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RESEARCH ARTICLE

"Land Without Identifiable Ownership" in the Post-East Japan Earthquake Recovery: Lawful Land-Grabbing in Neoliberal Japan

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Abstract

This paper, with a focus on the status of tsunami disaster victims affected by the 2011 East Japan Earthquake, investigates into the status of private property rights in facing with the reviving legal instrumentalism in Japan, under the campaign of land law reform for the elimination of "land without identifiable owners" in the name of facilitating the disaster recovery, by means of the "special zone" method or the designation of lawless areas where the normal time law is excluded, with the particularly targeted area for such exclusion being the constitutional requirements of due process and fair compensation in public taking. Under the extraordinary setting of absolute majority of conservative party at the National Diet in the aftermath of the 2011 great disaster, legislations in Japan during this decade have been characterized by a manifestation of neo-liberal policy, driving the entire Japanese legal system into a corner. Facts observed in present Japanese society are not different from those observed in other authoritarian regimes in Asia, including the phenomenon of "land grabbing" by the governmental projects, which Asia once experienced a century ago for the colonial land enclosure by "wasteland management."

Keywords: land registration; disaster recovery; Civil Code of Japan; land-grabbing; legal instrumentalism

1. Introduction

1.1 Background: disaster recovery as a justification for uncompensated taking

As a solution for contradictions between state-led development and civil properties, the Japanese Constitution, in Article 29, section 1, declares that the right to own or to hold property is inviolable, while section 2 provides that "[p]roperty rights shall be defined by law, in conformity with the public welfare."[1] This provision has been, together with Article 206 of the Civil Code,[2] utilized by the Japanese government as the basis for restricting the property rights of the nation's people without compensation, outside the context of public taking with compensation under section 3 of the same Article 29, which states that "[p]rivate property may be taken for public use upon just compensation therefor." The term "public welfare" has been key in differentiating the government's regulatory power from the public taking that necessitates compensation for special sacrifice, and the Japanese government has repeatedly referred to disaster management as a typical sphere

[1] This provision was derived from the Weimar Constitution, Art. 153, s. 3, which provided for the responsibilities of owners in the social state.

[2] The origin of this provision is the French Civil Code, Art. 544.

coming under "public welfare."[3] In fact, it has been a practice in Japan that post-disaster construction works are implemented with the greatest priority, even at the sacrifice of disaster-affected people who are obliged to suspend their individual reconstruction of houses and livelihoods for many years until the completion of such governmental works.

The Supreme Court of Japan, on the other hand, has established case-law in the consideration of "public welfare" in the context of constitutional Article 29, section 2, which requires proportionality between the purpose necessitating the restriction and the nature of the restricted rights as well as the extent of constraints thereon.[4] Hence, there must be a limit to the regulatory constraints imposed on the properties of disaster victims in the name of "public welfare." The author has already discussed in previous work, on the one hand, the standard of "safety" that is, to a sufficiently high degree, aimed at meeting the requirement for "public welfare" that justifies impediment to the individual reconstruction of disaster victims' lives.[5] Now, this paper turns to the issue of the property rights of affected populations, which is on the other side of the balance of proportionality that the case-law requires under the constitutionality test. Theoretically, this balance would require a more careful consideration where the targeted properties constitute the indispensable basis of housing and livelihood recovery of disaster victims, but the reality is far from such requirement due to the governmental prioritization of the post-disaster reconstruction of hard infrastructure and town rebuilding.

