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Conference paper

Original citation:

Originally presented at Public versus private planning: themes, trends, and tensions. The 13th International Planning History Society (IPHS) conference, 10-13 July 2008, Warsaw, Poland.

This version available at: <http://eprints.lse.ac.uk/21675/>

Available in LSE Research Online: November 2008

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The Public Interest in Planning in Japanese
Jurisprudence: The Limits to Participatory Democracy

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Paper for presentation at International Academic Group on Planning, Law
and Property Rights II Symposium, Warsaw, Poland, 13-15 February 2008

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Abstract

While mainstream academic literature tends to emphasise the place of ‘participatory democracy’ as key to realising the public interest in planning policy, this paper argues that the statutory framework as well as a fair judicial system both need to underpin the ideal of the public interest in planning development. The legal cases analysed in this paper illustrate why citizen participation have failed to change values or practices in Japanese planning, even in recent years. The paper demonstrates how the hierarchy of law, such as the statutory power between central and local government and the separation of power between the executive and judiciary, has essentially defined the idea of the public interest in Japanese planning.

Introduction

The concept of the public interest was once considered the most important value for planning professionals in the West (Faludi 1973). Planners regarded themselves as the guardians of the public interest in protecting the environment, preserving cultural heritage and providing public goods. Nevertheless, from the late 1960s onwards, feminists and social campaigners have rejected the public interest as being the hypocrisy of ‘white male middle-class’ technocrats (Greed 1994; Jacobs 1972; Sandercock and

Forsyth 1996). The proponents of postmodernism and multiculturalism have also criticised the use of the public interest to legitimise the Western hegemony over other cultures and developing nations (Burayidi 2000; Sandercock 1998). As a result, the concept of the public interest has lost much of its face value in planning policy-making.

Responding to this predicament, both planners and academics have increasingly asserted that public participation is a solution to making planning policy more accountable to citizens (Davidoff 1996; Forester 1989; Healey 1997; Innes and Booher 1999). Many now believe that the public interest in planning can be realised if participation in planning policy-making is 'successful' or democratic (Douglass and Friedmann 1998; Friedmann 1973; Hague and McCourt 1974). However, while active civil society has undoubtedly been the source of democratic movements and planning progress in the history of the West, the existence of civil society or public participation itself has not necessarily produced fair planning outcomes in the late-developed democracies (Cooke and Kothari 2001; Guijt and Shah 1998; Shibata 2007). Many of these countries still lack the liberal tradition, which is taken for granted in the West for a century or more, both in policy debates and politics that would make planning policy more accountable to all stakeholders (ibid). In addition to this, the legal and judicial systems in late developed democracies impede planning progressing towards more democratic norms (Shibata 2007).

In this paper, I have analysed prominent planning litigation in post-war Japan, and suggest that participation or ‘consensus’ is not sufficient to realise the public interest in planning. The first section investigates the legal dimension of the authoritarian state in Japanese planning policy. The analysis focuses on the relationship between central and local government, as well as the government and civil society in Japan’s planning policy-making. The second section discusses the role of the courts in Japanese planning in comparison to European planning, in particular regarding the introduction of new planning philosophies. This section summarises the courts’ interpretations of the public interest in planning and discusses their impact on Japanese planning development. The paper concludes that public participation is an empty promise to the affected parties in achieving democratic planning goals unless all stakeholders have opportunities - more precisely legal entitlement - to challenge proposed plans in the name of the public interest.

1. The Legal Dimension of the Authoritarian State

One of the most distinctive features of planning in Japan is its authoritarian nature. Japan’s planning decision-making system and its administration operates within a strict hierarchical order between different levels of governments. Occasionally, local governments may take initiatives in planning policies to meet local needs. This could be due to strong political

leadership in local government, or due to the urgency for local planners to deal with crises such as rapid population growth/decline, financial crisis or acute environmental degradation. However, when local planning policies conflict with those of central government, it becomes clear which government has the final say. While central bureaucracy maintains the principle of local autonomy with regard to planning at the municipality level (Japan. Ministry of Land Infrastructure and Transport 2003), the major court rulings have consistently contradicted this principle. The cases in this article demonstrate the ease with which developers can quash local planning initiatives in court in cases where local development control tools are stricter than the national planning codes or when they appear to overshadow the power of higher authorities.

1.1 Local ordinances and national laws

Limited local autonomy in planning in Japan is evident in the prohibition of local planning ordinances from setting codes that are stricter than national laws. At least until the 1960s, the government, the courts and academics in Japan maintained that national laws should have precedence over local ordinances when regulating the same matter (*kokuhō senseinron*)¹. The theory was that national laws set the highest standard of regulation, so local government must not create ordinances laying down stricter standards than national laws (*uwanose*) or additional rules to regulate other dimensions of

the same objective of the national laws (*yokodashi*).

