product at the said place was ordinarily unforeseeable, the law of the principal place of business of the Producer ... shall govern.' There is no recent cases which refer to Article 18.

[41] Article 19 (Special Provisions for Defamation) states that 'Notwithstanding Article 17, the formation and effect of a claim arising from a tort of defamation of others shall be governed by the law of the victim's habitual residence (in cases where the victim is a juridical person or any other association or foundation, the law of its principal place of business).' For cases referred to Article 19, see Osaka District Court, Judgment, 10 June 2021, 2021WLJPCA06109002; Tokyo District Court, Judgment, 5 September 2014, 2014WLJPCA09058010.

[42] Yokoyama, supra note 3, p.76.

[43] Article 20 states that 'Notwithstanding the preceding three Articles, the existence and effect of a claim arising from a tort shall be governed by the law of the place with which the tort is obviously more closely connected than

which the tort is clearly more closely connected, Article 21[44] provides for party autonomy after the damage has occurred, and Article 22[45] deals with the cumulative application of Japanese law. According to Article 22, a tort under foreign law is recognised to the extent that a similar tort exists under Japanese law (that is, double actionability).[46]

### *2.2.1. Scope of Article 17 of the AGR: Interpretation of 'the existence and effect of a claim arising from a tort'*

Article 17 of AGR states: 'The existence and effect of a claim arising from a tort shall be governed by the law of the place where the consequence of the harmful act occurred; provided, however, that if the occurrence of the consequence at the said place was normally unforeseeable, the law of the place where the harmful act was committed should govern.' Insofar as foreseeable, the governing law is 'the law of the place where the consequence of the harmful act occurred' (i.e., the place of the result) rather than 'the law of the place where the harmful act was committed' (i.e., the place of the act).

The word 'tort' in Article 17 is interpreted from the unique standpoint of private international law. Since foreign law may be the governing law in some cases, the word broadly refers to a system whereby a person who has infringed the legal interest of another (the victim) by a harmful act (the tortfeasor) is obliged to compensate for damages arising from the infringement of such legal interest. Accordingly, much as the term 'tort' in CCP Article 3-3(viii), the word ‘tort’ in AGR Article 17 encompasses all types of harmful acts under Japanese and foreign laws.[47]

However, the AGR contains specific provisions on product liability in Article 18 and defamation in Article 19. Therefore, matters of product liability and defamation are excluded from the scope of tort in Article 17. A minority of scholars argue that other torts (such as acts restricting competition and unfair competition) are excluded from Article 17.[48]

How is the expression ‘existence and effect of a claim’ arising from a tort to be understood in AGR Article 17? In general, the applicable law regulates all elements that need to be proved to establish the existence and effect of a claim between a tortfeasor and a victim arising from a tortious act. Examples of such matters are intention or negligence, justifiable cause for noncompliance with the law, damage, causation, capacity, quantum of compensation, contributory negligence, prescription, assignability of a

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the place indicated in the preceding three Articles, in light of that the parties had their habitual residence in the places governed by the same law at the time of the occurrence of the tort, that the tort was committed in breach of the obligation under a contract between the parties, or any other circumstances concerned.' For cases referred to Article 20, see Osaka District Court, Judgment, 10 June 2021, 2021WLJPCA06109002; Tokyo District Court, Judgment, 4 September 2019, 2019WLJPCA09048001; Sendai District Court, Judgment, 26 September 2018, LEX/DB25561532; Tokyo District Court, Judgment, 20 June 2016, 2016WLJPCA06208005; Tokyo District Court, Judgment, 24 May 2012, 2012WLJPCA05248004;

[44] Article 21 states that 'The parties to a tort may, after the tort occurs, change a law applicable to the existence and effect of a claim arising from the tort....' Some academics argue that the implied change by the parties is acceptable, while others assert that the parties must change expressly. For cases following the former opinion, see Tokyo District Court, Judgment, 29 June 2016, 2016WLJPCA06298031; while following the latter opinion, see Tokyo District Court, Judgment, 12 February 2020, 2020WLJPCA02128018; Tokyo District Court, Judgment, 26 August 2014, 2014WLJPCA08268008.

[45] Article 22 states that '(1) In the case where a tort shall be governed by a foreign law, if facts to which the foreign law should be applied do not constitute a tort under Japanese law, no claim under the foreign law may be made for damages or any other remedies.' For cases referred to Article 22, see Tokyo District Court, Judgment, 20 May 2020, 2020WLJPCA05208003; Tokyo District Court, Judgment, 27 April 2017, 2017WLJPCA04276002.

[46] Courts apply Article 22, although most academic opinions criticise and suggest deleting Article 22. See Yokoyama, supra note 3, p.76; Nishioka and Nishitani, supra note 3, p.126.

[47] See 2.1.1 about the scope of Article 3-3(viii).

[48] See Nishioka and Nishitani, supra note 2, p.132.

claim, and joint or several liability.[49]

There is a question whether Article 17 covers claims for an injunction. The Supreme Court answered the question negatively in a case where a Japanese corporation Y manufactured its product in Japan and exported the same to its US subsidiary Z which sold the product in the US. X, a Japanese national resident in Japan, claimed against Y on the ground that Z's conduct had infringed X's US patent rights and Y had induced the infringement by exporting the product. X sought (i) an injunction against the manufacture and export of the product, (ii) the destruction of the product, and (iii) damages for tortious conduct. The Supreme Court classified (i) and (ii) as concerning the effect of X's US patent right and (iii) as concerning tort. The court held that the law applicable to the effect of the US patent rights was the law of the place of their registration, US law, and the law applicable to the tort was the law of the place of the result, US law.[50]

### *2.2.2. Connecting factors in Article 17 of the AGR: the place of tort*

Article 17 of the AGR follows the principle of *lex loci delicti* (the law of the place where the tort occurred). The rationale is as follows: (i) the place of tort has the greatest interest in preventing tort and maintaining social order; (ii) the place of tort is predictable and neutral as between the victim and the tortfeasor; and (iii) it is easy to ascertain the place of tort, thereby enhancing legal certainty.[51]

Again, in the case of complex torts where the place in which a harmful act is committed ('the place of the act' or *locus delicti commissi*) and the place where the consequence of the harmful act occur ('the place of the result' or *locus damni*) may be different countries, the question arises as to whether the place of the act or that of the result should be considered as the place of the tort. Suppose a toxic substance emitted by a factory in country A causes damage to the inhabitants of country B. Which would be the place of tort, country A or country B? One view focusses on the aims of sanction and prevention within the tort system and the voluntariness and predictability of the tortfeasor's conduct (the place of the act theory). This view regards the place of the act as setting the standard for the tortfeasor's conduct and therefore treats the place of the act as the place of tort. A competing view focuses on the compensatory aspect of the tort system and the protection of the victim's expectations as to relief (the place of the result theory). This view regards the place of the result as setting the standard for the victim's expectation of relief and therefore treats the place of the result as the place of tort.[52]

Although the principle of the place of tort is well-founded, legal certainty would be undermined if the determination of the place of a complex tort is left to free interpretation. AGR Article 17 clarifies that, in principle, the law of the place of the result (*locus damni*) is the place of tort. Only in exceptional cases where the result in that place could not have been foreseen will the place of the act (*locus delicti commissi*) prevail instead. This ensures legal certainty in complex torts and strikes a balance between victim and tortfeasor.

Under Article 17, the plaintiff victim has no choice as between the law of the place of the act and the law of the place of the result. Provided the foreseeability requirement is met, the courts will apply the law of the place of the result. The application of that law will normally favour the victim over the tortfeasor, since generally the law of the place of result has a closer relationship with the victim.

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[49] In contrast to the conflict-of-law rules, for a discussion of whether the jurisdiction rule of Article 3-3(viii) covers indemnification among tortfeasors, see footnote 28 above.

[50] Supreme Court, Judgment, 26 Sep. 2002, *Minshu* 56-7-1551.

[51] Nishioka and Nishitani, supra note 2, p.123; Yokoyama, supra note 3, p.76.

[52] For discussion under *Horei* before the enactment of Article 17 of the AGR, see Nishioka and Nishitani, supra note 2, p.124.

#### *2.2.3. Establishment of connecting factor in conflict-of-law rules and foreseeability*

According to the prevailing view, as with jurisdictional decisions, the court must determine the applicable law *ex officio* and the parties do not need to argue or prove it. Nevertheless, as the plaintiff must identify the harmful act and the damage for the purpose of establishing jurisdiction, it should not be a difficult task for the court to determine the place of the harmful act or the place of the result.

Under AGR Article 17, as was the case with jurisdictional rules, the law of the place of the result will not be the governing law if the occurrence of the result in that place was not normally foreseeable. Again, geographical location will be decisive. Thus, in the example of infection from a plant with an unknown fungus sent from country A to country B, the occurrence of a result in country B will be treated by the courts as foreseeable. The fact that the specific outcome (infection by the fungus) was unforeseeable will only be relevant as an issue of substantive law.[53]

Much as with the foreseeability requirement in CCP Article 3-3(viii), it is not a matter of whether the tortfeasor could personally have foreseen the occurrence of the result at the relevant place. It is instead a question of whether objectively the occurrence of the result at the relevant place was normally foreseeable in light of the circumstances relating to the tort in question. Thus, in the aforementioned example, if the fungus-infested plant had been stolen en route to country B and transported instead to country C and the infection occurred in country C, the happening of the result in country C would not normally be foreseeable. In that case, the law of country A would be the applicable law as the law of the place of the harmful act.[54]

Unlike the proof of the foreseeability factors under CCP Article 3-3(viii), there is a debate about the interpretation of the prerequisite facts (such as foreseeability) for determining applicable law. Some commentators assert that the principle of *ex officio* determination by the court is appropriate as this is one aspect of the application of the law, while others argue that this is a question of fact and requires the parties to argue and prove their case as in civil proceedings. AGR Article 17 leaves the treatment of such facts open to interpretation.[55]

## 3. DETERMINATION OF THE PLACE OF THE RESULT (*LOCUS DAMNI*)

### 3.1. DEFINITION OF THE PLACE OF THE RESULT

'The place where the consequences of the harmful act occurred' in the Article 3-3(viii) of the CCP or Article 17 of the AGR is to be determined from the perspectives of private international law. It is generally understood that 'the place of the result' (*locus damni*) means the place where the consequences of the direct violation of the victim's legal interest by the tortfeasor's harmful act actually occurred. It basically means the place where the right directly violated by the harmful act were located when the violation occurred.[56]

However, according to the Supreme Court, Article 3-3(viii) covers an action for an injunction, so that a person whose right is likely to be infringed by a harmful act may also bring an action. Therefore, 'it is reasonable to conclude that "the place of the result" in Article 3-3(viii) of the CCP includes the

[53] Koide-2006, supra note 7, p.100.
[54] *Ibid.*
[55] Koide-2006, supra note 7, p.101. Nishioka and Nishitani, supra note 2, p.124, supports the former view, stating that 'it ought to be characterised as a matter of law to be decided by the courts ex officio, which accords with the procedural rules of determining connecting factors. A classification as a matter of law also allows deterring any "manipulation" by the defendant, as otherwise the defendant could select whether or not to plead and prove the relevant facts, thereby influencing the determination of the applicable law.'
[56] Koide-2015, supra note 7, p.193.

place ... where the rights or interests are likely to be infringed'[57] in addition to place of an the actual infringement.