This paper, with a focus on the status of tsunami disaster victims affected by the 2011 East Japan Earthquake, investigates the status of private property rights in facing the reviving legal instrumentalism in Japan, under the campaign of land law reform for the elimination of "land without identifiable owners" in the name of facilitating disaster recovery. This is achieved by means of the "special zone" method or the designation of lawless areas where the normal time law is excluded, with the particularly targeted area for such exclusion being the constitutional requirements of due process and fair compensation in public taking. Under the extraordinary setting of the absolute majority of the conservative party at the National Diet in the aftermath of the 2011 great disaster, legislation in Japan during this decade has been characterized by a manifestation of neoliberal policy, driving the entire Japanese legal system into a corner. Facts observed in present Japanese society are not different from those observed in other authoritarian regimes in Asia, including the phenomenon of "land-grabbing" by governmental projects. Moreover, the legislation of these Asian countries resembles the legal design of colonial law that Asia once experienced a century ago for land enclosure by "wasteland management."

"Land without identifiable owners" has become a focus in Japan in the campaign of the Ministry of Land, Infrastructure and Transportation (MLIT) as well as the Ministry of Justice during the recovery phase of the 2011 East Japan Earthquake, with an emphasis on the deregulation of procedures for the identification of ownership necessary for the facilitation of post-disaster reconstruction. It was reported that nearly 20% of the target areas of the cadastral survey in 2016 lacked clearly identified names of owners in the registry and therefore an enormous loss of time and energy was inevitable for the detailed investigation involving onsite interviews until the ultimate ratio of unidentified owners was minimized to 0.41%.[6] A study group was formed under the MLIT that published the "Guidelines for the Investigation and Utilization of the Land with Difficulties of Identification of the Owner" in 2016. The new legislation of Law on the Special Measures

[3] See e.g. Kodaka (2011).

[4] Supreme Court Judgment dated 13 February 2002, *Minshu*, 56(2): 331.

[5] See Kaneko (2021a).

[6] See Study Group on Legal Institutions for the Problem of Land Without Identifiable Owners (2020), p. 4; see also, for its critique, Takamura (2018).

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for the Facilitation of Utilization of Land Without Identifiable Ownership then followed in 2018, which introduced simplified methods for the investigation of ownership toward the ultimate designation of target land as "owner-unidentifiable specific land" based primarily on the documentary evidence and also introduced three series of deregulated procedures for the utilization of thus decided vacant land, namely:

1. Local welfare promotion project (2018 Law, Article 10): establishing a "land use right" (initially 10 years subject to renewal, Article 19; transferrable, Article 22) on the "owner-unidentifiable specific land" by the decision of the prefecture governor though a simplified procedure (Article 11, section 4: objection only by identified owner/right-holder for six months), excluding the Land Expropriation Law, which requires third-party consideration of the Expropriation Council, while the target areas under the 2018 Law are broader than those listed in Article 3 of the Land Expropriation Law (e.g. commercial complex for post-disaster town reconstruction implemented by private companies). The legal substance of "land use right" is not identified, in contradiction to the Japanese Civil Code's principle of *numerus clausus.*
2. Special procedure for compulsory acquisition under the Land Expropriation Law (2018 Law, Article 27): For the projects that are obliged to apply the compulsory acquisition procedure, a simplified procedure of decision by the prefecture governor is applicable once the target land is designated as "owner-unidentifiable specific land" (Article 28, section 3: objection only by identified owner/right-holder for two weeks) without resort to third-party consideration by the Expropriation Council under the Land Expropriation Law.
3. Special measures on the court order for the administration of missing owner's property under the Civil Code (2018 Law, Article 38): The application can be made by anyone without coming under the category of "relevant parties" for the court order to nominate the administrator of "owner-unidentifiable specific land," which can be performed by private companies, who can make dispositions including the sales of land if the court permits so.