However, this theory had to be relaxed when the parliament was slow to enact effective environmental laws in the 1960s, and pollution problems surfaced. Facing fierce protests by resident groups against new developments, many local governments created planning guidelines to protect their citizens from severe environmental hazards. Moreover, in 1975, the Supreme Court ruled that local government could enact ordinances with stricter rules than national laws on public safety regulation, and on the control of marches and mass demonstrations². In this judgment, the Supreme Court ruled that the illegality of local ordinances against national laws must be assessed with the intentions, objectives, contents and effects of both the law and the ordinances and whether there were inconsistencies and conflicts between them in regulating the same issues. Since this ruling, the rights of local governments to install ordinances have been strengthened and the courts seem to have at least accepted the trend towards more local autonomy of planning regulations. However, this Constitutional right has not been enforced through the practice of judicial ruling or decision-making in planning as judgements in the following section would reveal.

Takarazuka City Pachinko Parlour Ordinance Case

The general trend for local autonomy notwithstanding, it cannot be said that a sufficient level of local autonomy of planning regulations has been

established. For example, on 9th July 2002, the Supreme Court dismissed the legal standing of Takarazuka City Council to seek an injunction on the construction of a pachinko parlour. The issue was that the Takarazuka City Ordinances, which regulate the construction of pachinko parlours³, amusement centres and love hotels⁴, contained stricter codes than the Act Concerning the Control and Improvement of Entertainment Businesses (the Entertainment Business Act, *Fūei Hō*). The judgement undermined the development of planning ordinances as an effective tool to meet local needs such as promoting a pleasant residential environment.

Takarazuka City is known as one of Japan's oldest garden suburbs and attracts many tourists, which explains why the City Council is keen to protect its pleasant living environment. The 1983 Takarazuka City Ordinance No. 13 Concerning the Construction of Pachinko Parlours, Amusement Centres and Love Hotels, etc. was enacted to protect the city's features from the adult entertainment businesses. Simultaneously, the Entertainment Business Act was amended in 1984 to control the locations of entertainment businesses nationally by concentrating these businesses in areas designated by prefectural ordinances under the Act. In Japan, municipal governments cannot create additional zoning categories other than those defined by the City Planning Act. Also, changing zoning areas is such a time-consuming process that the Council enacted ordinances to control the location of adult entertainment businesses in a number of zoning areas, in addition to the

nationally designated areas for adult entertainment businesses.

Figure 1 A typical Pachinko Parlour in Tokyo



Source: Courtesy of Mr. Christopher Gladora, Department of Urban Planning, The University of California, Los Angeles (UCLA)

A company owning premises in the city's quasi-industrial area, which was almost entirely used as a residential area, planned to build a pachinko parlour and asked the Council for development permission. The Council rejected the proposal based on its ordinance's provision regulating adult entertainment business premises in areas close to schools, libraries, nurseries (within 100 metres' distance), hospitals and clinics (within 70 metres' distance). However, the company obtained building confirmation⁵ after complaining to the City's Building Examination Committee and subsequently started the

construction of the pachinko parlour. The Council sued the company, trying to halt the construction on the grounds that it was in violation of the City's local ordinance.

Both the District and the High Court rulings rejected the Council's request for the injunction as follows:

... The Entertainment Business Acts, with its 1984 amendment, set the highest and uniform standard for regulating locations of adult entertainment businesses across the nation. Although the protection of local public morals and living environment in response to local needs essentially falls under the responsibilities of a municipal government, a municipality must not use a local ordinance to enforce controls that are stricter than the Entertainment Business Act and the prefecture's ordinance for this purpose⁶.

The case also left questions unanswered about the proper legal enforcement measures of planning controls, since there is no effective administrative enforcement system which can penalise illegal developments under any planning statute and ordinance. The Council expressed its concern about this issue in court as follows:

In reality, when an individual does not undertake responsibilities required by regulations and ordinances, and an administrative body cannot carry out such obligations in his/her place in the public interest either, it is not unreasonable to expect that an administrative body would ask the court for the enforcement of such responsibilities [of the individual]. If, on the contrary, an administrative body leaves the matter unattended and thus fails to meet the responsibilities of the public administration, it seems to be against the public interest⁷.

The Supreme Court ruled that the Council did not have the legal standing to obstruct the construction, as there is no provision that allows the state and the local administrative body to enforce an injunction. In early 2007, the

Supreme Court ordered Takarazuka City Council to pay £2.4 million (480 million yen) to the pachinko parlour developer in compensation for the delayed construction (Asahi.com 2007).

Despite the endorsement by the central government for local autonomy in the Japanese planning system, this judgement shows that its strong hierarchical order of laws does not allow local governments to decide independently on the future of their local environment⁸. In this ruling, the duties of local assemblies in making ordinances in the public interest were not seriously considered.

In addition to this, the City Planning Act should also be in compliance with higher national planning laws, which are mostly aimed at national economic development (see Shibata 2007: Ch.5). Not only are the functions of local ordinances scrutinised at the judicial level, but they are also firmly controlled by the central bureaucracy at both the legislative and administrative levels. Japanese central bureaucracy has maintained control over the content of local ordinances by means of administrative guidance such as ministerial communications and comments (Chiba 1984; Igarashi and Ogawa 1993). For example, the central government issued a ministerial communication regarding vibration control, which prohibited local ordinances from setting higher standards than national laws. Also, the state has shown strong disapproval of setting stricter pollution controls through ordinances (Chiba

1984).