Does 'the place of the result' in Article 3-3(viii) of the CCP or Article 17 of the AGR only embrace direct damage, or does it also include indirect damage? 'Direct damage/initial damage' means the consequences of a direct infringement of an interest protected by law, while 'indirect damage/secondary damage' means damage that arises incidentally from direct damage. For example, in the case of a traffic accident, personal injury constitutes direct damage, while medical expenses are indirect damage.

As for jurisdictional rules, the majority view asserts that 'the consequence of the harmful act' embraces only direct damage. This is because if indirect damage were included, the tort jurisdiction would be too broad, exceeding what would be foreseeable by the tortfeasor. It would also allow an arbitrary choice of court by the victim. In contrast, the minority view argues for the inclusion of indirect damage. The minority observe that there are no words excluding indirect damage in Article 3-3(viii). Further, the place of the occurrence of economic damage cannot be ignored, because the relevant evidence will often be situated there. The victim may consequently prefer to bring a suit there. In any event, the court can decline jurisdiction in appropriate cases due to a failure to meet the foreseeability requirement or in 'special circumstances' (Article 3-9 of the CCP). Some lower court decisions support the majority view.[58]

In respect of conflict-of-law rules, like the jurisdictional rule in CCP Article 3-3(viii), 'the consequence of the harmful act' in AGR Article 17 is understood to be limited to direct damage and to exclude indirect damage. This is because the place of the occurrence of indirect damage has little connection with the tort, can be arbitrarily manipulated by the victim, and is usually beyond the prediction of the tortfeasor.[59] For example, if the personal injury results in country A and the victim is hospitalised in country B, the place of the result is deemed country A, even though hospitalisation costs and other damages were incurred in country B.

Therefore, the place of the result means the place where direct damage caused by the harmful act occurred. Nevertheless, it is sometimes hard to distinguish direct from indirect damage, as the analysis in the next section will indicate.

## 3.2. DETERMINATION OF THE PLACE OF THE RESULT

When it comes to the determination of the place of the result, the place of direct damage should be identified for each type of tort depending on the legally protected interest. The determination of the place of the result is appropriate for both jurisdictional and conflict-of-law rules unless otherwise indicated.

### *3.2.1. Physical damage: personal injury and damage to property*

3.2.1.1. General

CCP Article 3-3(viii) and AGR Article 17 cover the infliction of physical harm on a person or property, such as by reason of a traffic accident.[60] In this case, the location of the person or property at

[57] Judgment of Supreme Court, 24 April 2014, *Minshu* 68-4-329.

[58] For example, Tokyo District Court, Judgment, 21 October 2013, 2013WLJPCA10218001, held that 'the damage suffered by the plaintiffs was not directly caused by the publication of this press release, but should be considered as secondary and indirect damage caused by the decline in the share price of plaintiff Company. Therefore, it cannot be said that the publication of the press release directly caused damage to plaintiff Holdings in Japan.'

[59] Yokoyama, supra note 3, p.76.

[60] See Tokyo District Court, Judgment, 25 February 2020, 2020WLJPCA02258007 (Determination of Malaysian law as the governing law for claims for damages based on road traffic accidents in Malaysia); the Judgement of the Tokyo District Court, 28 December 2015 (Unauthorised disposal of room ownership in an apartment building located in Myanmar (the flat) and the movable property inside it: the applicable law for torts is the law of Myanmar);

the time of the infringement is considered the place of direct damage. For example, if a victim is treated in a hospital in country A after being involved in a road accident in country B, the medical expenses and other costs are incurred in country A. However, the medical expenses are only indirect damage, so country A is not the place of the result.

3.2.1.2. Product liability - special rules for the applicable law (AGR Article 18)

Personal injury or property infringement can also arise from a defective product. In such cases, product liability becomes an issue. In respect of jurisdiction, CCP Article 3-3(viii) applies to claims based on product liability.

In contrast, in respect of conflict-of-law rules, AGR Article 18 provides a special rule for product liability. The rule refers to the law of the place where the product was delivered.[61] The reason for departing from the general rule is that, in the case of product liability, the place where the result occurred could be fortuitous and diverse and consequently lead to the application of an unexpected law to the producer and the victim.[62] Suppose a person in country A travels abroad with an electrical appliance purchased in country A. The person may suffer damage in country B due to a defect in the appliance. In such case, the applicable law should be the law of country A where the product was purchased and delivered pursuant to Article 18, rather than the law of country B where the result occurred.

Therefore, for the determination of the applicable law in relation to product liability, the general rule of the place of the result is not applied.[63]

### *3.2.2. Non-physical damage: moral damage, infringement of intangible property, etc.*

In the cases of the non-physical infringement of reputation or intangible property, the location of the legal interest at the time of infringement may be unclear. It may then be difficult to define the place of the result consistently from case to case. Therefore, it is necessary to determine the place of the result by analysing the nature of the legal interest infringed.

3.2.2.1. Defamation - special rules for the applicable law (Article 19 of the AGR)

Defamation involves an act that diminishes the social reputation of others. In terms of jurisdiction, CCP Article 3-3(viii) covers claims for defamation.

As for the conflict-of-law rule, AGR Article 19 contains a special provision on defamation. With defamation, the legal interest infringed is the victim’s social reputation. That is intangible in nature and it may be difficult unambiguously to determine the place of the result. Under the defamation rule in Article 19, the governing law is not the law of the place of the result but the law of the habitual residence of the victim (or the law of the place of its principal office if the victim is a legal entity, association or foundation).[64] This is because the law of the victim's habitual place of residence ensures the protection of the victim and will usually be foreseeable to the tortfeasor. Even if damage to reputation occurs in multiple places, the most serious damage will usually have occurred in the country where the victim

[61] For the text of Article 18, see footnote 40. Yokoyama, supra note 3, p.78, says that 'the place of delivery seems to be understood as meaning the place where, whatever the title to it may be the product was legally placed at a person’s disposal, which does not necessarily coincide with the place of acquisition of physical possession'. The rules of Article 18 adopt the idea of 'the place of the market' which is neutral and closely related to both parties. Koide-2006, supra note 7, p.104.

[62] Koide-2006, supra note 7, p.104.

[63] However, in the case where the victim is not the person to whom the product has been delivered (the so-called bystander), the law applicable to the claim by the bystander against a manufacturer is determined by Article 17 rather than Article 18. See Koide-2006, supra note 7, p.104.

[64] For the text of Article 19, see footnote 41.

habitually resides. The application of the single law of the victim's habitual residence will avoid the complicated application of laws of potentially multiple places of result (mosaic theory).[65]

Therefore, for the determination of the applicable law in defamation case, the general rule of the place of the result is not applied.

3.2.2.2. Moral damage other than defamation

'Moral damage' refers to harm to the victim's mental health, such as causing mental pain and grief. It is difficult to determine the place of the result for moral damage. Suppose a child dies in a car accident in country A. The parents in country B claim compensation for moral damage from the tortfeasor. In such case, the parents' moral damage will be treated as indirect damage arising from the direct damage of the car accident.[66]

Other examples of moral damage are the infringement of personal rights or the invasion of privacy.

On jurisdiction, CCP Article 3-3(viii) covers claims for compensation for moral damage. For applicable law, as a result of the absence of special provisions for the violation of moral rights other than defamation, the general provision in Article 17 will be applied to the case of moral damage.[67] However, some authors have suggested that AGR Article 19 should be applied to situations analogous to defamation, such as infringement of privacy and other personal rights.[68]

The place of the occurrence of the moral damage is an issue. From a strictly geographical point of view, the location of the victim at the time of the tort in question would be the place where the moral damage occurred. However, the location of the victim is fortuitous. It may not be foreseeable for the tortfeasor. It would also be contrary to the victim's expectation of protection at one's habitual place of residence. Therefore, as with the law applicable to defamation, the victim's habitual residence should be regarded as the place of the result.

As a result, the plaintiff's habitual residence (*forum actoris*) is recognised as the jurisdiction for moral damage cases. Nonetheless, Japanese jurisdiction can be rejected due to the foreseeability requirement (CCP Article 3-3(viii)) as well as 'special circumstances' (CCP Article 3-9 of the CCP) in particular cases.

For applicable law, if the application of Japanese law as the law of the habitual residence of the victim would be inappropriate, the court can apply a suitable governing law by resorting to the exception provision (AGR Article 20).

3.2.2.3. Loss of consortium or infringements of the peace of family life

'Consortium' (conjugal rights) means the interests and rights that one spouse has over the other, such as society (joint living), services (domestic work), sexual intercourse, conjugal affection, etc. When Y engages in sexual intercourse with S, the latter's spouse X may bring a claim for damages in tort against Y. Such a case is covered by CCR Article 3-3(viii) and AGR Article 17, which raise the issue of the determination of the place of the result.

On this, there has been debate among academic circles. Some authors, considering consortium as the protected legal interest, assert that the place of the result is the place where S committed the unfaithful

[65] Koide-2006, supra note 7, p.111.

[66] It might be possible to consider moral damage as direct damage suffered by the parents. However, there are no recent cases which have decided this matter.

[67] Yokoyama, supra note 3, p.78. As to the case which applied Article 17 of the AGR to determine the governing law of a claim for damages based on an infringement of privacy, see Tokyo District Court, Judgment, 30 November 2016, 2016WLJPCA11308017.

[68] See Nishioka and Nishitani, supra note 2, p.130.

act (i.e., the location of the unfaithful spouse at the time of the unfaithful act). Other authors, treating 'the peace of marriage' as the protected legal interest, deem X' habitual residence or the matrimonial home as the place of the result.

In a recent case, plaintiff X claimed that her spouse S and defendant Y had engaged in adultery in New York for approximately two years and three months and thereafter in Japan for a continuing period of at least three years and six months. X sought damages.

At first instance, the court ruled that under AGR Article 17 New York law was the governing law as New York was the place of the result. Since under New York law, X could claim damages against Y for adultery,[69] the court dismissed the X's claim.

On appeal, the Tokyo High Court, applying AGR Article held:

> 'if there are multiple places of the result, the place where the most serious result occurred, or if it is not possible to determine the gravity of the result, the first place of occurrence of the result should be the place of the result. .....
> In this case, it is reasonable to conclude that the place of occurrence of the most serious result occurred is not the State of New York, but Japan. ..... Defendant Y's acts as S's unfaithful partner did not end during S's stay in New York State but continued uninterruptedly in Japan. At the start of the relationship, defendant Y knew S's professional status (that he is a ..... Japanese national civil servant and is scheduled to return to Japan with his family after the expiry of his posting) and his family situation (that he and the plaintiff X have three children). ...The period of consequence in New York State is approximately two years and three months and will not increase further, whereas the period of consequence in Japan is approximately three years and six months and will continue to increase as time goes by. In view of the above, the consequences occurring in Japan are clearly more serious than those occurring in New York. Therefore, the applicable law is Japanese law.'[70]

According to the judgment, the place of the result should be the place where the most serious result occurred.

