

Kuniko Shibata

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The Public Interest in the Developmental State: The Law, Economy and Planning in Post-War Japan

Dr. Kuniko Shibata

Global COE Visiting Fellow
Department of Geography and Environment
The London School of Economics and Political Science (LSE)
Houghton Street, London WC2A 2AE
The United Kingdom

Phone: +44 (0)20-7955-6749

Fax: +44 (0)20-7955-7412

Skype: kunikoshibata

E-mail: k.shibata@lse.ac.uk

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Abstract

Whereas current planning literature has seldom mentioned the role of law and courts to define the public interest in planning, any policy decisions cannot be legitimised without complying with law and order in the modern state. Because planning in its nature has to mediate conflicts between different interests, the rule of law principle – discourse on law and order – considerably matters to identify the public interest in planning. However, this principle is not same across many nation-states, in particular between liberal Western states and late-developed democracies or communist/socialist states. This paper analysed how the public interest was constructed in Japan's planning practice in the Developmental State, examining some of the most prominent planning litigation in post-war Japan.

Introduction

This paper examines discourses on the public interest in Japanese planning in courts by analysing leading cases in relation to Japanese planning culture of the Developmental State. While the public interest had been the foremost important concept in early planning development in the West¹, the same concept was also fiercely attacked in later years from both the left and the right of the political spectrum who argued that the public interest was to legitimise top-down planning policy without being accountable to citizens². In recent years, both academics and planners have claimed that the public interest in planning should be addressed through public participation in a plan-making process³.

However, participation theory dismisses the two important factors in a planning process. These flaws are especially problematic when the theory is applied to late developed democracies outside the West. First, political and intellectual liberalism has yet been achieved in late developed democracies. This would pose significant constraints on setting planning agenda as well as a participation process in those countries. Second, while law should protect the public interest – fairness - in a participation process as well as policy outcomes, it is questionable whether this principle – the rule of law – is fully contestable in late developed democracies. The paper intends to identify the role of law and courts in planning development in post-war Japan and analyse the relationship between law, the economy and the state in shaping the public interest in planning.

Deriving from the fundamentally different origins of the modern state and planning from the West, discourses on the public interest in planning have developed in a distinctive manner in Japan⁴. The concept of the public interest has been obscure in Japan's planning policy statements such as the Comprehensive National Development Plan (CNDP). Moreover, the institutions which involve planning decisions in Japan are not designed to discuss the public interest as common interests⁵. In particular, the public participation procedure in Japan has failed in encouraging debate on the public interest of proposed plans (ibid).

Citizens who were largely excluded from the policy-making process tried to redress the situations by filing litigation cases against governments' planning decisions. Therefore, legal challenge in courts was the only opportunities in which citizens could formally dispute the public interest in planning. For this reason, planning/environment litigation is one of the most useful materials to investigate

what the state considers about the public interest in planning in practice. A caveat here is that the government and the judiciary has not been completely separated in the execution of the power in Japan as the analysis of this paper highlights this problem later.

The analysis disclosed that the public interest and planning discourse in Japan was fundamentally different from the ones of advanced liberal democracies. The Japanese courts interpreted the public interest in planning exclusively as economic development to promote the national economy. However, while the courts acknowledged economic benefits derived from properties as a legally protected individual [private] right, citizens whose health and quality of life were adversely affected by both public and private sector development as a third party did not have any legal entitlements to challenge decisions even when the development severely infringed public safety and degraded local amenities. This flaw in planning controls often occurs in Japan because the state preferred 'private order' in mediating conflicts among stakeholders to strictly enforcing law and order⁶.

The cases examined in this paper are one of the most disputed cases about the public interest and planning controls in Japan. The selection is also to identify the impacts of Japan's developmental state ideologies on discourses on the public interest in its planning practice. Thus, I first investigate the cases deal with a relationship between economic development and the public interest in two prominent state-led planning projects. Second, I examine litigation which reveals Japan's authoritarian state ideology in interpreting third party rights in planning. Conclusions summarise the courts' interpretations of the public interest in planning and discuss their impacts on Japanese planning development.

The Public Interest in Planning and Legal Justice

The public interest, which is prescribed by planning laws and the Constitution, became a key word for Japanese citizens to challenge planning decisions and seek social justice under the constitutional rule in Japan's post-war democracy. However, the discourses on the public interest employed by the Japanese judiciary were significantly different from the interpretation by those who challenged the public administration. The Japanese judiciary regards public and private interests as the state versus individuals, based on the legal orthodoxy developed from Meiji Japan. Indeed, the public interest was rarely interpreted as interests of local communities or social interests in Japan's judicial review. This rigid interpretation by the courts made it very difficult for Japanese citizens to dispute the public interest of planning projects through judicial review. In order to avoid the risk that courts would dismiss their claims on the grounds of the absence of legal standing⁷ in judicial review, citizens often had to use civil suits instead, to ensure that their claims are heard. Paradoxically, this strategy of resident groups resulted in further widening the discrepancy between the concepts of public and private interests in both the judicial system and political thinking in Japan.