While the central government has no legal power to intervene in the content of local ordinances under the principle of local autonomy stipulated in the Constitution, ministerial communications in effect control local ordinances. Many academics regard this practice as compromising local autonomy to the same extent as the allocation of subsidies and the authorisation of issuing local bonds (Chiba 1984; Samuels 1983; Steiner 1965; Takeshita 1987). With all these limitations on planning ordinances, it seems all but impossible for local planning authorities to use legally binding planning tools to ensure that land-use is in line with local interests.

1.2 Planning agreements and national laws

The operational difficulties of local planning ordinances and problems with the effectiveness of enforcement under these ordinances have led many local administrative bodies to resort to the use of *kaihatsu shidō yōkō* (voluntary development agreements) in an attempt to control or mitigate development impacts on local environments and public finances. In such development agreements, local authorities request developers to: 1) offer financial contributions for the construction of public facilities such as schools and nurseries; 2) limit the number of housing units in the planned areas to within the capacity of the water supply system; 3) improve residential environments through the provision of roads and parks; 4) solve potential nuisance

problems expected from proposed developments (Japan. City Planning Division of Kishiwada City Council 1979: 37). When developers are not willing to accept such development agreements, local authorities often pressurize them by refusing building confirmation or halt the provision of water supply and garbage collection to proposed developments.

These development agreements have essentially acted to fill the void of ineffective development control under the City Planning Act. In fact, a 1983 survey conducted by the Construction Ministry and the Ministry of Home Affairs found that almost one-third of more than 1,000 local government bodies used residential land development guidance agreements (*takuchi kaihatsu shidō yōkō*) (Igarashi and Ogawa 1993: 158). The survey also found that the vast majority of the local administrative bodies were content with these development agreements (ibid). This indicates that, to a certain extent, planning as development control in the public interest operates outside the statutory framework at the local government level in Japan.

Nonetheless, the weak legal status of the development agreement creates potential problems in the judicial review system if developers refuse to accept such planning obligations requested by a non-statutory agreement. Indeed, developers have taken cases to court, protesting against the required compliance with these development agreements, in particular when local planning authorities have threatened them with the use of enforcement tools.

Although the Japanese court is not totally against the use of development agreements, the practice has been interpreted as only acceptable as far as local authorities ask developers for ‘voluntary cooperation’ in complying with planning agreements⁹. Therefore, local authorities that threaten reluctant developers with certain punishment tools are likely to lose in court, even when local planning authorities exercise their power *in the public interest*.

Musashino City Residential Developmental Guideline Case

The case of Musashino City, a suburb of Tokyo, clearly illustrates the limitations of a development agreement as an effective planning tool. Facing overwhelming housing growth and accompanying financial difficulties, Musashino City Council designed the Musashino Residential Development Guidelines (*takuchi kaihatsu shidō yōkō*), requesting developers to provide public facilities and contribute to local funds in order to cover the additional costs generated by the large scale housing development. In the cited litigation, based on the guidelines, the Council requested the developer share the cost of new schools which would be necessary following the developer’s construction of a high-rise apartment. The developer gained a building confirmation without obtaining the required planning approval from the City, and subsequently started construction. The Council therefore refused to provide water and sewerage services to this building. The case was settled out of court in 1974 and the developer agreed to share the cost for schools.

Figure 2 A newly built super tall residential tower overshadows a low-rise dwelling neighbourhood in Tokyo



Source: Courtesy of Dr. Ryōkichi Ebizuka, Faculty of Social Policy and Administration, Hosei University

The same developer brought a second case to court in February 1977. In a similar fashion as before, the construction started without meeting the requirements of the guidelines. Again, the Council refused to supply water to the building and its tenants who had moved in after the completion of its construction¹⁰. As a result of this lawsuit, the mayor was prosecuted for being in violation of the Water Supply Act (*Suidō Hō*) in 1978. The Supreme Court concluded that the mayor was guilty in 1988, dismissing his appeal¹¹.

The third case in Musashino City took place in May 1977. Another developer, who had already provided land for a park, roads, amusement

equipment in the park and a water tank for fire prevention, as required by the guidelines for the construction of an apartment block, was not willing to share the cost of new schools with the Council. After being threatened by the Council that it would stop the water supply, the developer saw no alternative but to pay partial costs for new schools. In 1988, the developer brought the case to court, asking the Council for the return of his contribution. After the appeal, the 1993 Supreme Court ruling acknowledged the necessity of its residential development guidelines as follows:

In Musashino City, the construction of high-rise apartments has rapidly increased since 1969. As a result, not only have problems of sun light blockage, deteriorating TV aerial reception and noise from building construction arisen, but it has also caused a shortage of schools, nurseries and traffic safety facilities, thus pressurising the local finances in providing these services. To protect the local environment against the sudden growth of residential developments and high-rise apartment construction, the Council formed *the Musashino Residential Development Guidelines* in 1971 after consultation with the local assembly in order to mitigate the impact of sizeable housing developments on the city's finances¹².

However, the Supreme Court ruled that the Council's act of enforcing the voluntary development agreement by means of a punishment tool was illegal.