3.2.2.4. Infringement of intellectual property

Infringements of intangible property rights, such as patents and copyrights, are covered by CCP Article 3-3(viii). As mentioned, jurisdiction is determined by the same article for claims for an injunction and claims for damages for the infringement of intellectual property rights (IPRs). In contrast, as regards the governing law, for claims for an injunction based on infringement of IPRs, instead of the law of the place of the result designated by AGR Article 17, the law governing the effect of the right in question will apply. For example, the law applicable to a claim for an injunction against the infringement of a patent registered in Japan will be the Japanese law. Only claims for damages based on the infringement of IPRs are subject to AGR Article 17.[71]

As for patent infringement, in a case in which infringement of a US patent right was an issue in

[69] Yokohama District Court, Judgment, 30 October 2018, cited in Tokyo High Court, Judgment, 25 September 2019, 2019WLJPCA09257001.

[70] Tokyo High Court, Judgment, 25 September 2019, 2019WLJPCA09257001.

[71] At the discussion in the Legislative Council on the AGR enactment, the Council considered setting out the special provisions which designate the law of the place of the act infringing the IPRs as the applicable law. But eventually it decided not to include such provision, as there were doubts about making the law of the place of the harmful act the governing law uniformly and the need to watch trends as they might be discussed at WIPO and other organisations in the future. See Koide-2016, supra note 7, p.114.

relation to the manufacture of card readers in Japan (the card readers case), the Supreme Court held that if the tortfeasor's act in Japan 'actively induced infringement of the US patents in question in the United States, the result of the infringement of the right can be said to have occurred in the United States'.[72] In line with this precedent, the place of the result in cases of infringement of registered IPRs, such as patents or trademarks, is the country of registration.

Therefore, provided the foreseeability requirement is fulfilled, Japanese courts will have jurisdiction, and Japanese law will be the governing law in actions based on the infringement of Japanese patent rights, as the place of the result will be Japan.

The place of the result relating to copyright infringement is to be determined on a case-by-case basis, considering various circumstances. For example, suppose a Japanese resident X publishes images of copyrighted works in a catalogue for an auction in Hong Kong organised by a Japanese corporation Y. X distributes the catalogues in Japan. In such case, a lower court has held that Japan was the place of the result.[73]

Another lower court judgment addressed the case in which a Japanese corporation Y imported a USB memory device (the product) into Japan. The USB had been manufactured by a Taiwanese corporation Z, an agent of Y. Z manufactured the product from design drawings of the USB, the copyright of which was held by X, another Taiwanese corporation. X sued Y for damages for infringement of X's copyright. The court held that Taiwan was the place of the result because X alleged that the manufacturing was the act of infringement and the manufacturing had been carried out in Taiwan.[74]

From these decisions, it appears that the determination of the place of the result depends on which facts the plaintiff chooses to allege as the act of infringement. For example, if X had alleged that its copyright had been infringed in Japan and could prove a causal link between Y's manufacturing of the product in Taiwan and the act of infringement in Japan, the place of the result might have been determined to be Japan.

3.2.2.5. Act restricting competition and unfair competition

Torts based on acts restricting competition or acts of unfair competition are subject to CCP Article 3-3(viii) of the CCP insofar as jurisdiction is concerned.

As for conflict-of-law rules, there is a dispute among academics on whether AGR Article 17 covers such activities. The majority view holds that Article 17, which is a general rule, applies as long as there are no special provisions concerning acts restricting competition or acts of unfair competition.[75] In contrast, the minority view contends that laws against restrictions on competition are of a public law nature and so the application of foreign law by the Japanese courts in such matters would be inappropriate. This view maintains that some kinds of unfair competition are closely related to market order and should be governed by the law of the marketplace rather than AGR Article 17, which only concerns torts whose main purpose is the adjustment of private interests.

Under Article 17, the place of the result caused by an act restricting competition or an act of unfair competition is understood to be the place where free and fair competition has been prevented if those act in nature affect the market order rather than target a specific competitor.[76]

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[72] Supreme Court, Judgment, 26 September 2002, *Minshu* 56-7-1551.
[73] Tokyo District Court, Judgment, 26 November 2009, 2009WLJPCA11269011.
[74] Tokyo District Court, Judgment, 2 March 2011, 2011WLJPCA03029001.
[75] Recent cases which determined the governing law of unfair competition according to Article 17 of the AGR include Intellectual Property High Court, Judgment, 15 January 2018, 2018WLJPCA01159005 (trade secret); Tokyo District Court, 4 September 2019, 2019WLJPCA09048001 (abuse of dominant bargaining position).
[76] Nishioka and Nishitani, supra note 2, p.132.

Some kinds of unfair competition constitute defamation of business reputation or infringement of copyright. The former case is covered by Article 19, which designates the law of the victim's principal place of business as the applicable law,[77] and the latter case is covered by Article 17, which designates the law of the place of the result as mentioned in 3.2.2.4.

3.2.2.6. Financial or economic loss

On financial or economic loss due to tortious acts, CCP Article 3-3(8) and AGR Article 17 apply for the determination of jurisdiction and governing law, respectively. In Japan, there are no special provisions for financial loss.

Therefore, the place of the result is the place where the direct infringement of the legal interest occurred. In determining the place where the direct infringement took place, the circumstances of the individual case will be considered.

On jurisdiction, it is the plaintiff who must identify an infringement of a legal interest. The court will then investigate whether the interest is legally protected and whether the infringement has a causal link with the harmful act alleged by the plaintiff. For example, X (plaintiff), a resident of Japan and representative director of a Japanese company A, claimed damages from Y (defendant), an employee of the United States Internal Revenue Service (IRS), alleging that Y's request to submit all of A's bank transaction records and other documents under the guise of a tax audit, constituted a harmful act. The court held that 'the request for submission, which constitutes the main part of the tort in question, was made in San Jose in the US, so the place of the harmful act is in the US and not in Japan'. However, 'the place where the tort occurred' in Article 3-3(viii) of the CCP also includes the place of the result, and since the lost earnings and compensation claimed by X are said to have been incurred by X, the place of the result is deemed to be in Japan'.[78]

In contrast, for conflict-of-law purposes, the court should determine the place of the result, and it is essential how the court finds the place of the result. Let us pick up some recent cases.

The first case concerns coercion. A Japanese corporation X (the plaintiff) manufactured and supplied adapters for personal computers sold by Y (the defendant), a California corporation in the US. X established a mass production system for the adapters pursuant to Y's request. But Y suspended its orders and demanded a reduction in price and a rebate. X was forced to comply with this demand in order to continue receiving Y's orders. X sought damages from Y based on tortious conduct. The court held that 'according to the main clause of Article 17 of the AGR, the existence and effect of the right to claim damages based on the harmful act in question shall be governed by the laws of Japan, the place where the damage caused to plaintiff X as a result of the harmful acts in question occurred'.[79] The court considered the result as the lost profit due to the price reduction and rebate forced upon X in its place of business.

The second case relates to fraud. X (the plaintiff), a Japanese corporation, held shares in the defendant Y, a Hong Kong listed company. But X was deceived by Z, Y's executive director and chairperson, into selling X's shares in Y at an unfairly low price to A. X sought damages against Y based on tortious conduct. The court held that 'according to X assertion, X expressed its intention to sell the shares of Y to company A in Japan due to Z's deceptive act. Therefore, the place of the result of the

[77] Yokoyama, supra note 3, p.81.
[78] Tokyo District Court, Judgment, 13 September 2017, 2017WLJPCA09138010.
[79] Tokyo District Court, Judgment, 4 September 2019, 2019WLJPCA09048001.

harmful act, in this case, is in Japan'.[80] The court considered the result as the agreement to sell, which occurred in X's place of business in Japan.

A lower court has decided that where economic loss results from a withdrawal from a deposit account in Japan, the place of the result is in Japan.[81]

From the foregoing recent cases, it appears that the courts do not treat economic loss as a special case, but instead regard financial loss as direct damage. In determining the place of the result, the courts will usually consider the damage or harmful act alleged by the plaintiff.

3.2.2.7. Infringement of claims by third parties

A claim is essentially the assertion by one party of a personal right giving rise to a corresponding obligation on the part of another party. Interference with a claim by a third party can therefore constitute a tort. CCP Article 3-3(viii) on jurisdiction and AGR Article 17 on governing law apply to infringements of claims by third parties.

The place of the result depends on how the location of the claim is determined. Academic opinions is divided as to whether a claim is located at the domicile or principal place of business of the creditor, the domicile or principal place of business of the debtor, or the country to which the governing law of the claim belongs.

In a recent case, Japanese company X (the plaintiff) concluded an agency agreement with French company Z for the exclusive sale of Z's products in Japan. The agreement was renewed several times. Subsequently, another Japanese company Y (the defendant) jointly established a company with Z to sell the same products in Japan. Z then refused to renew the contract with X. X brought a lawsuit for damages against Y and Z. The court applied AGR Article 17 and held that 'the results of the joint tortious acts of Y and Z, which X claims, all arise in Japan, and therefore the law applicable to them is Japanese law.'[82]

## 4. CYBERTORTS AND MULTI-LOCALISED DAMAGE

### 4.1. CYBERTORTS

Cybertorts refer to harmful acts in internet space. Examples of such torts include defamatory posts on the internet or uploading content that infringes the copyright of others. Cybertorts differ from ordinary torts in that they are torts in internet space with no connection to any land or jurisdiction, and it may be difficult to identify the place of the harmful act or the place of the result (e.g., the domicile of the tortfeasor, the location of the tortfeasor's PC terminal, the location of the server, the location of each terminal accessing the harmful content, or the domicile of the victim). Furthermore, a single act may cause an infringement of rights in several jurisdictions simultaneously.

In Japan, there is no special provision for cybertorts, so the general tort provisions will apply.

#### *4.1.1. Jurisdictional rules*

CCP Article 3-3(viii) will apply to cybertorts, and courts will need to decide the place of tort. In one case, a Japanese domiciliary X sued Y, a Nevada corporation, seeking damages for defamation due to an article published by Y on an internet website. The Supreme Court held that 'in this case, because it can be said that the defamation occurred in Japan as a result of publishing the above article on its website by Y, the Japanese courts have jurisdiction over the action (Article 3-3(viii) of the CCP)', even though

[80] Tokyo District Court, Judgment, 22 November 2018, 2018WLJPCA11228013. In addition, Tokyo District Court, Judgment, 14 April 2017, 2017WLJPCA04146008, also held that in a similar case.
[81] Tokyo District Court, Judgment, 5 December 2017, 2017WLJPCA12058012.
[82] Tokyo District Court, Judgment, 29 January 2010, 2010WLJPCA01298007.

the article was written in English.[83]

According to the Supreme Court, as far as jurisdiction is concerned, all places that are accessible will be treated as the place of result for cybertorts. However, where Japanese jurisdiction would be inappropriate, the action can be dismissed due to the foreseeability requirement (the proviso to Article 3-3(viii)) or special circumstances (Article 3-9).