In 2019, another piece of legislation followed: the Law on the Adjustment and Administration of Land with Unidentifiable Ownership in the Heading Section Registry, which was introduced for the facilitation of land use for economic development and enhancement of people's living through the adjustment of land registrations (Article 1). While the real property registration in Japan has consisted of two parts, namely the heading section registry stemming from the former land revenue record system and the right section registry succeeding the former real property registration system, since the integration of both systems in 1960, discrepancies between them have sometimes been inevitably carried over. They are often the result of either the inheritance lacking registration or the common land held by local communities under local customs for common use (known as "*iriai-ken*"). In particular, *iriai-ken* has had a long story of survival in the modern legal history of Japan. After the public-land-versus-private-land separation policy adopted in the early Westernization era of the Japanese legal system in the 1870s, many of *iriai*-communal lands were entered into the land revenue record as either under the co-ownership of all community members, or by the name of the community leader, or the name of the community itself, or the corporatized community groups particularly during World War II. On the other hand, such *iriai*-lands were seldom registered under the real property registration system due to the scarcity of transactions of such land. Therefore, the irregularity of the land registry inevitably occurred after 1960 when the land revenue record system and the real property registration system were integrated into a new registration system. The 2019 Law has been an attempt to eliminate the irregularity

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of title registrations (Article 15) through an *ex officio* investigation of ownership by the registry officer (Article 3), together with the new judicial procedure of administration order, which allows the court-appointed administrator to control the land, including the land sales if the court so permits (Article 19).

Another piece of legislation was the amendment in 2020 to the Japan's Civil Code to oblige heirs to make a compulsory registration upon inheritance, which is considered to have brought a dramatic step forward in changing the legal effect of real property registration under the Code from a presumption effect to a perfection effect.

All in all, this series of legislation under the campaign for the facilitation of post-disaster recovery has newly opened up several procedural channels for the transaction and utilization of land without regard to the true ownership, based on the real property registration system. They might result in the taking of land without compensation, outside of the 1954 Land Expropriation Law which reflects the spirit of Article 29, section 3 of the Constitution, while disaster recovery support is exaggerated as a justification in the context of "social welfare" under Article 29, section 2 of the Constitution.

1.2 Literature review

1.2.1 Law and development critiques on "land-grabbing"

The argument for eliminating "land without identifiable ownership" in post-tsunami recovery in Japan reminds us of the "land-grabbing" phenomenon in the rapid development phases of emerging economies throughout Asia. Numerous cases of land disputes are, in particular, results of a land-titling project that was meant for the introduction of a so-called Torrens-style title registration system that creates a final, absolute land title simply by the effect of the governmental conduct of entry into the registry ("title by registration"), which is treated as the final, indefeasible evidence at the court ("indefeasibility"). When such a Torrens system is implemented as a compulsory registration system, together with the abolishment of the doctrine of "adverse possession," the so-called "mirror effect" emerges, resulting in a simple denial of unregistered rights and interests, regardless of their peaceful and long-term existence as the actual fact ("registration alone confers title").[7] Since ordinary farmers often lack documentary evidence to prove their rights over ancestry-succeeded land, they fail to obtain the title registration and eviction follows without any compensation, while a third-party purchaser can easily obtain the title registration by showing the land sale contract as evidence. There are numbers of empirical studies by legal sociologists (e.g. Carter and Harding, 2014; Fitzpatrick, 2014; Fu and Gillespie, 2014) and anthropologists (e.g. Benda-Beckmann, Benda-Beckmann and Wiber, 2009) that have identified the tragic results of land-titling projects involving the deprivation of farming populations of their land as a means of subsistent livelihood. Kaneko (2021b) applied a historical legal perspective that donor-led contemporary land law reform is a revival of colonial legal apparatus for the deprivation of farmland: legal prioritization of a bona fide purchaser with documentary evidence over actual cultivators, eviction of unregistered occupants as trespassers, abolition of adverse possession, promotion of the land sales market, wasteland management system for the nationalization of unregistered land and granting thereof for developers, etc.

1.2.2 Neo-institutional development economics

Such a land-titling project has constituted a main part of the land reforms guided by leading international development agencies such as the World Bank and the United

[7] See Kaneko (2021b) for the impact of Torrens-style land titling in the recent Asian land law reforms. Also see Kaneko (2021c).

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Nations Development Programme (UNDP) for many decades as a means of economic growth through the land market, and more vigorously implemented in structural adjustment programmes since the boom of neo-institutional development economics in the 1990s (Deininger, 2003; Bruce, 2006; De Soto, 2008).