The judgement concluded as follows:

The administrative guidance based on *kaihatsu shidō yōkō* is intended to protect local environments from excessive developments and is therefore supported by the majority of residents in Musashino City. However, the act [of the Council forcing the developer to share the cost for schools using a punishment tool] is an unlawful exercise of the authoritative power exceeding the limitation of the administrative guidance, which must have asked for the donation out of the developer's voluntary will¹³.

This ruling was in line with ministerial communications from the

Construction Ministry and the Ministry of Home Affairs issued in the 1980s¹⁴, which were designed to redress *undue* development controls by local planning authorities under development agreements (Igarashi and Ogawa 1993; Takeshita 1987). The 1983 communication from Administrative Vice-Minister of the Construction Ministry instructed local governments as follows:

‘[Local governments] rectify excessive development controls with development agreements and administrative guidance in responding to citizen’s demand for affordable and quality housing under the current economic condition of slow income and an increase in residential development cost’¹⁵

This communication criticised the punishment practices of development agreements such as refusing to supply utility services to unapproved developments (Igarashi and Ogawa 1993: 162-167). With strong emphasis on the hierarchy of planning laws and public administration, local governments cannot exercise adequate autonomy in planning policy, even when local public administrations simply respond to their citizens’ needs or *the public interest*.

1.3 Transparency and participation in planning

In addition to the lack of local autonomy in planning, Japanese planning decision procedures lack adequate transparency as a prerequisite of citizen participation in planning. Freedom of access to planning decisions is not guaranteed by the City Planning Act or other planning laws. Moreover, legal

justice has not effectively secured the transparency of decision-making processes in planning. While the courts have rejected disclosures of planning-related information for reasons of privacy and business confidentiality, the most controversial logic for denying access is the inappropriateness of the disclosure because the government is still in the process of [final] decision-making. The argument is that publishing provisional plans and other related raw materials could prevent the government from making fair and efficient decisions.

For example, based on the 1988 Kyoto Prefecture Information Disclosure Ordinance (*Kyoto-fu Jyōhō Kōkai Jyōrei*), a citizen's ombudsman group requested the Kyoto Prefectural Government disclose information from a *kyōgikai* (policy advisory committee) regarding possible dam sites on the Kamo River in Kyoto. After being rejected by the Kyoto Prefectural Government, the ombudsman group took the case to the Kyoto District Court. The District Court acknowledged the importance of the ordinance and ordered the prefecture to release the information unless there was apparent and significant danger resulting from the disclosure (Matsui 1996: 126-127).

However, the Osaka High Court upheld the view of the Kyoto Prefecture, claiming that if the information for tentative plans was published, the raw evidence would cause confusion and misunderstanding among citizens. The ombudsman group argued that the reasons for withholding information in the

decision-making process should be clear and concrete, since the rejection of the disclosure of government information was against both the Constitution and the ordinance. However, upholding the High Court's opinion, the Supreme Court later dismissed the challenge of the ombudsman group.

In recent years, legal challenges for governmental information disclosure by citizen groups have led to the publication of previously suppressed planning information. However, the major setback for transparency in planning is that the City Planning Act still makes the disclosure of planning information and citizen participation non-mandatory. Furthermore, ministerial communications even discouraged citizen participation during the 1980s, when local planning authorities employed development agreements to control rapid residential developments (Igarashi and Ogawa 1993; Takeshita 1987). The 1983 Executive Communication from the Ministry of Construction asked local planning authorities to reconsider development agreements which instructed developers to consult with neighbourhood residents when developers planned large-scale residential developments. The 1983 Executive Communication instructed local planning authorities as follows:

On occasions of high and middle-rise apartment construction, a requirement for consultation with neighbourhood residents under *kaihatsu shidō yōkō* is understood to intend to prevent conflicts between developers and neighbouring residents about matters such as sunlight blockage. Nonetheless, local governments' requests to developers to disclose building plans beforehand, to hold meetings with

neighbouring residents when problems are expected, and even to submit a written approval from neighbouring residents for the proposed plans, are regarded as inappropriate, since these requirements would restrict developers from exercising their rights and cause the delay of construction (quoted by Igarashi and Ogawa 1993: 164).

The courts have not supported the rights of third parties (residents) under the City Planning Act to be informed of and consulted about development plans. A 1978 judgment on the request for the cancellation of development permission, to which the majority of neighbourhood associations agreed, refused the right of the neighbourhood to be informed about nearby developments as follows:

Although the plaintiffs claim rights and interests of receiving materials and information on the development, there is no legal ground to accept such rights and also no room to construe that the City Planning Act protects such rights and interests¹⁶.

Although this ruling was made well before the Law Concerning Access to Information Held by Administrative Organs came into effect (Law No.42 of 1999, enacted on 1 April 2001, the Information Disclosure Act hereafter), the full disclosure of development plans based on the City Planning Act and other planning laws has not yet been made compulsory. Furthermore, although the Information Disclosure Act obliges national governmental agencies to disclose information upon request, the Ministry of Land, Infrastructure and Transport (MLIT) can still withhold planning-related information on the grounds that it is still in the process of decision-making. Article 5.5 of the Examination Standard of Access to Information Held by the Ministry of Land, Infrastructure and Transport defines the MLIT's deliberation and

examination of materials as an exception of disclosure as follows:

Materials for discussion and examination etc.