My previous analysis already identified Japan's authoritarian state ideology of its planning institutions, which appears in the practise of the central-local government relationship, transparency, citizen participation⁸. I investigate the planning litigation in which citizens challenged the fairness of the planning decision-making process, first to protect their health, and then the quality of social life in later years. Under the civil law principle, the Japanese courts rely on precedents in interpreting statute provisions, and thus, major opinions in courts are unlikely to change

radically in the short term. This means that the introduction of new philosophies to planning policy often accompanies the amendment or creation of statutes as was the case with pollution control in the 1970s and landscape control in the early millennium.

There are three important issues for understanding the concept of legal justice in Japan. First, the majority of statutes have been drafted by bureaucrats of the central government⁹. This is partly due to the staff shortage and the lack of expertises in drafting bills on the legislators' side¹⁰. A large number of bills¹¹ are initiated by ministries with the assistance of policy advisory committees, which are also under the close supervision of bureaucrats. In the past, the vast majority of these bills were generally accepted in the parliament without much resistance under the one-party dominance. Furthermore, an interpretation of the statutes is very much under control of the central bureaucracy. In Japan, articles of statutes tend to stipulate only basic rules, leaving the details of specific rules to be given in the form of cabinet and ministerial ordinances as well as *tūstasu* (communications)¹². Administrative guidance such as communications, however, does not have full-fledged legal status, and as such, it is generally excluded from judicial review in Japan¹³.

Second, the Constitution of Japan was drafted under the initiative of US post-war democratic reformers. It is one of the most advanced constitutions in modern democracies, assuring the principles of civil, political and social citizenship. However, because of its 'foreign' origins and high ideals for democracy, articles of the Constitution do not sit comfortably with Japan's civil code, which has its origin in the authoritarian Meiji regime. These two legal cultures sometimes competed in

courts. The cases discussed in this paper also reveal the disparity between Japan's judicial orthodoxy (the Developmental State) and the Constitution of Japan (the modern state) with regard to the ideas about citizenship.

Third, it is often pointed out that the rule of law is absent in Japan¹⁴. Japan's modern laws and court system were initiated in a time of foreign threats in the nineteenth century. The Meiji government rushed to install a legal system to overcome problems with the unequal treaties and extraterritoriality¹⁵. Although the Meiji elites understood the importance of laws in a modern administration, they did not fully comprehend the legitimacy of laws that could be challenged in courts¹⁶. As a consequence, laws exist in Japan to rule people and society but the principle of reviewing the accountability of the actions of law-making and law-enforcing institutions was not properly introduced into modern Japan¹⁷.

The Dominance of Development Priorities in Legal Cases

One of the most significant features of the Japanese planning system is its strong orientation towards economic development. Although Japan's City Planning Act is supposed to protect safety, public health and amenity, Japanese planning laws are fundamentally weak in satisfying even minimal requirements of protecting the quality of environment against externalities of the market in land-use. National level planning laws and ministerial guidance, which bind actual planning practices at local levels, are mainly designed to promote economic development¹⁸. As a consequence, there exists an underlying contradiction in actual planning practices between the national planning framework and the basic principles of the City Planning Act regarding the implementation of development controls of local built environments. Moreover, property rights, in particular the right to develop land,

have been strongly protected by the civil code, which originated in the Meiji administration to collect land taxes. As explained in my recent paper, land taxes represented the major source of revenue for the Meiji government to support industrialisation¹⁹. The right to develop land was further reinforced by the agrarian land reform, which was carried out during the US occupation period.

Because of the strong rights to develop land and the legally binding national planning framework to promote economic development, development controls under the City Planning Act have further been undermined to accommodate large-scale developments that are considered to serve ‘the public interest’. Facing health threats and environmental hazards, Japanese citizens disputed the legitimacy of planning decisions that seemed to be in contradiction with the objectives of the City Planning Act, or violate basic human rights that are guaranteed under the Constitution of Japan. In this process, the public interest in the Japanese planning system was examined against the ideology of the Developmental State. The goal of this paper is to examine planning litigation, and observe how conflicts over the public interest have been resolved in two different political and legal cultures in post-war Japan.