The emphasis has been on "land tenure security" to be realized by the land-titling project. While there are several different types of land reforms being attempted in the developing world, including (1) the "land to the tillers" type, which is aimed at vesting tenant-cultivators with full individual ownership (or an equivalent right thereto) through the elimination of the colonial social structure consisting of layered intermediary landowner-tenant relations; (2) the tenancy protection law that creates room for exceptional continuation of tenancy against eviction by a landowner who intends to evade the loss of land by tenancy elimination reform[8]; (3) the "ceiling and land redistribution" type, which nationalizes the extra land over the upper limit of landholding and redistributes it to landless populations; and (4) land tenure security enhancement by land titling for the promotion of the land market, etc. The leading international donors have supported choice (4) as a model for economic growth (Holder, Otsuka and Deininger, 2013, p. 3), while occasionally referring to the needs of (3) in the context of poverty alleviation (Holder, Otsuka and Deininger, 2013, p. 4).

The causal link between Torrens-style land titling and economic growth has been explained such that the tenure security increased by land titling will increase agricultural investment due to the lowered risk of eviction, which leads to higher land prices, enabling larger finance based on land mortgages and realizing larger-scale investment towards economic growth (Deininger, 2003, pp. 42–3; Holder, Otsuka, and Deininger, 2013, p. 4–5, etc.). While emphasizing the failure of the "land to the tillers" type of land reform, in terms of the delay and low productivity due to small-scale agriculture (Holder, Otsuka and Deininger, 2013, p. 13), these economists affirm the contribution of land titling to poverty alleviation through the promotion of the land market as an opportunity for landless poor to grow up to be landed (Rolfes, 2006; World Bank, 2011; Holder, Otsuka and Deininger, 2013, pp. 57–9, etc.).

However, a large amount of negative evidence has also been reported from around the world against their assertion (Bledsoe, 2006). As a defence against such criticisms, the mainstream economists have emphasized the limitation of the data and the lack of good governance in developing countries (Deininger and Hilhorst, 2013), as well as the relationship between labour cost increases and the scale merit of farm sizes by land concentration via the land market (Otsuka, 2021). Without waiting for a firm conclusion on such a long-debated question of a causal link between land titling and development goals, the land-titling project has been implemented as a key agenda in the donors' structural adjustment programmes (Bledsoe, 2006, p. 172).

1.2.3 Fallacy due to the lack of comparative knowledge

Apart from the issues of good governance, the choice of law model has also been referred to as a determinant of failing land reforms (Holder, Otsuka and Deininger, 2013, p. 2). Indeed, an active campaign has been made by influential institutional economists such as La Porta, Lopes-de-Sillance, and Shleifer (2008) on the superiority of Anglo-American law as the world's best model; however, legal scholars have warned that attempts at transplanting any legal model into another jurisdiction may be in vain if a thorough knowledge of comparative law is lacking (Upham, 2018). In particular, while the effect of "securing the tenure" is envisaged in the World Bank's land-titling project based on the Torrens-style title registration (Bruce, 2006, pp. 30–3, 35–6), such an effect is theoretically

[8] See Deininger, Jin and Yadav (2013) p. 55.

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only meaningful for countries under the Anglo-American law tradition that succeed the feudal land regime of common law containing layers of rights and interests on land, lacking the notion of clear-cut "ownership" as an individual exclusive right to control a property (UK Law Commission, 2001; Cook, 2003); countries belonging to the continental law tradition that have already established the exclusive concept of "ownership" under the Civil Code may find limited need for such a title registration to "secure the tenure." Thus, a positive effect of Torrens-style titling is much smaller than envisaged.