#### *4.1.2. Conflict-of-law rules*

AGR Articles 17 to 22 will apply to cybertorts. For copyright infringements on the internet, the determination of the place of the result under Article 17 becomes a crucial problem. As with the interpretation of 'the place of the result' in CCP Article 3-3(viii), all places that are accessible will be interpreted as 'the place of the result' for the purposes of Article 17. If it is inappropriate to apply the law of the place of the result as the governing law to a particular case, it is possible to rely on the foreseeability requirement as justifying the application of the law of the place of the harmful act or to choose the place which is most closely connected with the tort pursuant to Article 20.

For defamation over the internet, AGR Article 19 stipulates the law of the victim's habitual residence as the governing law. Nevertheless, there may be cases where the law of the victim's habitual residence is inappropriate. In such cases, Article 20 provides for the law of the place with which the tort is most closely connected.

One case has relied on Article 20 to determine the governing law for cyber defamation. A BVI corporation X with a Hong Kong head office sued Y, a Nevada corporation, seeking damages for the publication of an article defaming X on a blog service provided by Y. The court held:

> 'X's main business is to introduce investment products in Hong Kong to Japanese people by writing its website and pamphlets in Japanese and holding seminars for overseas investment for Japanese customers in Tokyo. The article in question is written in Japanese, and its content relates to the warning from the Financial Services Agency to X. Therefore, it can be said that the article is mainly targeted at Japanese readers residing in Japan.
> In this way, although X's registered head office is in the BVI and X's actual head office is in Hong Kong, X's business is closely related to Japan. Besides, the article in question is closely related to X's social reputation in Japan. Therefore, the most serious social damage caused by the article in question can be said to have occurred in Japan. As a result, concerning the question of whether the claim arising from the wrongful act in relation to the article in question will exist, it can be said that 'the place with which the tort is obviously more closely connected' in Article 20 is Japan'.[84]

### 4.2. MULTIPLE PARTIES OR MULTIPLE PLACES OF THE RESULT (MULTI-LOCALISED DAMAGE)

CCP Article 3-6 provides that, if a Japanese court has jurisdiction over a claim, it also has jurisdiction over other claims that are closely related to that claim.[85] For example, if a party to a joint tortious act has a domicile in Japan, the court has jurisdiction over all other tortfeasors, even if the place

[83] Tokyo District Court, Judgment, 30 November 2016, 2016WLJPCA11308017, made a similar holding.
[84] Tokyo District Court, Judgment, 20 June 2016, 2016WLJPCA06208005.
[85] Article 3-6 states that 'If multiple claims are involved in a single action, and the Japanese courts have jurisdiction over one of those claims and no jurisdiction over the others, the action may be filed with the Japanese courts only if the one claim is closely connected with the other claims; provided, however, that with regard to an action brought by multiple persons or an action brought against multiple persons, this applies only in the case specified in the first sentence of Article 38.'

of the tort is not Japan (subjective consolidation of claims).

In addition, if Japanese courts have jurisdiction over an action in respect of a tort, Japanese courts also have jurisdiction over a claim related to that action against the same defendant (objective consolidation of claims). Therefore, in Japan, a limitation of the scope of the place of the result (*locus damni*) jurisdiction to the damage that occurred in a country, as in the Shevill ruling of the ECJ,[86] is meaningless. Once place of result jurisdiction is established over a wrong, Japanese courts will have jurisdiction to award damages for any harm arising from that wrong which may have occurred in other countries by objective consolidation of claims (Article 3-6).

When it comes to applicable law where damages has occurred in multiple places, there is a possibility to apply a single law under AGR Article 20. If the damage is obviously more closely connected with one country, the law of that country will apply to all of the damages.

## 5. CONCLUDING REMARKS

This Report has given an overview of Japan's jurisdiction rules and conflict-of-law rules in relation to tortious acts. Given the summary here, the questions posed at the outset of the Report are readily answered:

In respect of the first question, since the claim is based on the infringement of a patent registered in a foreign country, AGR Article 17 determines the applicable law. The law of the place where the result occurred, i.e., the law of the foreign country, shall apply.

On the second question, the issue is jurisdiction over a claim for damages from the infringement of a patent registered in Japan. According to CCP Article 3, if Japan is the place of the tort, the Japanese court has jurisdiction. This is because the place of tort comprises both the place of the act and the place of the result. In this case, the place of the result is Japan, and the occurrence of the result in Japan would ordinarily be foreseeable by the exporter.

The third question concerns the infringement of copyright via the internet. On jurisdiction, since the contents are accessible in Japan, the place of the result is Japan. The Japanese court will have jurisdiction by CCP Article 3-3(viii). As for applicable law, Japan being the place of the result, Japanese law will govern the claim for damage.

[86] Case C-68/93 *Shevill v Presse Alliance SA*.

# Human Rights in Japan

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## Diversity and Plurality in Japan, Do They Exist?

1.1 On February 1990, a group of gays and lesbians used Fuchu Seinen no Ie, a public accommodation for youth located in Fuchu City and operated by Tokyo Municipal Government. While they were using the facility, a Christian group and others disparagingly cited Leviticus, interfered with assigned bathing time, bullied and treated with disrespect during the whole stay. When the group complained to the management, it was told that it was no longer eligible to use the facility. In April 1990, Tokyo Municipal Government announced a new rule assigning separate facilities for males and females, and indicated that the rule had to be introduced to exclude the group. On February 1991, the group members sued Tokyo Metropolitan Government for damages caused by its refusal to accommodate the group and the newly introduced rule as discriminatory. Tokyo District Court 1) properly recognized homosexuality as sexual orientation which is not different from heterosexuality in its nature, and found that gays and lesbians have been isolated in society, suffering from unreasonable bias and undergoing uncertainty about themselves, and determined that 2) introducing the separate facilities rule itself is the evidence of consciously invidious discrimination by the public entity.[1] Tokyo Metropolitan Government appealed to Tokyo High Court, changing the reason to refuse the group's use: that considering the educational aspect of the facility, the public statement of group members' sexuality would confuse those young members of the public who might have access to the facility at the same time as the group. The appellees refuted the claim by presenting various behavioral studies conducted in the United States about children of gay and lesbian couples. In the end, Tokyo High Court found that, around 1990, most people might not be aware of gays and lesbians, and their plight. But as an entity operating the facility, Tokyo Metropolitan Government should have been considerate of the rights and interests of minorities, including sexual minorities. Governing entities exercising the authority and power are expected to be responsible and should have been aware of the rights and interests of minorities in 1990, if not by the date of the decision.[2]

1.2 On 24 August 2015, a law school student fell from the law school building and died. Most people around him believe that the reason for his emotionally unstable condition (which lead to his fall, inadvertent or not) was that it was not the rejection of his advance to his fellow law student itself, but the fact that he had been outed as gay by that person to his classmates (using LINE, a popular SNS in Japan). There are disputes as to the extent of who (and how many) had gained the knowledge of his sexual orientation because of this action. The parents of the deceased sued the person who outed as well as the university in 2016, asking for an apology from the person who outed their son, and claiming that the university had not responded nor provide adequate support when he asked for.[3] The former litigation was settled by January 2018. The settlement included a non-disclosure clause, thus we do not know the

[1] Tokyo District Court decision of 30 March 1994, Docket 1991 (wa) 1557, Hanrei jiho vol. 1509, p. 80.
[2] Tokyo High Court decision of 16 September 1997, Docket 1994 (ne) 1580, Hanrei Taimuzu vol. 986, p. 206.
[3] The outed student had filed a harassment complaint to the university and asked for an apology for the disclosure without his consent. Kazuki WATANABE, Gei da to barasare tenrakushi "Hitotsubashi dai OUTING jiken"no saiban de, doukyusei to izoku ga wakai (Parents and the Student Settled, Hitotsubashi University Outing Case), <25 June 2018 Huffingpost.jp> It is not disclosed what the complainant had asked the university to do to deal with the issue.

details.[4] On 27 February 2019, the Tokyo District Court dismissed the complaint and stated that the death was not foreseeable and that the university had not breached its duty to care for the safety of students who were psychologically and emotionally unstable. On appeal, Tokyo High Court found, on 25 November 2020, that outing is "a severe invasion of the right to personhood and privacy" and should be condemned but that liability does not extend to the university for not sufficiently supporting him on the occasion.[5]

Reacting to the incident, Kunitachi City, where the university is located, adopted the first ever ordinance[6] prohibiting "outing without consent" which became effective on April 2018.

1.3 On 17 March 2021, Sapporo District Court declared, in a 43 page-opinion, that Civil Code Article 739[7] and Family Register Act Article 74[8] are unconstitutional under the Constitution Article 14[9] but not under Articles 13[10] nor 24.[11] Civil Code and Family Register Act, assume a legally recognizable marriage only exists between a male and a female, and made it procedurally impossible to have same-sex marriages accepted at a family registry even when they applied.[12] The Sapporo District Court opinion read the phrase "individual dignity and the essential equality of the sexes" of Article 24, and even the phrase "the pursuit of happiness" of Article 13 does not give sufficient support to extend the idea of marriage to same-sex marriages, as the legislative power of the Diet is discretionary, the Diet cannot be at fault for not enacting any legislation to support same-sex marriages. Nevertheless, various

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[4] WATANABE, *id*.

[5] Both decisions are not published except in newspapers: Mizuru KUMODE, Daigaku gawa no sekinin wo mitomezu (The decision did not find the University was at fault), TOKYO SHIMBUN, 28 February 2019; Hitotsubashi daisei no doseiai bakuro sosho, Saibancho OUTING ha yurusarenai koi, izoku no seikyu ha kyakka, Tokyo Kosai (Hitotsubashi University student outing litigation, The judge found that Outing is Unacceptable conduct, the parents' claims dismissed, Tokyo High Court, TOKYO SHIMBUN, 25 November 2020.

[6] Kunitachi shi josei to dansei oyobi tayouna sei no byoudou sankaku wo suisin suru jorei (Kunitachi City ordinance to promote equal participation of people of diverse sexuality and gender identity) (28 December 2017 Ordinance No, 36, effective 1 April 2018). Article 8 section 2 prohibits forced outing without the person's consent but there is no penalty for the violation.

[7] Civil Code (1896 Law No. 89, as amended by 1947 Law No. 222) Article 739(1) Marriage shall take effect upon notification pursuant to the Family Registration Act.

[8] Family Registration Law (1947 Law No. 224) Article 74 Persons who wish to marry shall submit a notification to that effect, entering the following matters in the written notification:
(i) the surname that the husband and wife will take; and
(ii) other matters specified by Ordinance of the Ministry of Justice.