[They are] Internal or liaison materials held by national organs, independent administrative agencies and local government for deliberation, examination and negotiation, which may contain risks of obstructing candid opinion exchanges and neutrality of decision-making unfairly, of causing unnecessary confusion among Japanese citizens, thus of resulting in advantages or disadvantages to certain people¹⁷.

Many commentators, resident groups and environmental campaigners have expressed their frustration at the inaccessibility of governmental information at the administrative level. They often refer to the reluctance of officials as a legacy of a feudal doctrine, called ‘*shirasimubekarazu, yorashimubeshi* (‘The masses must not be informed, rather make them dependent on the ruler)’. This dictum originated from the Chinese classic, *The Analects*, written around 500 B.C. by Confucius (*Kon Zi*), which remains essential reading to understand the morals, culture and politics of contemporary East Asian countries (Confucius and Dawson 2000). This attitude to divide the ruler and the ruled still seems to obstruct the transparency of planning and citizen participation in Japan.

2. The Role of the Courts in Japanese Planning

Legal justice is crucial to ensure that the public interest is sought in planning practice. Mobilised by public debates and social movements at first, then quasi-legal procedures such as public inquiries and public examination, and

finally the legal justice system, modern planning systems in the West have developed to incorporate new ideas such as amenity and social citizenship as ‘material considerations’ in the public interest (McAuslan 1975; Purdue 1999; Taylor 1998). In addition to this, citizen participation in planning is only fully secured when there are opportunities for the public to formally challenge the legitimacy of plan formation and the development control process (Barlow 1995). In this sense, the independence of the courts from other governmental organisations is crucial to ensure that the public interest in planning is adequately examined through due process. The development of the judicial review system and the expansion of third party rights in modern planning require the impartiality of the court in responding to this task.

In spite of the increasing demand for independence of the courts from other state functions to safeguard citizens’ rights as the public interest, the Japanese judiciary has been extremely reluctant to intervene in the decision-making of other state organs. This non-interventionist attitude of the courts towards administrative decisions has contributed little to changing the concept of the public interest in the Japanese planning system. This is particularly true concerning the introduction of new values, such as the preservation of historical assets, townscape and open spaces – amenity and social life - which comprise the quality of life. While amenity and social life are central themes of modern planning in the West, the Japanese courts have not played a

significant role in advancing these elements as the public interest in planning. In judicial review, the Japanese courts have now come to accept the legal standing of third parties when developments are likely to have an impact on economic benefits or may affect safety. There are a small number of cases in which the loss of amenity due to developments has been recognised as damage to ‘third party’ residents, enabling them to obtain either injunctions on such developments or compensation for past damage. However, these cases are still exceptional in Japan.

Despite the contributions of the courts to the progress of planning and environmental policy in Japan, there is a pitfall in the interpretation of the public interest in the previous planning litigation. While the underlying cause of infringements of a right to sunlight and a right to a view is related to uncoordinated land-use in Japan, the courts have only acknowledged the violation of *individual* human rights. All the judgments accepting third party rights in Japan’s planning/environment litigation have been based on the following common ideas. The acts of defendants infringed on personal rights because the impacts of the developments exceeded the tolerance limit of the plaintiffs, so that the acts were considered wrongful (tort). To protect *collective* interests such as amenity and social life, citizens resorted to claiming environmental rights as an extension of the personal right to litigation. Consequently, all these citizens’ claims for common concerns ended up being considered as private interests in contrast to the public (state)

interest in court. The limitation of this interpretation is that the court does not regard the state's failure to protect common interests such as the environment as an infringement of the public interest in planning. Japanese legal theory still considers the interests shared by the general public as 'reflex interests' (*hanshateki rieki*). Reflex interest is considered a privilege which certain individuals happen to benefit from because of the government's actions. It is not regarded as a legal entitlement, rather the result of the benevolence of the authorities in Japan. Thus, the government can take away such a privilege from individuals at anytime without compensation (Gresser, Fujikura, and Morishima 1981: 133). Reflex interests are the mirror images of the public interest and are not perceived or protected as legal interests in Japan.

Whereas Western planning systems have developed the protection of natural and built environments as the public (common) interest, the interpretation of legal theories in Japanese planning have led to quite opposite outcomes: the courts have either defended the public interest as a national interest or have safeguarded individual human rights as private interests. Under the current judicial review system, amenity and social life, which are irrelevant to the property right of plaintiffs, have principally been dismissed for reasons of absence of the legal standing, except in the cases discussed above where individual rights were violated.

A further contradictory issue in planning litigation is that the courts have

avoided giving any judgement on qualitative values such as local amenity. The courts have claimed that they are not in a position to quash planning decisions made by other administrative agencies in the name of environmental rights, as planning agencies have not recognised this right to be a part of the public interest. Thus even though the environment, and in particular amenity, has not been satisfactorily protected in Japanese statutes, citizens in the communities and even local administrations do not have powers to challenge the legitimacy of developments that are likely to impact on their local environment. The following cases in Kunitachi City indicate the inadequacy of Japanese legal doctrines in protecting amenity/social life and improving accessibility of the local environment *in the public interest*.