1.2.4 Constitutional question of land titling

Instead, the negative impacts of Torrens-style land titling, particularly its unconstitutionality, have been focused on by legal comparativists.[9] As Sir Torrens himself once admitted (Torrens, 1882, p. xx), Torrens-style title registration was a product of nineteenth-century colonial policy aiming at the maximization of land revenue by eliminating subsistent land users and securing the title of investors by the effect of registration as the final definitive evidence of absolute title, even when they were a mala fide party. The Torrens system had never been applied in the UK until the end of the twentieth century by Thatcherism[10] and it was found to be directly unconstitutional in an Illinois court in the US.[11] Even in Australia, which is believed to be the origin of the Torrens system for negating Aboriginal land use, its constitutionality has barely been secured by the unsteady implementation of the "indemnity" principle[12] and, of course, the system has never been adopted in any continental jurisdictions in Europe.

The same constitutional question in the West should also apply to the Asian developing countries. Even though they could not resist land deprivation through the Torrens system during the colonial period when legal experts gathering from major Western suzerain countries together endorsed the Torrens system as a universal principle of colonial reign (Malaspina, 2023),[13] we now recognize that the post-independence Constitutions of developing countries have changed the legal setting: the states' powers for taking private property are strictly regulated under each constitutional prohibition in the contemporary developing world. Therefore, land-titling projects currently guided by the World Bank's structural adjustment programmes are tested in this constitutional norm. Upham (2018) refers to the impact of international critical sects in a case-study of Cambodian land law reform that resulted in the withdrawal of the World Bank. This was possible at least partly due to the basis for the protection of property rights under its 1993 Constitution, despite the limited availability of legal and judicial remedies in local settings. In contrast, Kaneko and Ye (2021) analyzed the donor-guided 2012 land law reform in Myanmar as the revival of colonial apparatus for land-grabbing, but the vague definitions of property rights under the 2008 Constitution could not constitute a sufficient basis for protection.

The same setting of deprivation due to the effect of the land registration system is also observed in the post-disaster context in Japan. Particularly after the 1923 Great Kanto Earthquake, which took the lives of 100,000 people, a series of legislation for post-disaster infrastructure development and urban planning was enacted and has been the basis for the prioritization of public projects over the individual restoration of living conditions for disaster victims. Concerning this issue, as summarized by Kaneko, Matsuoka, and Toyoda

[9] See Kaneko (2021b), *supra* note 7, pp. 23–5.

[10] Land Registration of UK in 2002 initiated the compulsory system but it contains numbers of exceptions such as overriding interests and envisages a gradual change (Schedule 6); see Rhy (2017).

[11] Yoshimura (1960/2004).

[12] See Hopkins (2017), p. 201. Nowadays, the law reform is seriously debated by Law Commission Consultation Paper No. 227, 2016, due to the increased cost of "rectification" due to the frequent occurrence of fraud.

[13] See also, for land deprivation in colonized countries in Asia as a result of the Torrens system, Jaluzot (2019); Kaneko & Ye (2021).

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(2016) and Toyoda, Wang, and Kaneko (2021), many researchers have raised questions about realizing human-centred recovery, such as the constitutional right to live (Japanese Constitution, Article 25), which comes under the category of a socioeconomic right subject to the discretion of the government in the capitalist state setting. The author has, on the other hand, paid attention to the constitutional protection of private property (Japanese Constitution, Article 29), which can constitute a basis for claiming a direct obligation from the government of a capitalist country beyond its discretion. When we understand the reach of private property here to cover the entirety of a property regime, including not only individualized ownership, but all relevant rights and interests that together constitute the basis of the functioning of ownership, there is the possibility to extend constitutional protection to the restoration of a pre-disaster status of living for the affected population and communities, against the prioritization of governmental post-disaster projects (Kaneko, 2021a).

1.3 Research method: historical legal review and empirical approach

This paper focuses on the status of law and society in the post-2011 East Japan Earthquake recovery phases in Japan, to consider the possible balance between post-disaster development projects and the constitutional protection of the private property of disaster victims, with an expectation to contribute to critical legal discourses in regard to the contemporary land law reforms led by neo-institutional economics, particularly under Asian authoritarian regimes.