Noise pollution of the Osaka International Airport Case

The judgement upon noise pollution of *the Osaka International Airport* is one of the most cited cases about the public interest in infrastructure planning in Japan. *The Osaka International Airport* (now the *Itami Airport*, used for mostly domestic flights) started as a small local airport for single-engine planes in 1936. It was enlarged further during the early post-war years for US military use. After the right to control aviation finally returned to the Japanese government in 1958, the

Ministry of Transport decided to turn the *Osaka Airport* into an international airport and started to consult with local governments. While the business communities in Osaka and Kobe were enthusiastic about building an international airport in the Kansai region, residents in the area strongly opposed to the proposed plans because of its smaller-than-standard size (304 ha)²⁰ and the proximity to residential areas²¹. The protest was fierce. When the voting for the airport expansion was held in Itami City assembly on 5th April 1962, for example, as many as 900 policemen had to protect the assembly building against protesting citizens²².

Once the international airport started operating, over 42,000 households were exposed to noise at the level of 85 WECPNL²³, which was considered to be very close to the tolerance limit²⁴. Testimony²⁵ submitted by Terai Hisayoshi, the Civil Aviation Bureau Chief of the Transport Ministry, to the Transport Committee of the House of Representatives in 1974 further revealed that 179,000 households were exposed to noise levels of more than 75 WECPNL²⁶. At a residence occupied by one of the plaintiffs, the noise level reached between 100 and 110 phons²⁷ (more than 95 WECPNL), when jumbo jets started using the B runway of the airport from the 5th of February 1970 onwards²⁸. In March 1970, according to evidence submitted to the Supreme Court, the number of airplanes which took off and landed at *the Osaka International Airport* amounted to 367 (including 165 jet planes) on the day of examination.

After negotiations with the government failed, 264 residents filed a civil suit in the Osaka District Court in 1969²⁹. They tried to halt night flights based on personal and environmental rights and to obtain compensation for damage in the past as well as in the future. The judgment of the Osaka District Court³⁰ (27th Feb 1974) partly

accepted the first two issues, but entirely dismissed compensation for future damage. A year later, the judgment of the Osaka High Court³¹ (27th November 1975) accepted nearly all claims of the residents. The government appealed to the Supreme Court in 1976. In this suit, the principle of ‘the public interest’ was examined in relation to the state’s planning decision against the plaintiffs’ human rights.

The Supreme Court ruling, which was finally handed down in 1981, contained the following four main points. First, it rejected the request for injunction to prevent all night flights at a public airport by means of a civil suit. Second, it admitted that the erection of the airport had been illegal, and that the mode of its usage created a risk to cause a certain level of damage to the users and third parties. Third, it dismissed compensation for the plaintiffs who had moved into the area after aircraft pollution problems had already been extensively reported. Finally, it rejected compensation for future damage on the grounds of difficulties in assessing the degree of damage, although the ruling acknowledged that continuing use of the defective airport was illegal.

The ruling of the Supreme Court was severely criticised. The most serious criticism was that the Supreme Court rejected the legal standing of the plaintiffs to request the injunction of night flights by means of a civil suit (*tōjisha soshō*), because the judiciary believed that the operation of the airport constituted the exercise of ‘authoritative power’³². Therefore, the case should have been challenged by means of judicial review of administrative acts such as an ‘appeal-type suit (*kōkoku soshō*)’. However, the Supreme Court did not clarify whether the plaintiffs could bring this case in the form of judicial review. The Supreme Court

further claimed that, by giving an order to the Transport Ministry (to stop night flights), the High Court ruling was in violation of the doctrine of the separation of the three branches of the state powers as stipulated in the Constitution. The Supreme Court argued that since there were other countermeasures against noise pollution, it must be at the Transport Minister's discretion to decide which one(s) the Ministry would use against the pollution. For this reason, the Supreme Court overruled the Osaka High Court's judgement.

The further controversial point in this ruling was the judiciary's interpretation of the public interest in relation to the plaintiffs' rights and the illegality of the action of the state. The plaintiffs argued that the operation of night flights at the airport was illegal, because it violated personal and environmental rights based on Articles 13 and 25 of the Constitution that guarantee 'the right to life, liberty, and the pursuit of happiness' and 'the right to maintain minimum standards of wholesome and cultural living' respectively. However, the ruling of the Supreme Court did not examine this matter and simply maintained that the illegality of the airport operation must be assessed in relation to the public interest based on the following premise:

.. while the damage experienced by the appellants exceeds the tolerance limit in social life in general [in Japan], considering the public interest of this airport, even when the damage exceeds such limit, [the court must assess the case] on the condition that the victims have to endure a certain higher level of tolerance due to its public necessity.....

Nevertheless, the Supreme Court acknowledged serious errors in the planning of the airport, which was too small for the massive use of jet planes and too close to residential areas in the absence of effective countermeasures for noise pollution. Moreover, the judiciary admitted that there was an imbalance between the benefits

that the residents in the neighbourhood received from the airport and the damage caused by its operation; this danger was too large to justify the claim that the existence of the airport was ‘in the public interest’.