2.1 Community rights in Kunitachi City

Kunitachi Pedestrian Bridge Case

The typical attitude of Japanese courts toward amenity/social life is reflected in *the Kunitachi Pedestrian Bridge Case*. In 1974, a residents' group in Kunitachi City sought the cancellation of a contract to construct a pedestrian bridge over the beautifully tree-lined University Avenue, which has been selected as one of *The 100 New Tokyo Views* by the Bureau of Citizens and Cultural Affairs of the Tokyo Metropolitan Government since 1982. The campaigners challenged the development in view of safety and accessibility for the elderly and school children, as both a school and a day centre were

located near this bridge. The plaintiffs also claimed environmental rights, in particular visual amenity, which would be threatened by the construction of the pedestrian bridge. However, the court dismissed the plaintiffs' plea as follows:

The plaintiffs' claim that they used a level crossing at University Avenue before the completion of the pedestrian bridge is a mere reflex interest accompanying the use of the road as a public good. Thus, even if residents are now obliged to cross the road using the pedestrian bridge, we cannot infer that the plaintiffs' rights or legally protected interests are harmed.[the judge continued that].....

Not only the construction of a pedestrian bridge like this but all public policy must be decided by comprehensively examining the costs and benefits of policy-making decisions on grounds of the public interest. When implementing policy, it is very hard to obtain universal approval and support, so it is inevitable that some people will experience disadvantages and inconvenience or feel displeased by the implementation of certain public policy. However, if disadvantaged groups would be able to obstruct the enforcement of such policy with judicial tools in the name of environmental rights, it is obvious that the function of administrative agencies would be paralysed; thus, administrative agencies would be forced to abandon the plans and have the existing condition remain, which would result in harming the public interest¹⁸.

The court also dismissed the plaintiffs' claim that the pedestrian bridge would immediately lead to growth in traffic volume and the speed of vehicles using this road, thus increasing the risk of traffic accidents as well as air pollution. The court rejected the plaintiffs' challenge citing the absence of their legal standing.

The development control through Kunitachi City Landscape Ordinance Case

The Tokyo High Court's ruling of 27th October 2004 on the request to

dismantle a high-rise apartment build in violation of *the Kunitachi City Local Ordinance* reflected the same opinion as in the case of the pedestrian bridge regarding the residents' legal interest in amenity and social life. This ruling is very important to assess the effectiveness of the newly promulgated Landscape Act (*Keikan Hō*) in June 2004 (effective from December 2004). Landscape Act was enacted because the public became increasingly discontent with chaotic landscape. Simultaneously the government recognised the need to improve landscape to promote tourism and cultural consumption.

The High Court overruled a watershed judgement of the Tokyo District Court in response to a citizens' group wanting to protect the city's aesthetic surroundings. The Tokyo District Court had ruled the high-rise apartment to be illegal, being twice as tall as the maximum height of the building standard (20 metre) as designated by the local ordinance, even though the building met the codes of the Building Standard Act and the City Planning Act¹⁹. The District Court ordered the developer to remove the part of the building that exceeded the height limit. However, the High Court overturned the District Court's ruling as follows:

[An] attractive townscape must be fully protected and maintained by appropriate policy measures for the present and future, as it creates the quality of national and local environment; thus a beautiful townscape/landscape is a common asset, bringing benefits to the national and local population. However, it is impossible to conclude that individuals or local residents hold specific legal rights or interests

to enjoy attractive townscape/landscape based on civil law. Nonetheless, in case a view from particular places has specific importance and thus the benefits from this view are socially and objectively accepted as a legal interest in one's life, the interest must be legally protected[The judge continued....].....

However, there is no current statute enshrining an individual's right to enjoy an attractive townscape/landscape; a standpoint is the same as in the Landscape Act. While the Landscape Act defines the basic principles and responsibilities of the national government and others in devising the system for the formation of landscape master plans and landscape planning areas, the controls to shape beautiful landscapes in landscape districts and the support [to local administrations] through the Organisation for Landscape Management, there is no provision to stipulate an individual's rights to enjoy an attractive landscape.

As the formation and conservation of a beautiful landscape is closely related to the national and regional nature, history, culture, livelihood and economic activity, it must be the role of the public administration to implement balanced policies based on professional and comprehensive standpoints that involve citizen participation. Without making good use of the systems above, accepting the individual rights or legal interests of particular residents who share the same opinion about the value of the specific landscape may create the danger of obstructing the formation and conservation of a socially balanced good landscape²⁰.

Again, this statement reveals the perception of 'public' and 'private' as the nation-state versus individuals. Despite such a view, in fact, almost all 70,000 Kunitachi City residents were opposed to the development, including the local assembly and the mayor (Igarashi 2003). The resident group appealed to the Supreme Court. However, the Supreme Court upheld the High court's ruling, which confirmed that even a local government is not entitled to protect amenity within its administrative area under laws and ordinances²¹.