[9] Constitution Article 14 All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

[10] Article 13 All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

[11] Article 24 Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

[12] The registration requirement makes it legally impossible for a married couple not to legally use different last names upon marriage. This is another issue pertaining to "diversity and plurality", but I would just mention that in the "Follow-up and Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW), dated 17 December 2018", the UNHC expected the Diet to enact a legislation concerning this Civil Code Article 739 (1) and Family Registration Law Article 74 so that marrying couple may choose to retain their last names upon notifying their marriages. In its ninth periodic report, dated September 2021, not only has the Diet not lived up to the expectation of the international community (no legislation nor even a bill), but that the Supreme Court of Japan paid no attention to observe international obligation to implement the CEDAW by declaring that Civil Code Article 750, stating that a husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage" is constitutional on 23 June 2021 (Grand Bench decision of June 23, 2021, Docket No. 2020 (ku) 102, is not yet published).

effects of legally recognized marriage under the present regime only extend to opposite-sex marriage couples to the exclusion of same-sex couples in de facto similarly situated position. The resulting differentiation, according to this decision, extends beyond the reasonable exercise of the legislative power to make it invidious discrimination, rather than reasonable distinction, because sexual orientation is immutable and the institution of legal marriage is widely supported. It also mentioned the global trends in the legal recognition of same-sex marriages. Lastly, the opinion did not recognize that the Diet was liable for its omission to exercise its legislative power to enact appropriate legislation, for the Diet was not sufficiently aware that the right to marry for the same-sex couple was constitutionally warranted.

In 2015, two municipalities within Tokyo Metropolitan Area[13] introduced registered partnership systems. The idea has spread to more than 130 municipalities and overs more than 40% of the population of Japan by the end of 2021.[14] The Diet might not have been sufficiently aware that equality extend to same-sex couples but it ought to have been sensitive to what same-sex couples have been asking has become acceptable to fair number of people in general.

1.4 Elected public officials, especially of the conservative Liberal Democratic Party (LDP) which has been in power more less throughout after the Second World War, appear to have the tendency to emphasize the "productibility of a person," i.e. whether one can and do have children and indicate that that could well be a good reason to deprive people of the protection of law. On November 2001, the then Tokyo Metropolitan Governor Shintaro ISHIHARA, a prize-winning novelist turned politician and one of the most influential Liberal Democratic Party members of his generation, is said to have referred to women living beyond child-bearing age, unlike men who still can father in their eighties and nineties, as the most harmful existence that civilization has ever known. On January 2007, the then Minister of Health, Labour and Welfare Hakuo YANAGISAWA described women as child bearing machines in the context of falling birthrate. On August 2018, Mio SUGITA, an LDP member of the House of Representative, published an article[15] stating that as sexual minorities do not give birth to children and are "unproductive," they do not deserve to receive any public subsidies. Masateru SHIRAISHI, the longest serving city councillor within Tokyo municipal councils, depicted lesbians and gays as if these were a kind of disease with the possibility of extinguishing the population (and therefore, do not deserve to be given legal protection) at a September 2020 Adachi Council Session.

On one hand, they could be voicing a typical reaction of an average electorate as elected officials. On the other hand, these might be an evidence of hard-wired gender and sexuality that permeates, at least some parts of our society. Could Japanese courts be extraordinarily sensitive of discrimination against insulate minorities, even though society is lagging behind? Has the Constitution been helpful in securing protection to minorities and promoting diversity and plurality? Is Japan, known for its homogeneity, drastically changing to become diverse and accept pluralism?

2.1 The present Constitution was drafted in the early 1946 and came into effect on 3 May 1947. It is the child of its time, reflecting the ideology of the mid-20th century democratic liberalism (e.g.

[13] Shibuya City on October 2015, and Setagaya City on November 2015. Both were through the initiatives of its (progressive) mayors.

[14] The Governor Koike of Tokyo announced in December 2021 that she would like to introduce same-sex partnership within the budgetary year 2022. The details are still not clear.

[15] Mio SUGITA, "LBGT" shien do ga sugiru (Supports for LGBT are going too far too much), SHINCHO 45, August 2018, p. 57. Her article had attracted the United States State Department's Country Report on Human rights Practice for 2018.

universal suffrage,[16] parliamentary system of responsible and responsive government[17]), liberal democracy (e.g. separation of powers among different governing entities;[18] universal suffrage, secrecy of the ballot and other political freedoms;[19] rule of law;[20] civil rights and liberties,[21] including right to property[22]) with a dash of democratic socialism in promising the rights to marriage,[23] to education,[24] to work,[25] and to maintain the minimum standards of wholesome and cultural living.[26] It assumes that the population is made up of "ethnically" Japanese people and that most people share the same culture and the same values.

It has not been amended since then, and the text has remained the same for the past 75 years. Yet one need not be too hard pressed to find references to "diversity and plurality." "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin"[27] or of the qualification of members of the Diet and their electors, "there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income."[28]

To be honest, the Constitution of 1947 reflects the wishful thinking of the Allied Forces preceding the Cold War to establish a liberal and democratic but militarily powerless country in the Far East, and its text reflects terminology and philosophy of that period as understood by the Western civilization. In fact, it was drafted, ratified and promulgated during the occupation by the Allied Forces. The ruling elites of the day apparently detested (and their grandchildren, including some of our recent prime ministers, still do detest) the Constitution as an unwelcomed document forced upon them, although it found overwhelming support among the populace who suffered under the old regime. For those who have no experiences nor memories of the lives under the military-dominated government, it is another story.

The drafting process has been disclosed around 1950[29] when it became apparent that it was penned a the near-present form between 5th and 10th of February 1946, by the Government Section (GS) of the Supreme Commander for the Allied Powers (SCAP), also known as GHQ (General Headquarters) of the occupying Allied Forces. The GS had already reported its preliminary studies and recommendations by 6 December 1945,[30] indicating that the GS was aware of a non-governmental draft by certain

[16] Articles 15 and 44.
[17] Article 67.
[18] Articles 41, 65 and 76.
[19] Articles 15, 16 and 17.
[20] Articles 76, 78 and 81.
[21] Articles 13, 14, 18 to 23 and 31 to 40.
[22] Article 29.
[23] Article 24.
[24] Article 26.
[25] Articles 27 and 28.
[26] Article 25.
[27] Article 14.
[28] Article 44.
[29] TAKAYANAGI, Kenzo, OHTOMO, Ichiro & TANAKA, Hideo, Nihon koku kenpo seitei katei (The Making of the Constitution of Japan) vols. I & II (1972). Documents of the Government Section pertaining to the making of the Constitution based on materials which Maj. Milo E. Rowell had kept.
[30] The recommendations classified (1) freedom of religious worship, (2) freedom of thought, speech, press and assembly, (3)right to petition any agency or person for redress of wrongs, (4) inviolability of communications, (5) private property shall not be taken for public use unless reasonable compensation is paid therefor, (6) prohibition against involuntary servitude including compulsory labor for a term where payment in advance has been made, aimed at prohibiting sale of services of a minor daughter for a term of years, (7) no person shall be arrested, except in case of hot pursuit, nor any private dwelling searched, except at the time of arrest, without a warrant issued by a court of competent jurisdiction, (8) no ex post facto criminal law shall be valid, (9) an accused shall be presumed innocent, shall have the right to counsel from the time of arrest, shall have the right to a speedy and pubic trial, shall not be placed in jeopardy twice for the same offense, and shall not be compelled to testify against himself. Upon the

progressive scholars, who were apparently familiar with the 1919 Weimar Constitution. Before the GS began its task, on 11 January 1946, the SCAP received "information" on "Reform of the Japanese Governmental System" as approved by the State-War-Navy Coordinating Committee (SWNCC), known as SWNCC-228. Among issues discussed in SWNCC-228 is the inadequate provision for the protection of civil rights under the previous 1889 constitution. According to its view, many of the human rights guarantee in the Constitution of 1899, often called the Meiji Constitution, were qualified by phrases "except in the cases provided by law" or "unless according to law" which permitted the legislature to enact statutes involving wholesale infringement of the rights, the administration to issue statutory instruments empowering itself to execute statutes and orders according to its own interpretation, and the judiciary to administer justice so as not to impede upon executive decisions.

Nevertheless, on 7 February 1946, the tone-deaf Japanese Government intended to present its own version of a draft constitution (informally) which left most provisions of the 1889 Constitution intact. On 10 February, the GS Chief had sent their version of the proposed constitution to the SCAP for approval. The SCAP disclosed the "suggested ideas for a new constitution," also known colloquially as the "MacArthur draft" to the Japanese Government on 13 February. Whether it was a draft for negotiation or was forced upon the Japanese Government accompanied by some threat to Hirohito's position as an emperor, participants' recollections vary. As Chapter I provided for the emperor as "the symbol of the State and of the unity of the People," the Government and public opinions appeared to have perceived that the essence of the national polity (Kokutai 國體)was maintained even under this draft.[31]

On 4 March 1946, the Japanese Government presented its draft to the SCAP and then, on 6 March, the outline to the people of Japan. On 10 April, people, including women for the first time, elected new members of the House of Representatives (Lower House) who were to deliberate on the new constitution. People were first exposed to the unexpectedly liberal and democratic new constitution on 17 April 1946.

2.2 The preamble declares "We, the Japanese people." Furthermore, the Constitution states that the people have the right to choose their public officials.[32] It is through the duly elected representatives in the Diet, the highest organ of state power[33] and representative of all the people[34] that the people exercise their power. Added to these are some feature of direct democracy: the right to recall elected

violation of any of the rights of the accused he shall be discharged and the charges against him dismissed with prejudice, (1) the right of habeas corpus shall be granted and shall not be suspended except in time of war as essential whereas (11) right of privacy particularly as applied to eavesdropping and constant inspection of homes by peace officers, except inspections authorized by statute, (12) freedom of educational institutions above the middle school level from governmental restrictions on curricula and instruction and non-interference in academic matters by the Ministry of Education or other administrative branch of government, (13) property shall not be subject to double taxation except the several government (i.e. National, Prefectural and Municipal) may each tax the same property, (14) confessions obtained by force, duress or inducement shall not be admitted in evidence, a conviction cannot be had on the unsupported testimony of an accomplice: the testimony of an agent provocateur shall not be admitted in court. The administration of justice in Japan is notorious for its reliance on confessions obtained by torture and the of agents provocateur to induce crime by critics of the administration as of lesser importance.

[31] There always appears to be some inadvertent, if not intentional, misunderstandings whenever the Japanese Government dealt with the Allied Forces. In spite of the fact that the July 26, 1945 "Potsdam Declaration" which stated the terms of surrender for the Empire of Japan, including the very word "unconditional surrender," when the public were told of the acceptance on 15 August 1945, the reaction of the people in general was that the Allied Forces guaranteed Japan can maintain its national polity and was definitely not "unconditional" in that aspect. The existence of the chapter on Emperor in the draft was, to many people, seen as the evidence that the national polity was maintained, even though the site of sovereignty no longer was the emperor.

[32] Article 15.

[33] Article 41.