Although the Supreme Court acknowledged the illegality of the airport operation and thus ordered the state to compensate the victims for the past damage, Judges Kurimoto Kazuo, Fujisaki Banri, Motoyama Tōru and Yokoi Daizō expressed an opinion different from the majority of Judges:

Incidentally, when projects carried out on behalf of the state cause injuries to third parties, injuries beyond the tolerance limit alone do not make the projects illegal although such claims can be valid in application to private business in general. The tolerance limit must be considered according to the nature and content of the public interest (*kōkyōsei*) of the state’s project. When the state’s project in question is in the public interest to a high extent, the tolerance limit must be raised accordingly. When injuries to third parties caused by the state’s project that is highly in the public interest are non-property injuries, such as psychological pain or obstructions to life as the Osaka High Court judgement in this case acknowledged, it would be appropriate to conclude that the demand for compensation for such damage must not be allowed in principle because the damage is considered to be within the tolerance limit. Only when injuries are serious enough to have caused physical damage can the conclusion be upheld that these injuries have exceeded the tolerance limit. After all, the modern state has various responsibilities in the achievement of many objectives for the public; in order to achieve these objectives, the state itself carries out projects when it deems necessary. As citizens benefit from these state projects either directly or indirectly, in comparison with the benefits citizens receive as said, it would be inevitable that citizens are requested to accept certain levels of sacrifice caused by the state’s projects which are highly in the public interest (underlined by the author).

As this minority opinion suggests, even in a serious noise pollution case as the *Osaka International Airport*, Japanese citizens can be expected to accept severe infringements of their human rights, sometimes even without compensation, in the name of the public interest. Then, how was the concept of the public interest (*kōkyōsei*) interpreted in the noise pollution case of the *Osaka*

International Airport? The ruling explained as follows:

..the public interest (*kōkyōsei*) or the necessity of the public benefit (*kōeki jyōno hitsuyōsei*) claimed in this case is the necessity of high-speed public transport by aircraft. In modern society, considering an increasing demand for speedy movement, especially in the area of economic activities, it is obvious that air transport is highly in the public interest. Moreover, as this airport occupies an important position in both domestic and international air routes, it is apparent that the public demand for its use is very high. The High Court ruling did not deny this fact.

It is clear that the public interest in this case equalled the demand for air transport, especially for economic development, and failed to include the large number of residents that were affected by severe noise pollution. In contrast, the demand by citizens for peaceful nights and compensation was considered as a private interest.

As a result of political intervention, the stoppage of night flights was accomplished and the monetary value of compensation to the victims was raised from 700 million yen to 1.3 billion yen in an ‘amicable settlement’ outside of court³³. After the settlement, various countermeasures to the noise pollution of *the Osaka International Airport* were taken, including subsidies to the residents to soundproof their homes and the relocation of severely affected residents to other areas. The efforts to reduce the severe aircraft noise at *the Osaka International Airport* culminated in the construction of a new international airport, the Kansai International Airport (opened in 1994), which is located on a manmade island off the Osaka Bay and therefore considerably free from noise pollution problems. In this sense, the litigation of *the Osaka International Airport* contributed to prompt the government to take more serious precautions against environmental hazards in infrastructure planning.

Despite its positive impact on future planning in Japan, *the Osaka*

International Airport case negated the advancement of the discourses of the public interest in Japanese planning for rigorously safeguarding citizens' human rights. First, the ruling demonstrated the serious defect of Japan's legal authority against the principle of the rule of law in the modern state. The Constitution of Japan declares the role of the judiciary as follows:

Article 76.3: All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

Article 81: The Supreme Court is the court of the last resort with power to determine the constitutionality of any law, order, regulation or official act.

As confirmed here, the courts must be independent from other branches of state powers to ensure social justice in the modern state. Without a mechanism to challenge the acts of the state's law-making and law-enforcing institutions by means of judicial controls in reviewing their compliance with principles of legal rules, the state would simply become an absolute state³⁴. Judicial independence does not mean that the courts must not interfere with the executive power as the judges of *the Osaka International Airport case* argued. On the contrary, the Japanese courts are vested with powers to remedy the errors of the state's actions. The rule of law in the modern state is only maintained by guaranteeing citizens' rights to challenge the legitimacy of existing law, order, regulation and official act in courts³⁵. Therefore, considering the importance of the rule of law to protect citizens from arbitrary state power in the modern state³⁶, the ruling of *the Osaka International Airport case* may represent a serious violation of the Constitution, by maintaining the judiciary's non-intervention principle to the executive power .

Second, the ruling rejected the legal standing of the plaintiffs on the grounds that the form of litigation was incorrect. Because the legal standing of third

parties in judicial review was often rejected in Japan, the plaintiffs chose to file a civil suit to secure their legal standing against injuries³⁷. By denying the legal standing of the plaintiffs simply because of the technical reason as stated, the Supreme Court ruling of *the Osaka International Airport case* sounded like a warning to Japanese citizens who brought similar injunction suits during this period³⁸. The Supreme Court judgement discouraged Japanese citizens from challenging the state's unjustifiable actions.