It is reminiscent of the case where the court did not accept the legal standing of *the Kyoto Buddhist Association*, which sued a developer who was planning

to construct a 60 metre-high hotel in the old capital city of Kyoto on grounds of religious, historical and cultural environmental rights (landscape right)²². This development only became possible when the state introduced the Comprehensive Design System (*Sōgō Sekkei Seido*) in 1980, which allowed the deregulation of height control (45 metre in this area) of planned buildings in exchange for the provision of a (small) open space surrounding the buildings. Another high-profile case about amenity is that of users of *Hibiya Park*, a large park in central Tokyo, who took legal action against a developer that was planning a 120 metre-high office building at the south of the Park, claiming the right to use the park, personal and environmental rights, the right to sunlight and safety in case of disasters²³.

All these legal challenges were initiated by citizens aiming to protect prominent townscapes/landscapes in Japan, which have not been sufficiently safeguarded under its planning laws. Moreover, public administrations in Japan are not obliged to inform and consult citizens about proposed plans, nor do local ordinances and guidance have adequate enforcement power to make developers comply with controls. Despite these flaws in planning policy implementation, the public have not been granted an opportunity to dispute the legitimacy of flawed developments in court in the name of the public interest in Japan.

3. Conclusions

Although local governments are supposed to protect the public interest within their administrative areas, when it comes to development control, their power is limited despite the principle of local autonomy. Various practical difficulties surround the formation of effective planning ordinances under the current legal system and these have forced local planning authorities to rely on voluntary planning agreements. However, non-statutory planning agreements have proven to be too vulnerable when developers challenge such obligations in court. It should be stressed that planning advisory councils have also undermined local planning power by taking over the role of local assemblies in planning decisions. This means that all three branches of the government of Japan fail to recognise that the public interest in planning should be held accountable to local citizens.

Weak local autonomy in Japan is an obstacle to transforming the concept of the public interest into a more accountable and democratic one to citizens in the community. Many academics argue that Western history shows a strong relation between the progress of urbanisation and democracy (Boyer 1978; Castells 1977; Giddens 1985; Jones 1976; Tilly and Tilly 1975). In the nineteenth century, prior to national government policies, city administrations initiated democratic reforms and implemented planning policies in response to demands from local citizens (Hall 1996a; Sutcliffe

1980; 1981). Also, social movements flourished in cities in the twentieth century (Castells 1977; Giugni, McAdam, and Tilly 1999) so that they brought changes in planning policies in the West (Hall 1980; Simmie 1974; Taylor 1998).

Japan is not an exception to this process. Citizen movements against pollution and calling for welfare provisions in the 1960s and the 1970s resulted in shifting environmental and planning policies at the local and subsequently the national level (McKean 1977; 1981; Steiner, Krauss, and Flanagan 1980). Similar to the West, these initiatives for planning changes were taken by progressive city administrations, as discussed in this paper. However, the Japanese courts have been very slow to respond to these demands and changes.

The rulings discussed in this paper reveal a continued rejection of transparency and citizen participation in planning by both the public administration and the courts in Japan, even in the twenty-first century. In the contemporary modern state, democracy or democratic policy-making cannot only be secured through elections. With the growing role of planning and the increasing influence of state power on the lives of citizens, it is inevitable for the state to disclose future land-use plans and relevant materials to the public, and then consult with stakeholders in order to ensure that planning decisions are accountable to the public. The significantly limited access to government

information and opportunities for citizen participation in planning in Japan are against the principle of the public interest of the modern state.

A further problematic issue is that the Japanese legal doctrine has not accepted the public interest as a shared interest in the community or society as a whole. The court rulings here make the view obvious that the public interest in planning is strictly the domain of Japanese governmental organisations, more specifically, the nation-state. Within this rigid perception, the public is only represented and protected by the (central) state. Citizens' interests were rarely seen as a part of the public interest in court, even though the number of the affected citizens and the extent of the effect by the disputed planning cases were considerable. Although Japan's environmental litigation has to a certain extent contributed to change in environmental policies and raised awareness about the importance of protecting human rights and the environment in developments, the strategy adopted by citizens to protect their interests (or community interest as in the cases in Kunitachi City) as environmental rights has had a double effect. While this tactic was intended to obtain a fair hearing in court, it has ended up fixating the image of citizens' rights versus the state's interests as private versus public.

These two interests have never been integrated in Japan's intellectual history neither by the left (liberals and social democrats) nor the right (conservatives

and nationalists) in political thought (Oguma 2002). Therefore, this ‘rights’ approach has a serious limitation when it comes to the protection of amenity and social life. The rigid dichotomy between the public (the state) and the private (people) in the discourse in Japanese planning litigation has made it almost impossible to advance the public interest as a collective concern for society.

Planning history in the West suggests that, in order for Japanese planning to change, the public sphere should be shaken up through lively open-minded arguments and the formation of autonomous civil associations. It also requires more extensive disclosure of government information and guaranteed citizen participation. However, participation is not sufficient to realise democracy in planning as Robert A. Dahl claims in his book ‘Polyarchy’ (Dahl 1971). There should be open opportunities for challenges to decisions under the rule of law. Finally, the most important lesson from the West is that the meaning of the public interest in planning must be continuously challenged, deconstructed and re-invented.

Notes

¹ This doctrine is derived from the word of Article 92 ‘Regulations concerning organisation and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy’ and article 94 ‘enact their own regulation within law’ of the Constitution of Japan as well as Article 14 of the Local Government Act ‘as far as not against laws and ordinances’.