[34] Article 43.

officials,[35] to remove supreme court justices,[36] to ratify amendments to the Constitution initiated by the Diet,[37] and for special legislations applicable only to specific localities, local voters are given the choice to accept or reject bills passed by the Diet.[38] It appears that the Constitution assume a single common interest among the People which is adequately represented by the Diet.[39]

This populist tendency of "one nation one people " or "vox populi" is supposedly balanced by counter-majoritarian measures: Chapter Three on protection of human rights, judicial review by which courts may annul an act of the Diet,[40] and the requirement of the two-thirds majorities of both Houses of the Diet to initiate its amending procedure.[41]

2.3 Chapter III has been understood as the Japanese version of the Bill of Rights. The MacArthur draft on Chapter III consisted of four parts and 31 articles: general provisions, freedoms, social and economic rights and juridical rights (of criminally accused and indicted) of all persons. The GS apparently accommodated numerous objections from the Japanese Government, obviously in accordance with the statement "the knowledge that [the reform] had been imposed by the Allies would materially reduce the possibility of their acceptance and support by the Japanese people for the future."[42] In fact, all articles providing for human rights were rewritten.[43] The final version of Chapter Three "Rights and Duties of the People," as adopted by the newly elected Houses of Representatives (Lower House) and the House of Peers (the hereditary Upper House), according to Article 73 of the 1889 Constitution, also contains 31 articles, but they do not necessarily correspond to each of the articles in the MacArthur draft. As the 1947 Constitution has not been amended since then, it contains the eighteenth century political rights and civil liberties as well as the early twentieth century proclamation of social and economic rights[44] none of which are extended to non-nationals.[45]

The most prominent feature of Chapter Three is that most details are left to law,[46] which

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[35] Article 15.
[36] Article 79.
[37] Article 96.
[38] Article 95. There are 16 legislations, all of them between 1949 and 1952, for which referenda were carried out with overwhelming support. In 1997, when a bill to extend the terms of eminent domain for American bases (in reality, only applicable in Okinawa) was presented to the Diet, the Government explained that, under the Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Japan under the Treaty of Mutual Cooperation and Security between Japan and the United States of America of 1960, the legislation would be theoretically applicable anywhere within Japan and therefore Article 95 does not apply.

On 2019, when Okinawa conducted its own referendum concerning the transfer of American Base to Henoko area, more than 70% of the voters rejected the proposal. Nevertheless, the Government declared the result was not binding as the referendum was based on Okinawa's ordinance rather than Article 95.

[39] The two Houses of the Diet have different election cycles: term of four years or dissolution of the House for the House of Representatives and fixed six years with half the members staggering for the House of Councillors. Since 1994, the House of Representatives combines the first-past-the-post and non-transferrable proportional representation methods, assigning 289 seats to the former and 176 seats to the latter since 2017. The House of Councillors began the combination of first-past-the-post districts and at-large election in 1984, with 74 seats for the former and 50 for the latter since 2019. The similarity of election methods since 1990's have caused the Houses to replicate each other in its party/ideological compositions.
[40] Article 81.
[41] Article 96.
[42] SWNCC-228.
[43] One unfortunate casualty along this process is the disappearance of Article XVI of the GS draft stating that "[a]liens shall be entitled to the equal protection of law."
[44] See, supra notes 1 to 11 and accompanying text.
[45] Saiko Saibansho Dai hotei [Sup. Ct. (Grand Bench) Japan] decision of 4 Oct. 1978, Docket No. 1975 (gyo-tsu) 120, Saiko Saibansho Minji Hanreishu (hereinafter cited as "Minshu") [Selected Official Supreme Court Decisions Collection, Civil Cases] vol. 32, Issue 7, p. 1223.
[46] Articles 10 (nationality), 17 (redress of grievances by lawsuit), 26 (education) 27 (wages, hours and other working conditions), 29 (property rights), 30 (taxation) and 31 (criminal penalty).

systematically negates the constitutional protection of minorities against the tyranny of the majority. The situation in essence is no different from the protections which were accorded to civil rights and liberties in the 1889 Constitution.[47] Another feature, the existence of "public welfare" as the supreme consideration is mentioned only a few times in the text itself,[48] yet academics in the early years and courts thereafter took the existence of the phrase as the sign to interpret all rights and liberties to be placed under the spell of "public welfare" as if the text was not changed much from the 1899 Constitution.[49]

Academic discourse has taken a different turn: in 1950's, Toshiyoshi MIYAZAWA suggested that the exercise of fundamental rights can only be restrained, and limits to rights and liberties can only be set by infringement of other fundamental rights.[50] In 1970's, Nobuyoshi ASHIBE[51] and, in 1980's, Koji SATO[52] tried to articulate different standards of judicial review by classifying numerous rights and liberties. Masanori SHIYAKE[53] turned the table around, in 1990's, stating that restrictions upon human rights and "public welfare" are two different matters. By 2000's, most scholars appear to agree that accommodating two conflicting human rights is only a part of "public welfare." It also includes societal interests, but these constitutional lawyers do not argue that interest of the whole is greater than interests of individuals. Conservative faction of society sees the world quite differently.[54]

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[47] For example, in a case dealing with obscenity under the 1947 Constitution, the Case of "Lady Chatterley's Lover." The novel, written by D. H. Lawrence in 1928 was translated (by Sei ITO) and published (by Koyama Shoten) in April 1951, was confiscated in June and prosecuted in September 1951 under the Criminal Code (1907 Law No. 45) Article 175 which penalizes anyone who distributes, sells or displays in public an obscene documents, drawing or other objects shall be punished with work for not more than two years, a fine of not more than 250,000 yen (now 2,500,000 yen). After Tokyo District decision (18 Jan. 1952, unpublished) acquitting the translator but not the publisher, and Tokyo High Courts decision (10 Dec. 1952, unpublished) overturning the reasonings of the lower court decision and fined both the translator (100,000 yen) and the publisher (250,000 yen), the Supreme Court upheld the High Court decision on March 1957. Saiko Saibansho Dai hotei [Sup. Ct. (Grand Bench) Japan] decision of 13 March 1957, Docket No. 1953 (a) 1713, Saiko Saibansho Keiji Hanreishu (hereinafter cited as "Keishu") [Selected Official Supreme Court Decisions Collection, Criminal Cases] vol. 11, issue 3, p. 997. In this decision, under the 1947 Constitution, the Supreme Court cited a 1918 case of Great Court of Cassation, the Highest Court under the 1889 Constitution, not only approvingly but as if it still binds the Supreme Court under the 1947 Constitution. The 1918 decision stated that obscenity as provided in the Criminal Code of 1907 Article 175 points to "written, drawn and all other materials which ought to stimulate, excite and satisfy sexual desire, therefore in order to a material to qualify as 'obscene,' it is essential to cause (the reader, viewer, audience) the feeling of shame and distaste." Dai shin in [Great Court of Cassation] decision of 10 June 1918, 1918 (re) 1465. It took twenty years in Japan to have fully translated (non-deleted) version of "Lady Chatterley's Lover."

[48] Articles 13 (the right to life, liberty, and pursuit of happiness), 22 (freedom to choose and change residence, and to choose occupation) and 29 (property rights).

[49] According to Report of Preliminary studies and Recommendations of Japanese Constitution, dated 6 December 1945, the 1899 Constitution guaranteed rights and liberties but limited, without exception, by the phrase "within the limits of law." The 1899 Constitution permitted not just the Diet to enact various statutes restricting rights and liberties, but also the administrative branch to pass ordinances impairing and limiting the same. It is true, under the ancient regime, the Government need not justify those restrictions by claiming that those restrictions were necessary for public welfare, although they routinely said these measures are necessary to promote society. Interestingly, the GS used "welfare of the people" rather than "public welfare."

[50] MIYAZAWA, Toshiyoshi, Kempo (1949, last edition 1973), Kempo II (1959, last edition 1971).

[51] ASHIBE, Toshiyoshi, Gendai jinken ron (1974), Kempo gaku in 3 vols. (1992-1998), Kempo (1993, his last edition 1997, 7th ed. by TAKAHASHI, Nobuyuki 2019).

[52] SATO, Koji, Kempo (1981, latest edition 1995), Nihon koku kempo ron (2011)

[53] SHIYAKE, Masanori, Kempo: Kihonken (1996, latest edition 2010)

[54] In 2012, the Liberal Democratic Party (LDP) published a draft to amend the Constitution, a first one in nearly 60 years. The draft altered "public welfare" to "public interests and public order." LDP explains that the phrase "public welfare" (as LDP understood which is based on MIYAZAWA's reading and obviously outdated) is too ambiguous, whereas "public interests" is acknowledged in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights as grounds to restrict the exercise of human rights, and "public order" simply means one should not annoy others in the exercise of one's rights. LDP is having a hard

3.1 The myth of homogeneity of the population has caused confusion in the understanding of nationality, ethnicity and race in Japanese terminology, and consequently in society.

With over two hundred years of isolation policy from the 17th to 19th century, it is easy to believe that there is an ethnically homogeneous group with a shared language, belief system, and ancestry which matches with the nationality itself.[55] The rule of jus sanguinis also contributes to the idea that all nationals are assumed to have Japanese ancestry whether they are brought up within Japan or abroad. And this shared ancestry inevitably, to some minds, results in the existence of shared values and traditions, which is reflected in a deeply held belief among most conservative politicians of "one race,[56] one civilization, one language and one culture" that is the key to social stability and economic success of Japan.

In the past, equating nationality and ethnicity led to a groundless assumption that people with Japanese ancestry do share the language and belief system and behave accordingly. In 1990, the Diet amended the Immigration Control and Refugee Recognition Act[57] to introduce "grandfather clause" and preferential work permit scheme to those with Japanese ancestry. In reality, nurture overwhelms nature. Those who are brought up abroad, both Japanese "returnees" and second- or third-generation children of emigrants who decided to take advantage of "grandfather clause" and began to work in Japan as immigrants, usually have difficulty guessing tacit knowledge or understanding the implicitly shared "commonsense." Unable to speak the language (yet, sharing facial features and looking conspicuously Japanese), those people did not adequately adjust to society nor did they assimilate as expected. Instead, they formed "colonies" in certain areas of Japan. On the flipside, people began to acknowledge that having Japanese ancestry does not automatically make one objectively Japanese.

Legally, the Nationality Act[58] does not ask for Japanese ancestry as a prerequisite to Japanese nationality, and authorizes the Minister of Justice wide discretionary power to permit naturalization.[59] Although one would and could inherit Japanese nationality because of jus sanguinis, the law does not obstruct persons with non-Japanese ancestry, no language proficiency, no confession of belief system, to obtain Japanese nationality. The word "Japanese" legally means nationality, but to many people, it also signifies ethnicity. This conceptual confusion makes any existing plurality and diversity within Japanese nationals quite invisible.

3.2 To make the matter more complicated, international community have placed much pressure upon the Japanese Government to recognize the presence of Ainus and Ryukyuans/Okinawans as indigenous peoples living within its borders. Anthropologists and genetic researchers suggest that there are three ethnically different groups living and mixing within the Japanese archipelago: Ainus in Hokkaido, Ryukyuans in Okinawa and Yamatoes (who are said to be genetically closer to those living at the eastern area of the Eurasian Continent than Ainus or Ryukyuans) dispersed in Honshu, Shikoku and

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time understanding that rights and liberties basically are annoying to others, especially those in power, nevertheless must be protected.

[55] Article 10 of the Constitution states that the conditions necessary for being a Japanese national shall be determined by law. The national census conducted every ten years questions one's nationality, including those naturalized as Japanese, but does not question one's ethnicity or race. In fact, there is no official data based on ethnicity.

[56] To most Japanese, ethnicity (associated with languages, culture and other acquired traits) and race (often associated with physical traits and biology) are understood as interchangeable in that both are biologically determined.