Third, the Supreme Court ruling dismissed the pressing opportunity to interrogate the public interest of planning in relation to Articles 13 and 25 of the Constitution, which embrace citizenship rights in a modern democracy. In this context, what the public interest stands for must be equated to a principle for materialising a fair society, not simply equal to the state's interests. The public interest in the modern state must be determined through due process, if many interests conflict with each other in public policy-making. While the plaintiffs claimed that noise pollution surrounding *the Osaka International Airport* violated their personal and environmental rights, the extent of the injuries endured by the plaintiffs can be described as a serious threat to public health and safety. As the modern planning system in the West initially emerged to protect public health in the public interest³⁹, the ignorance of the Supreme Court on the protection of public health can be seen as an antithesis to modern planning development.

Finally, by adhering to the theory of tolerance limits, the Supreme Court belittled the concept of the public interest. The theory of tolerance limits was proposed by Professor Nomura Yoshihiro, who argues that injuries by pollution must be assessed by weighing various factors and balancing competing interests

surrounding pollution cases, irrespective of the intention or fault on the side of polluters⁴⁰. This theory was helpful for pollution victims to overcome the burden of proving faults or negligence of polluters, as it had been difficult under the Japanese civil code to make polluters liable without proof of their negligence, at least until the establishment of the doctrine of no-fault liability (*mukashitsu sekinin*) in Japan's environmental litigation in the late 1960s⁴¹.

However, the theory of tolerance limits has a serious flaw when it is applied to matters involving the public interest of governments' projects. As the minor opinion of the Supreme Court judges of *the Osaka International Airport case* reveals, the public interest of governments' projects could be misused without serious examination of competing interests in disputed cases. Governments could simply claim that the objectives of their projects are highly in the public interest so that inconvenient outcomes caused by the projects might be dismissed. If only the state can decide what the public interest should be about a disputed case without giving affected parties an appropriate opportunity of consultation nor granting them a right to challenge the government decisions, the concept of the public interest becomes a void notion in a modern democracy. As a result, tolerance limits can easily be raised according to the degree of 'the public interest' which governments consider 'appropriate'. In this sense, the theory of tolerance limits can no longer be a valid doctrine to promote public welfare in planning. Therefore, there is a need to establish concrete principles to examine what the public interest in planning is in relation to laws and the Constitution, and set out rules about how to define the public interest in future planning in Japan. Law also should identify who are entitled to participate in planning policy-making and to challenge planning

decisions.

The Hanshin Expressway and the National Route 43 Case

Environmental citizen movements in the 1960s and the 1970s and subsequent environmental litigation resulted in the enforcement of the 1968 City Planning Act, creation of new environmental laws and changes in legal theory to protect pollution victims. However, despite these developments and increased awareness of citizen's rights about the environment, the judiciary's definition of the public interest in planning and environmental litigation has hardly changed in post-war Japan. The 1995 Supreme Court's ruling of the air and noise pollution case of *the Hanshin Expressway (HE) and the National Route (NR) 43* reflected the same interpretation of the concept of the public interest as in *the Osaka International Airport case*, imposing 'tolerance' upon the victims by dismissing the residents' rights to pursue a 'healthy and pleasant living environment'.

In the early 1970s, a resident group living in an area within 85 metres from the NR43 suffered from a level of noise pollution with a median value of around 70 to 80 phons. (dB)⁴², vibration and air pollution, all as a result of more than 90,000 vehicles using this route. When the state started to construct the HE and connect it to the NR 43 in the form of an elevated motorway in October 1971, a resident group applied to the Kobe District Court for an injunction to prevent the construction of the HE⁴³. The residents cited their personal and environmental rights as grounds for the request. Although the courts did not accept that residents had the right to ask for the protection of their 'local environment'⁴⁴, it did acknowledge their rights to protection against unlawful intrusion of their 'residential environment', including sunlight, ventilation, quietness, view, clean air,

privacy and comfortableness. Although the judiciary rejected the injunction request from the residents, it ordered the Hanshin Expressway Public Corporation (HEPC) not to aggravate the residential environment further by limiting the number of vehicles using the HE and the NR 43 to less than 150,000 per day and to monitor noise levels that exceeded environmental standards.