Since Japan has belonged to the continental legal family since the start of the Westernization of its legal system, the private property regime is provided by the Civil Code, with occasional modifications through the accumulation of case-law and special legislation. To ascertain the nature of the changes that occurred to the property rights for disaster victims after the 2011 tsunami disaster, this paper will start with a review of the historical path of modern Japanese property law since the introduction of the Civil Code, guided by the realistic approach chosen by its drafters, with a particular focus on the design of the registration system (Section 2); next, a legal text-based interpretive analysis is applied to identify the neoliberal policy choice of "land without identifiable owners" campaign in the post-East Japan Earthquake (Section 3); then, the focus of the paper turns towards the empirical facts in the tsunami-affected areas in the 2011 East Japan Earthquake, with a spotlight on the selected model areas under the government's campaign for expediting the post-disaster public works, based on the author's repeated interview surveys (Section 4). Section 5 will summarize the discussions.

2. Historical axis: Japan's realistic approach in the reception of the Civil Code

2.1 Relics of Boissonade: compulsory registration obstructed

With the reception of Western capitalist law in the beginning of Meiji modernization period, to deal with the gap that was expected to emerge between the transplanted Western model and the existing normative order in society, Japan might have had three choices of strategy: (1) "legal pluralism," which admits the continuation of traditional order in parallel with the transplanted Western regime; (2) "assimilation," which allows the transplanted Western law to entirely supersede the existing order; and (3) a "realism," which aims at an integration of Western law and existing order through compromises between them. While most colonial reigns in Asia chose legal pluralism, Japan has seen a perpetual process of transformation of the once-received Western model into a mixed system as a result of compromises in facing social resistance. Even though such "realism" has been a target for criticism by modernists, it should be fair to note that this realist

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approach has enabled the existing social norms to be asserted and enforced in the formal court to a certain extent as a formal defence against the penetration of overly harsh capitalism, which is in good contrast to the consequences under a legal pluralism that only allows an informal status for the existing norms without securing their enforceability in the formal court. Japan's realism can be restated, in this sense, as the formalization of informal norms.[14] Real property registration is a typical area reflecting the realistic approach taken by the Civil Code drafters in the Meiji modernization period in Japan.

In particular, the reason why the Torrens-style title registration system was imposed as a compulsory registration system in most parts of Asia but not in Japan is a good question. The situation of the pre-modern agricultural economy of Japan was not very different from those of other parts in Asia, characterized by individual, exclusive, perpetual rights over farmland, which had been protected by the legal prohibition of transactions over perpetual rights to farmland. These were first issued in 1643 at the earliest stage of the Tokugawa Shogunate government and were maintained throughout its nearly 300 years of reign. It was an attempt to prevent a concentration of land falling into the hands of the wealthy and secure a minimum area of land as the basis for the livelihoods of subsistent farmers, backed by a communal property regime that secured access to water, fuels, and other natural resources necessary for making a subsistent living. Historians have presented a large amount of evidence that explains the gradual prevalence of informal land transactions in reality, in various forms of financial securities, but still the ratio of landed farmers was as high as 70% at the end of Tokugawa reign in the late nineteenth century.[15] A drastic change occurred in the rural economy, however, upon the implementation of the land revenue reform in 1873 by the Meiji restoration government. This liberalized land transactions through the transfer of land certificates (*chiken*) and invited failing farmers who could not afford to pay taxes in cash to use their crops as payment instead in order to retain their ownership, which turned them into tenants or landless farmers. The ratio of landed farmers dropped to 30% within a few decades. This radical change invited serious social disturbance throughout Japan and it was in stark contrast to the gradualist approach of "legal pluralism" applied in many Asian colonies that were under the same land revenue reforms at that time.[16]