[57] Shutsunyukoku oyobi nanmin nintei hou (Law No. 319 of 1951).

[58] Kokuseki ho (Law No. 147 of 1950).

[59] Articles 4 to 7.

Kyushu islands.[60]

The Japanese Government has been reluctant to acknowledge that there are ethnic groups other than Japanese, normally assumed as Yamato, in Japan. Unable to ignore the reality, on 26 April 2019, the Diet legislated an Act to Advance Policies for the Realization of Society where a High Value is Set on Ainu People's Pride.[61] Article 1 of this Act recognizes that the Ainu is indigenous people of the North of Japanese Archipelago, especially Hokkaido. Interestingly, it does not define who are or who can qualify as an Ainu. The gist of the legislation is that there will be a nationally owned property characterized as a "racial symbiosis symbolic space" called UPOPOY facilities to showcase whatever are deemed as Ainu culture. If you look deep in the historical materials, one can find that, in 1899, the Japanese Government enacted an Act to Protect Indigenous Natives of Hokkaido,[62] suggesting that the Japanese Government had recognized the status of Ainus as indigenous people already in the 19th century. The 1899 Act deprived Ainus of their ancestral lands, forbade fishing and hunting which were their means of livelihood, prohibited their traditional customs and worship, and forced them to use Japanese language and Japanized names, in other words, enforced a typical assimilation policy of the 19th century.

3.3 As to Ryukyuans, the United Nations Human Rights Council has recommended since 2008, and the Committee on the Elimination of Racial Discrimination since 2010, to recognize the distinctness of Okinawa and its people. In response, the Japanese Government, in April 2016, not just refused to acknowledge their existence as an ethnically distinct group within Japan, but also explained to the Cabinet Committee of the House of Representatives that it will continue its effort so that UN organizations will rescind or amend such recommendation.

4.1 The structure and relationship among government agencies, especially the issue of judicial independence, is inseparable with the protection of human rights.

The independence of the Judiciary has been "considered" an honored tradition since the late 19th century. The Crown Prince of Russia was attacked, by none less than a policeman guarding him, while visiting Japan. Not surprisingly, the Government put enormous pressure to apply lèse-majesté and high treason to the culprit as if the victim were a member of the imperial household. The decision by Korekata KOJIMA, the Chief Justice of the Great Court of Cassation at that time, not to extend lèse-majesté by analogy, against the pressure from prime ministers and others, was understood to signify the independence of the Judiciary.[63]

4.2 Although the Constitution provides for judicial review,[64] the power of the Supreme Court

[60] Yaponesian, the Project sponsored by Japan Society for the Promotion of Science, deciphering origin and establishment of Yaponesians mainly based on genome sequences <https://www.yaponesian.jp/images/pdf/Yaponesian_Vol_0_No_0.pdf/ > (published February 2019).

[61] Ainu no hitobito no hokori ga soncho sareru shakai wo jitsugen suru tame no shisaku no suishin ni kansuru horitsu (Law No. 16 of 2019).

[62] Hokkaido kyu dojin ho (Law No. 27 of 1899).

[63] The firm stand that KOJIMA took vis-à-vis the political pressure at that time enhanced the image of the Judiciary as an institution of high integrity. But when one looks closer, there are several issues which defy the claims of judicial independence. If the trial was to be conducted as an average criminal case, Otsu District Court had jurisdiction. But the actual trial was conducted by seven justices from the Great Court of Cassation on the understanding that that court had jurisdiction of all lèse-majesté and high treason cases. Although Chief Justice KOJIMA was not one of these seven justices, he apparently put pressure upon those who actually sat on the bench. Thus, Chief Justice KOJIMA enhanced the independence of the Judiciary at the expense of the independence of individual judges.

[64] Article 81.

(and other courts as held by the Supreme Court Grand Bench decision of 1 February 1950[65]) to determine the constitutionality of laws, orders, regulations and official acts,[66] courts have been reluctant to negate the will of the People, as expressed in the form of statutes enacted by the Diet.[67] Supreme Court has often placed the protection of minority as secondary to the accepted norms of the dominant majority.[68] In the country of judicial career system with ten-year tenure, it appears quite ironical that some lower court judges are more open-minded and willing to listen to the voice of minorities.

More significant is the fact that the 1947 Constitution provides for the Westminster-type of parliamentary system which could induce a fairly weak judicial independence. Masami ITO, after spending over forty years as a comparative law scholar in an academic environment and almost ten years as a supreme court justice, wrote in his memoire[69] that the Supreme Court of Japan is but an arm of the government and justices are reluctant and unwilling to block the "will" of the people as exemplified in the acts of the Diet and the decisions of the Cabinet. Needless to say, in parliamentary system, the prime minister has the support of the majority of the members of the Diet and is the head of executive branch, thus has control over two out of three branches of the government. Furthermore, the Supreme Court justices, except for the chief justice who is appointed by the Emperor,[70] are appointed by the Cabinet.[71]

Under parliamentarian system, our expectation that the judiciary is well-equipped to protect human rights and upholds rule of law might not be fulfilled easily. Courts might not nullify legislations which appear on its face to be within specific prohibitions of the Constitution, or legislations which restrict

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[65] Saiko Saibansho [Sup. Ct. (G.B.) Japan] 1 Feb. 1950, 1950 (re) no. 141, Saiko Saibansho Keiji Hanreishu (hereinafter cited as "Keishu") vol.4, issue 2, p.73.

[66] Article 81.

[67] The reasons for reluctance are occasionally expressed in decisions which the Supreme Court Grand Bench declared constitutional. E.g. 16 Dec. 1959, 1959 (a) 710, Keishu vol. 13, issue 13, p. 3225, 3230 (unless it is obviously unconstitutional, the power to decide the constitutionality of the treaty belongs to the Cabinet who concludes the treaty and to the Diet which ratifies the same); 23 Mar. 2011, 2010 (gyo-tsu) 207, Minshu vol. 65, issue 2, p. 755 (the Constitution has authorized wide discretion to the Diet on matters pertaining to election. Only when the outcome of its decision fails to satisfy the fundamental constitutional requirement and the exercise of its power has been ultra vires, the Court will consider the system as unconstitutional. So long as the chosen system is reasonable and rational, the Constitution does not require the system to strictly reflect equality in electorates' voting power).

There have been 10 decisions (7 statutes) that the Supreme Court Grand Bench declared unconstitutional:

4 Apr. 1973, 1970 (a) 1310, 27 Keishu vol. 27, issue 3, p. 265, invalidating the Criminal Code Article 200;

30 Apr. 1975, 1968 (gyo-tsu) 120, Minshu vol. 29, issue 4, p. 572, invalidating the Pharmaceutical Law Article 6 cl. 2;

14 Apr. 1976, 1974 (gyo-tsu) 75, Minshu vol. 30, issue 3, p.223, invalidating the Public Offices Election Act Appendix;

17 Jul. 1985, 1984 (gyo-tsu) 339, Minshu vol. 39, issue5, p. 1100, invalidating the Public Offices Election Act Appendix;

22 Apr. 1987, 1984 (o) 805, Minshu vol. 41, issue 3, p. 408, invalidating the Forest Act Article 186;

11 Sept. 2002, 1999 (o) 1767, Minshu vol. 56, issue 7, p. 1439, invalidating the Postal Act Articles 68 and 73;

14 Sept. 2005, 2001 (gyo-tsu) 82, 83 and 2001 (gyo-hi) 76, 77, Minshu vol. 59, issue 7, p. 2087, invalidating the Public Offices Election Act on the ground of legislative failure to provide for eligible voters overseas;

4 Jun. 2008, 2006 (gyo-tsu) 135 and 2007 (gyo-tsu) 164, Minshu vol. 62, issue 6, p. 1367, invalidating the Nationality Act Article 3 cl. 1;

4 Sept. 2013, 2012 (ku) No. 984, Minshu vol. 67, issue 6, 1320, invalidating the Civil Code Article 900 Cl. 4; and

16 Dec. 2015, 2013 (o) 1079, Minshu vol. 69, issue 8, p. 2427, invalidating the Civil Code Article 733 cl. 1.

[68] Saiko Saibansho [Sup. Ct.] 1 Jun. 1988, 1982 (o) 902, Minshu vol. 42, issue 5, p. 277, 286 (the guarantee of the free exercise of one's belief requires to be tolerant to others whose beliefs are incompatible with one's own so long as the others' beliefs do not amount to compelling one to observe other beliefs or placing extra burden upon one to freely exercise one's belief).

[69] Ito, Masami, Saibankan to gakusha no aida (As a Judge and as a Scholar) (1993).

[70] Article 6.

[71] Article 79.

political processes to bring about undesirable result to the majority or legislations incorporating existing prejudices of the majority against "discrete and insular" minorities who cannot resort to the operation of political processes[72] unless the breach is so blatant or the support to strike the act as unconstitutional is overwhelmingly evident to society. As society has not experienced upheavals since 1945,[73] stability and continuity of status quo ante might have become the ultimate values to protect for the majority of the people.

4.3 The 1947 Constitution can be classified as a constitutional monarchy in which the reigning monarch has no political power to govern. Textbooks on constitutional law acknowledge monarchy from the standpoint of an exceptions to human rights in terms of equality[74] and of the right to choose his occupation, but not much more. To most constitutional scholars, monarchy exists because the Constitution states that it shall be the symbol of the state and of the unity of the people.[75] The solution for the conflict between monarchy and human rights heads in the direction of demystifying the status of those who are trapped in the system. To most monarchists, it appears that the system ought to exist under any political regime and the conflict should be solved by firmly guarding and differentiating the Occupier of the Throne even if it would restrict how these people can live.

5.1 What to make of the three lower court decisions cited earlier? The 1997 decision actually awarded the plaintiffs damages that they sought. On the contrary, the 2019 and 2021 decisions were laced with encouraging words to the plaintiffs and appear to have opened new pages for a more inclusive society, but in the end, they did not recognize damages. Even the lower court judges, are they becoming less sensitive to the plight of those who are suffering from the prejudice of the majority? The (national) university and the Japanese Government, as defendants, won and they would not have appealed the judgments. The higher courts will not have the opportunity to erase those languages. These decisions are, in fact, not so damaging to those who do not care about discriminating and disparaging people they consider are not powerful or outside of the mainstream. In spite of the proud history of the independence of the Judiciary, has it become a watchdog who barks occasionally but never bite?

5.2 The business community on a whole and many industries competing globally have accepted the idea of diversity and plurality as a way to improve their efficiency and productivity. If companies can diversify their workforce, the thinking goes, they could, would and should be able to overcome imminent labour shortage due to rapidly declining birthrate. Although the trend toward diversity and plurality had little to do with contributing to make society a better place for everyone with the dignity of persons in mind or to make society more inclusive, the evident changes in the make-up of labour force have pushed society away from gendered "commonsense," if only a little. Whatever the reason, we should welcome these changes which honour each individual as human being.