Nevertheless, the pollution levels caused by the HE and NR remained far higher than the designated environmental standards. As a consequence, the resident group sued the state and the HEPC in 1986, demanding compensation for damage and an injunction to restrain an excessive use of the routes, claiming that the motorways destroyed the local environment (destruction of the townscape) and the residents' healthy and pleasant life by causing sleep deprivation, a disruption of normal life or damage to mental health. The Osaka High Court acknowledged the damage to residents who lived within 20 metres from the motorways as well as to those who experienced noise levels exceeding the tolerance limit. While the High Court ordered the defendants to pay compensation for past damage, it rejected any future compensation. Also, the injunction request was denied based on the argument that 'the motorways are highly in the public interest'⁴⁵. The case went to the Supreme Court to seek an injunction to prevent an excessive use of the routes. The residents insisted that there was a serious misjudgement in the interpretation of the public interest by the High Court, arguing as follows:

In short, without defining the density of NO_x to affect human health, the High Court judged that the air pollution caused by exhaust gas from the motorways in this case was not serious enough to be considered as affecting the residents' health, and thus, the appellants' damage caused by noise, exhaust gas and so on from these motorways were judged as mere obstruction for normal life. Furthermore, although the appellants did not request to stop the use of the motorways completely, the High Court ruled that with an increase in the number of vehicles using these

motorways, its growing demand made the motorways to be in the public interest. However, the High Court ruling which dismissed the injunction request for excessive use arguing that there was no alternative motorway, contained a misinterpretation of the statutes about the assessment of the tolerance limit by not complying with the due process of collecting adequate proof and examining past cases, as well as making the error of judgements without sufficient reasons⁴⁶.

Despite those counterarguments, the Supreme Court upheld the decision of the High Court and dismissed the plaintiff's appeal for the injunction, arguing as follows:

The High Court acknowledged the infringement that the traffic noises have penetrated into the [appellants'] living spaces almost all day, thus having disrupted the appellants' sleep, conversations, telephone conversations, pleasure of having a happy home, television and radio reception, as well as created the situation where the accumulation of the factors above has affected their mental health. The High Court also accepted that the residents who live within 20 metres from the motorways have suffered from additional nuisances such as dirt on the washing caused by floating particles from automobile exhaust gas. On the other hand, the High Court also lawfully recognised that the motorways have contributed significantly to interregional transport, mainly in the logistics of industrial materials, and its contribution has risen further along with an increase in both car ownership and the share of car transport in domestic passenger and freight transport. On balance, the High Court judged that while the extent of the appellants' present and future damage represented a disruption of their normal life, considering the motorways' irreplaceable great benefit not only to the residents and businesses alongside the motorways but also to interregional transport and industrial economic activities both in quality and quantity, there is no serious illegality about not accepting the appellants' request for the injunction⁴⁷.

The Supreme Court did not satisfactorily assess the motorway's impact on public health⁴⁸ and the possibility of reduced traffic by considering an alternative route. It again failed to recognise that citizens' rights to health and safety constitute a part of the public interest in planning policy.

The legal standing of third parties in planning

As explained so far, it is extremely difficult for neighbouring residents (third

parties in judicial review) to challenge the legality of the state's development projects, even when it is recognised that such developments would cause injuries to citizens⁴⁹. The civil cases reviewed above also demonstrate that unless neighbouring residents had injuries of physical health, the state's planning projects are unlikely to be quashed or significantly altered because of 'the public interest' of these projects. Even when the public administration's action is considered to be a tort, such action cannot be revoked since the 'public (the state)' interest is superior to 'private (individual)' interests. The problem with this logic is that residents' rights are not considered as a part of the public interests, but simply treated as private interests. This leads to the question what kind of 'private interests' could be legally protected against 'the public interest', which appears to be dominated by the state in Japan. *The Authorisation of the Japan National Railway Project Case* (1978), in which nearby residents challenged the legitimacy of the development authorisation of a bullet train route, indicates the answer. The Supreme Court dismissed the challenge of third party residents who claimed that the development project contradicted the purpose of the Land Expropriation Act (*Tochi Shūyō Hō*), as follows:

The Land Expropriation Act was enacted with Article 1 stipulating its aim as 'to balance the promotion of the public interest against private property rights and thus contribute to appropriate and rational national land use', responding to the aim of the Constitution's Article 29, Clause 3, which stipulates 'Private property may be taken for public use upon just compensation therefore'. Since the procedure of land expropriation based on this act is the system that balances the promotion of the public interest through implementing projects against the private property rights of land owners and related parties within the area of planned project, individual interests that this act aims to protect are construed solely as property rights and property-related benefits of land owners and related parties. However...[continued] in this case, since there is no dispute that the plaintiffs do not hold any right in relation to the property where the project is planned, the authorisation of the project would not cause any change on the legal status of the

plaintiffs.