² 1973a. Judgement upon the violation of the Road Safety Act and the Tokushima City

Ordinance concerning marches and mass demonstrations. In *Keishū*: The Supreme Court of Japan, Grand Bench.

³ Pachinko is a popular gambling game in Japan combining slot machine and pinball. A pachinko parlour is a gambling premise and often decorated with bright colours and neon as well as with loud music. Japan-guide.com. 2005. *Pachinko* [cited 5 July 2005]. Available from <http://www.japan-guide.com/e/e2065.html>.

⁴ Love hotels (also known as boutique or fashion hotels) and motels (located on the roadside or the interchange of motorways) in Japan do have a particular type of clients, mainly couples to spend hours or nights. In many cases, the entrance area and the reception is shielded by smoke screen glass so that a couple arriving there, in particular by car, can use these hotels in a very discrete manner. These hotels are often designed in notorious kitsch styles (to attract the young population) and are thus in many cases not in harmony with their local environment.

⁵ Building confirmation is a separate procedure from development permission in Japan.

⁶ 1994. The case of the Takarazuka City Local Ordinance regulating the construction of pachinko parlours etc. In *The Supreme Court Database*: Kobe District Court, Japan.

⁷ Ibid.

⁸ This ruling can be compared with the Britain's recent regulations about gambling and the extension of business hours of pubs. In both cases, local authorities control giving license to such premises considering social and community impact. For example, the Britain's Gambling Reviewing Body advised that 'Under our proposals, local authorities will be responsible for licensing premises. They will apply the normal planning rules in terms of suitability of location etc and will opening hours. We recommend 1) local authorities have the power to institute a blanket ban on all or particular types of, gambling in specific area; 2) in determining whether the location for gambling premises is appropriate the local authority have regard to the character of the locality and the use to which nearby buildings are put.' Great Britain. Department for Culture Media and Sport. Gambling Review Body. 2006. *Gambling Review Report* HMSO, July 2001 [cited 22 March 2006]. Available from http://www.culture.gov.uk/global/publications/archive_2001/gamb_rev_report.htm. pp. 4-5.

⁹ 1983. The pros and cons of collecting development charge under a voluntary planning agreement (*Yōkō ni motozuku Kaihatsu Kyōryoku-Kin no Kyōhi*). In *Jurist, an extra issue*: Sakai Branch Office, Osaka District Court, Japan.

¹⁰ The developer had managed to provide the tenants with water from the annex building until the Council started to supply water to the building eight months after the first tenant had moved in.

¹¹ 1985. The appeal of the mayor of Musashino City about the rejection of water supply under the voluntary planning agreement (*Musashino Shichō Kyūsui Kyōhi Jiken Jōkokushin*). In *Hanrei Times (The Law Times Report)*: The Supreme Court of Japan.

¹² 1988. Judgement upon the request of the return of the development charge for *Musashino City* educational facilities. In *Hanrei Times (The Law Times Report)*: The Supreme Court of Japan, the First Petty Branch.

¹³ Ibid.

¹⁴ Japan. Administrative Vice Minister of the Construction Ministry. 1983. *Takuchi Kaihatsu Shidō Yōkō nikansuru Sochi Hōshin nituite* (To Governors of Prefectures and Mayors of Specially Designated Cities: The guiding principles of the measures on residential land development administrative guidance agreements). Tokyo: Japan. Ministry of Construction, Japan. Director General of Planning Bureau, the Construction Ministry, and Japan. Chief of Home Ministry's Secretariat. 1982. *Takuchi Kaihatsu Shidō Yōkōtō no Unyō nituite* (On the operation of residential development guidance agreements, etc.), edited by Governors of

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¹⁵ Japan. Administrative Vice Minister of the Construction Ministry (1983) cited by Igarashi and Ogawa (1993), p.163.

¹⁶ 1978b. Judgement upon the request of cancellation of development permission from neighbouring residents. In *Gyōshū*: Yokohama District Court, Japan.

¹⁷ Japan. Chief of the Ministry's Secretariat of Land Infrastructure and Transport. 2004. *Jyōhō Kōkai nikakawaru Kokudo Kōtsūshō Shinsa Kijun* (The examination standard of access to information held by the Ministry of Land, Infrastructure and Transport). In *The Examination Standard of Law Concerning Access to Information Held by Administrative Organs*. Tokyo: Japan. the Ministry of Land, Infrastructure and Transport.

¹⁸ 1973b. Kunitachi pedestrian bridge case. In *Hanrei Jihō*: Tokyo High Court, Japan.

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²⁰ 2003. Kunitachi high-rise apartment case: appeal. In *The Supreme Court of Japan Database*: Tokyo High Court, Japan.

²¹ 2005. Judgement upon the request of the alteration of the Kunitachi high-rise apartment building. In *The Supreme Court of Japan Database*: The Supreme Court of Japan, the First Petty Bench.

²² 1992. The case of Kyoto Buddhist Association - judgement upon the request for an injunction of the building construction destructive to historical cityscape. In *Hanrei Jihō*: Kyoto District Court, Japan.

²³ 1978a. Hibiya Park case - environmental conservation of visual amenities of the park. In *Hanrei Jihō*: Tokyo High Court, Japan.

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