5.3 Lastly, many things are lost in translation. Every comparativist is aware of the subtle and not so subtle differences that translations produce. Japanese government have chosen the phrase "male and female co-participation (danjo kyodo sankaku)" as an official translation for "gender equality." The concept is tainted with dichotomy. It is more difficult for a Japanese speaker to be conscious of the element of social construct that the word "gender" signifies. Deliberation whether "sex" is biologically determinative or socially constructed classification, or that the dichotomy (M/F) itself is the suspect

[72] See, United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).
[73] In today's journalism, conditions imposed by the Government to control Covid-19 pandemic, at the moment, are often juxtaposed with the deprivations during the WW II.
[74] Articles 14 and 22.
[75] Article 1.

cannot arise naturally if "gender" is simply equated with "male and female." Thus, some of the Japanese words chosen to discuss the issue of diversity and plurality in society appear to stifle society's imagination concerning "diversity and plurality."

For example, in the business community, the concept of diversity and plurality is often equated with the increase in number or percentage of females and non-Japanese in their management, rather than making working conditions acceptable to those who do not fit into the traditional image of workers. Companies still ask whether you are male or female, whether you are a Japanese, what schools and universities you graduated from to applicants for jobs. Female applicants for job interviews, even to this day, sincerely believe that wearing knee-length skirts in dark colours and high heels give them better chance, regardless of the kind of jobs they are seeking, than turning up with pants suits and sensible shoes. It has been more than seventy years since women began graduating from national universities thanks to the 1947 Constitution, almost forty years since Japan ratified the CEDAW and enacted the so-called Equal Employment Opportunity Act,[76] and over twenty years since the Basic Act for Gender Equal Society.[77] Those laws no doubt had impact . . . today, women can apply for things that rejected their applications because they were women, as long as they perform their roles as defined by society. Trans would have little chance joining the crowd unless they remain closeted.

5.4 It is important to mention here that things written in law and systems put in place according to law are not exactly the reality. I must admit that human rights law in books are almost flawless. Since 1946, women have the same political rights, to vote and to run for public offices. The Constitution of 1947 guarantees equal rights for women in all aspects. That was an astounding statement to make in 1947. Yet, Japan ranks the 120th (of 156 countries and regions) in the World Economic Forum's Global Gender Gap Report of March 2021.[78] There is the basic law for gender equal society,[79] the national machinery to promote gender equality at all areas,[80] action plans are promulgated every five years by the Cabinet with the Prime Minister as the person responsible to oversee the whole policy.[81] It appears that Japan has everything to achieve the No.1 place in Gender Gap Report mentioned above. But having all those laws and system is not enough. It has to work.

Stereo-typical assumptions are abundant: when both partners are working at home under the Covid-19 emergency declaration, Kyoto University research surveyed during April 2020 of over 300 respondents using online questionnaires, males said there were 20% increase in time spent for domestic chores whereas females responded that there were 35% (no child) and more than 40% (with children) increase, therefore about 50% of males saw increase in quality time spent with the family whereas most females found it more difficult to work at home under the situation. According to Professor OCHIAI who heads the survey, the responses expose the hidden gender roles within each family and unconscious gender bias that "home is women's sphere."

Law, including legislations and court decisions, only tells a part of the story.

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[76] Koyo no bunya ni okeru danjo no kinto na kikai oyobi taigu no kakuho to ni kansuru horitsu (Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment) (Law No. 113 of 1972 as amended, including the title of the Act by Law No. 45 of 1985.).

[77] Danjo kyodo sankaku shakai kihon ho (Basic Act for Gender Equal Society) (Law No. 78 of 1999).

[78] World Economic Forum, Global Gender Gap Report 2021.

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[80] Naikaku fu danjo kyodo sankaku kyoku, Gender Equality Bureau of the Cabinet Office.

[81] Danjo kyodo sankaku suishin honbu, the Headquarters to promote Gender Equality, is established by the Cabinet Order with the Prime Minister as the head of the organization.

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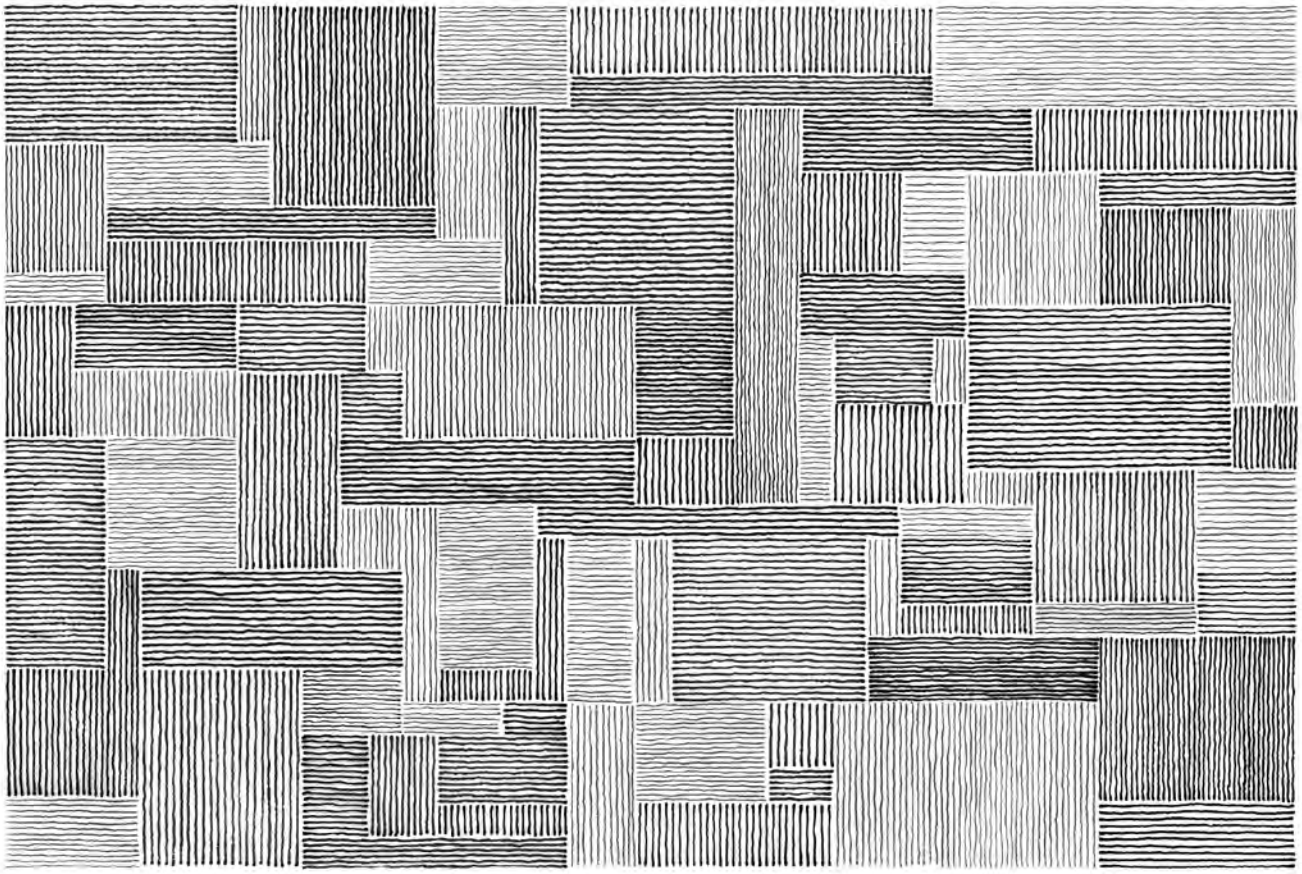

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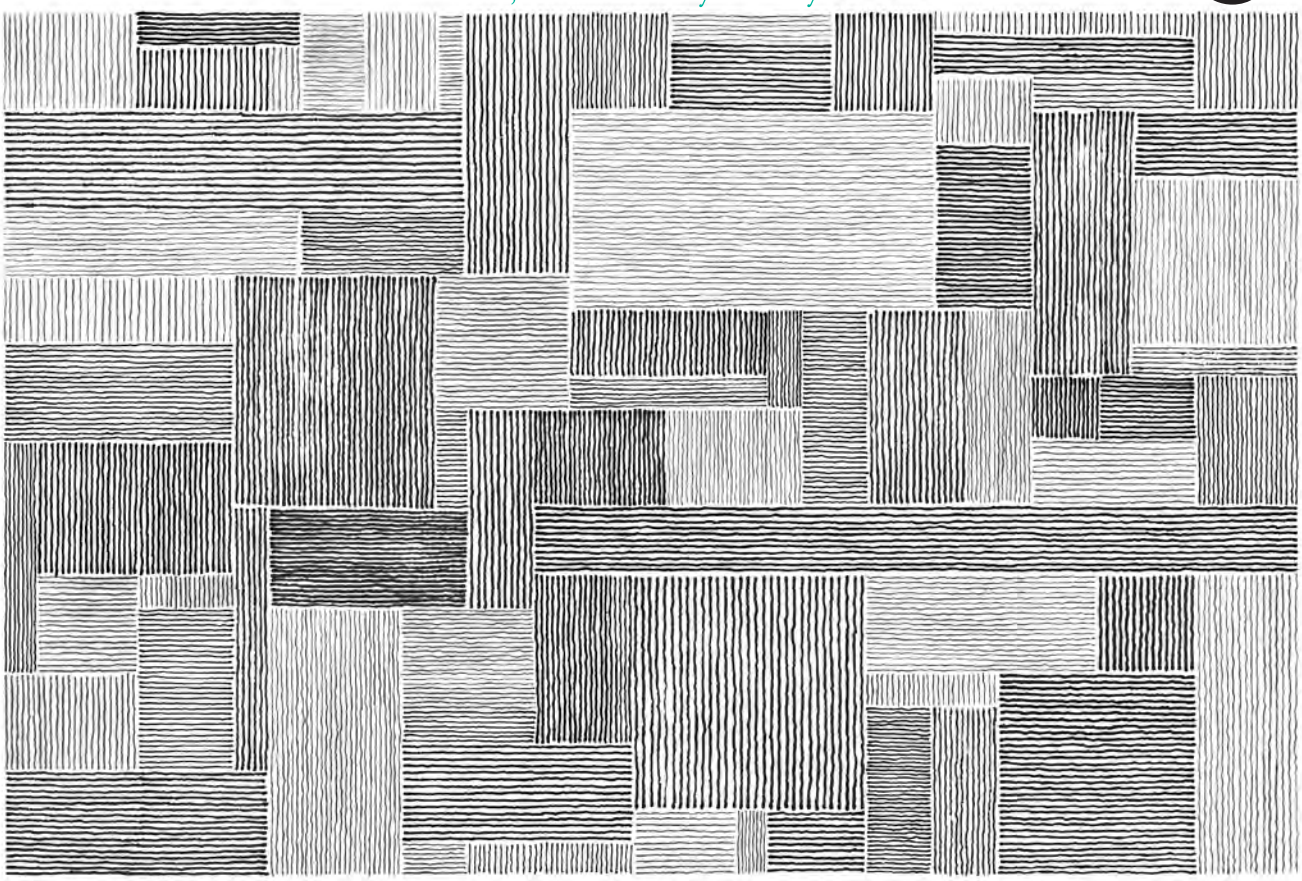

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