Furthermore, the aim of Article 20, Clause 3 of the Land Expropriation Act, which stipulates that ‘the project plan must contribute to appropriate and rational land-use’ as a precondition of project authorisation, must be construed in such a way as to oblige administrative agencies to judge whether the land is going to be utilised appropriately and rationally from the viewpoint of the national economy, by balancing the disadvantages of the property owners holding land etc. within the designated area for the project and the related parties in relation to the public interest to be realised by the project through land expropriation etc. As for environmental protection, since the Act does not have a clause stipulating its scope, extent, method and so on, it is not appropriate to argue that Article 20, Clause 3 of the Land Expropriation Act also intends to protect individual and specific environmental benefits of citizens living nearby the project (underlined by the author)⁵⁰.

The Japanese judiciary has historically confined its interpretation of ‘legally protected interests’ in planning developments to economic property rights. Although the Japanese courts have hardly accepted the legal interests of third parties in planning, they have been exceptionally willing to accept the legal standing of third parties when the injuries are directly connected with the loss of economic benefits. This is typically represented in cases where hotels or inns located in historic towns were successfully granted injunctions to restrain the construction of tall buildings in their vicinities, since the courts acknowledge that these tall buildings would obstruct the views from the plaintiffs’ properties, and were likely to cause negative impacts on the revenues of the plaintiffs’ businesses⁵¹.

Third parties had difficulties not only in challenging governments’ development projects, which are automatically regarded to be in the public interest on most occasions, but also in overturning the private sector’s developments that obtained authorisation such as development permissions and building confirmations. Even when authorised development plans do not comply with regulations, Japanese

courts have rarely quashed granted authorisations, or ordered developers and administrative bodies to adjust these unlawful developments on third party's requests⁵². Only recently have the Supreme Court begun recognising the rights of a third party to challenge authorised developments in cases where the third party is likely to be exposed to considerable dangers such as landslide⁵³ with the completion of such developments.

Apart from these exceptions, the judiciary has maintained that neither the City Planning Act nor the Building Standard Act is meant to protect 'specific individual interests', but rather to safeguard 'the public interest in a general and abstract sense'⁵⁴. For example, the Yokohama District Court denied the legal standing of neighbouring residents who requested to quash a development permission of a large-scale residential development that did not provide adequate roads⁵⁵ adjacent to the planned development area, as stipulated in the City Planning Act. The residents based their complaint on this illegal aspect of the development and the lack of safety concerns. The judges set aside the flaws in the development permission which resulted from the public agency's negligence, but argued that the claimed safety concerns were not significant enough to quash the development permission as follows:

After all, the relevant laws in this case remain to protect life-concerned interests of the residents living within the planned development area, and thus, it must not be construed as to protect the individual interests of the neighbouring residents living outside the development area⁵⁶.

The same logic can also be seen in the case of illegal building confirmation on farmland under the Building Standard Act without obtaining development permission under the City Planning Act and the Nature Conservation Ordinance⁵⁷.

The legal standing of neighbouring residents who requested the annulment

of the illegal building confirmation for safety and environment reasons was rejected; the judiciary reasoned that the construction of the building had already been completed.

As seen in the cases above, the Japanese courts rarely revoke flawed planning authorisation upon third party requests. Then, how has the judiciary interpreted the public interest stipulated by planning statutes in relation to the neighbourhood? When neighbouring residents challenged a local government's permission to construct a 180 hectare residential development, of which more than 72 percent was to be implemented in the urbanisation control area (UCA) and was located adjacent to a nature reserve, the 1982 Yokohama District Court ruling defined legally protected interests under the City Planning Act as follows:

The City Planning Act aims for 'planning cities' appropriate developments and well-ordered maintenance, thus contributing to the balanced national land development and the promotion of the public welfare (Article 1)'. In order to accomplish these aims, [the Act obliges the state to] lay down city planning, and therefore the basic principle of city planning is 'to make rational land-use under appropriate controls in order to secure healthy and cultural urban life and functional urban activities while designing the good harmony with agriculture and fishery (Article 2)'. 'Healthy and cultural urban life' quoted here must not be interpreted as private interests of individuals and specific benefits of a healthy and cultural urban life for urban dwellers, but as a part of the public interest, which is the appropriate development and well-ordered maintenance of cities as the Act aims for, and 'healthy and cultural urban life' must be seen as a general and abstract benefit.

----- [continued]

Hence, as the provision of development permissions in Article 29 of the City Planning Act sees the fulfilment of the public interest as the appropriate development and well-ordered maintenance of cities, a healthy and cultural urban life and functional urban activities, it is right to construe that the Act does not directly intend to protect the rights or specific benefits of residents who live in the vicinity of the planned development area (underlined by the author)⁵⁸.

As can be seen from those cases, the Japanese judiciary has insisted that the rights of neighbouring residents who are affected by development are to be treated as 'private interests'; as such, they are not legally protected unless the residents are likely to undergo economic loss or life-threatening dangers from the development. Furthermore, although Article 1 of the Building Standard Act stipulates that its aim is 'to protect citizens' life, health and property', and Article 2 of the City Planning Act 'to secure a healthy and cultural urban life and functional urban activities, while designing the good harmony with agriculture and fishery', Japan's administrations and the judges have placed economic utility and monetary value of development above citizens' safety and environmental concerns in actual planning practices. While the role of planning is clearly stipulated in these statutes to include protection of the quality of life, the judiciary has not interpreted that citizens are eligible to defend such concerns in planning policy-making in the name of the public interest.

Conclusions

Japan's planning litigation discussed in this paper suggests the strong orientation in Japanese planning towards capitalist development supported by the state. As a result, even though the purpose of the City Planning Act is to promote 'rational' land use, the actual practices of the Japanese planning administration and the courts are far from protecting the environment and responding social concerns as the prime objectives of planning policy. Instead, the Japanese courts have confined legally protected interests in planning to the economic interest that properties can bring about. Under this ideology of seeing economic benefits as the foremost importance in planning, the public interest or 'rational land use' in planning was

equated with the promotion of economic growth in the cited litigation. Accordingly, even minimal development controls are often ignored by developers. The rulings discussed in this paper show that the rights to safety, amenity and social life are easily sacrificed when there are opportunities for economic gains by planned development.

The Japanese courts have firmly upheld the view that decisions by the state cannot be easily repealed or challenged by citizens in the name of the public interest, even when there are flaws in the governments' actions. With the legacy of the sovereign Emperor from pre-war times, Japan's judicial system does not function very well when it comes to protecting citizenship rights against the illegal acts and errors of administrative power in the public interest. Because the public interest in planning in a modern democracy has only been secured and developed with citizens' rights to challenge administrative decisions, the non-intervention principle adopted by the Japanese courts towards other state functions have severely restricted potential changes of discourse on the public interest in planning. Western planning history shows that the public interest is not a rigid concept, but changes over time, reflecting the demands of the public⁵⁹. The courts are the last public domain for citizens to contest the public interest (fairness and legitimacy) of planning decisions under the rule of law. Therefore, undermining the power of the courts to protect citizens' rights diminishes the role of the public interest as a vehicle for changes of planning.

Although 'public participation' in planning is now a new mantra for both policy-makers and intellectuals⁶⁰, the right to participate in plan-making and challenge government decisions in fact has not yet been endorsed by Japanese planning laws.

This explains why planning in Japan is so slow in responding to the demand for more accountability to the public despite the often-quoted emergence of its 'new' civil society in the recent decade⁶¹. The analysis also suggests the limitations of 'consensus politics' or 'participatory democracy' which has been a central concern in planning literature in the post-modern age⁶².

Usage for Japanese Names

Japanese names are given in the text in their normal Japanese order, surname first. However, all names in references appear in first name-surname sequence.

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- ¹¹ Throughout post-war years, more than 80 percent of statutes were made by cabinet proposals. Ramseyer, J. Mark and Frances McCall Rosenbluth, *Japan's Political Marketplace* (Cambridge, MA: Harvard University Press 1993), p. 135.
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- ¹³ Young, 1984
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- ¹⁷ Haley, 1992; Wolferen, 1988.
- ¹⁸ Shibata, 2007.
- ¹⁹ Shibata, 2008.
- ²⁰ The airport has only two short runways (1,828 and 3,000 metre-long against a standard 4,000 metre-long runway) for jet planes. When jet planes use an inland airport as in the case of the former *Osaka International Airport*, its recommended size for noise protection should be an area size of 6,400 hectares. Tsuru, Shigeto. *The Political Economy of the Environment: The Case of Japan* (London: Athlone, 1999). p.109.
- ²¹ *The Osaka International Airport* is located in the rapidly developed suburban communities of Itami, Ikeda and Toyonaka cities.
- ²² Tsuru, 1999, p. 108.
- ²³ WECPNL = Weighted Equivalent Continuous Perceived Noise Level (as defined by the International Civil Aviation Organization). Ibid., p.109
- ²⁴ Igarashi, Juichi *Kankyō Kijun Sōon No Settei Keika, Sono 2, Kōkūki Sōon Ni Kakawaru Kijun (the Process of Setting Environmental [Noise] Standards, Part 2: The Environmental Standard for Aircraft Noise)* (Kobayashi Institute of Physical Research, 1988 [cited 29 June 2004]); available from http://www.kobayasi-riken.or.jp/news/newstop/news_Frame_7souon.htm.
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- ²⁷ Phon = a unit of measurement of noise level used in Japan until November 1993. 100 to 110 phons of noise is equivalent to 100 to 110 dB (decibel = a unit of sound pressure level) , which represent a sound level ranging from the sound of a chain saw to the sound of a rock drill or a car horn. Prolonged exposure to a noise level of over 90dB is considered to be damaging to auditory nerves.
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