The drafters of the modern code system during a period of such drastic change must have encountered a serious dilemma. The first Civil Code of Japan adopted in 1890 was a product of French scholar Gustave Émile Boissonade, who stayed in Japan from 1873 to 1895, devoted enormous effort to the observation of the changing Japanese society, and elaborated on a series of unique designs for provisions, especially in the property section of the Code, which were an obvious deviation from the French Napoleon Code. The Japanese government at that time was in critical need of the prompt launching of a Western-style code system in order to impress upon the club of Western powers that Japan had matured enough for the renegotiation of the unequal treaties that Japan had been compelled to enter into during the late Tokugawa Shogunate period so as to avert the immediate danger of colonial invasion; such treaties included the extraterritorial privileges and immunities of foreigners and the lack of tariff autonomy. To this end, the Civil Code was adopted by modern Japan's first session of the Diet, but it was never put into force, largely due to the peculiarity of Boissonade's legal designs. Instead, three Japanese professors at Tokyo University, namely T. Hozumi, Y. Tomii, and K. Ume, were entrusted by the government to draft the next Civil Code, which was adopted in 1896 and has been in

[14] As for both positive and negative impacts of legal pluralism, see Tamanaha (2021).
[15] Fukushima (1962); Fukushima (1975).
[16] See for details Kaneko, *supra* note 7.

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force up to the present. However, scholars have identified a number of critical points that these Japanese drafters adopted from Boissonade's Code.[17]

First, the present 1896 Code (Articles 176 and 177) inherited the legal design of the real property registration system under Boissonade's Code, which offered a mere "publication" effect instead of a final perfection of title. During this era, Japan had implemented a system of final title through *chiken* since the land revenue reform (1873–79), which was further systematized by the Law on Real Property Registration. Initially, this had the legal effect of a voluntary registration system that provided notice of title when it was first adopted in 1886[18] but, in the following year of 1887, the Law was swiftly amended to make registration compulsory for the perfection of the transfer of real properties.[19] Moreover, the Law (attachment section 40) authorized the initial registration of ownership title based upon documentary evidence issued by the local chief, which was a system that was very close to the Torrens-style title registration that prevailed at that time throughout the colonized Asian countries.[20] Such formal titling was an efficient mechanism for the concentration of land in the hands of capitalists as a stable basis for fiscal revenue and economic growth but, at the same time, it was also a dreadful means of deprivation of farmland that was the sole basis of the livelihoods of the rural population.

Facing this dilemma, Boissonade challenged the once-established compulsory registration system under the Law on Real Property Registration by designing a voluntary registration system in his 1890 Civil Code. Furthermore, what warrants attention is the fact that the 1896 Civil Code compiled by the three Japanese drafters succeeded in the spirit of Boissonade's Code by designing the registration system as a voluntary one. The radical meaning of such a voluntary design choice was that the existing social order was incorporated into the formal system without being scrutinized by the registry administration. This realist approach was all the more significant not only for the unregistered individuals, but also for the communal land rights "*iriai-ken*," since the 1896 Civil Code by the Japanese drafters newly incorporated explicit provisions to legalize the communal ownership (Article 163) and communal use (Article 194) of land as well as the general principle of the superiority of existing social customs over the voluntary provisions under the Code (Article 92).

As a result of such a realist approach, an obvious conflict occurred inside the formal legal system between the Civil Code and the Law on Real Property Registration. In 1899, a new Law on Real Property Registration was adopted that did not explicitly define the legal effect of the registration system as being either compulsory or voluntary[21] and this law has remained in force up to the present day. Since the Civil Code prevails as the fundamental basis for the private law sphere, Japan has maintained a peculiar system of voluntary registration of title, unlike a voluntary deeds registration in France or a compulsory registration of title in Asian colonies such as Manchuria.

[17] Hironaka & Hoshino (1998); Hoshino (2015).

[18] Art. 1 merely provided the procedure for "those who intend to apply for registration," while Art. 6 provided that those who lack registration are unable to assert any legal effect against a third party.

[19] The subject of Art. 1 was amended such that "those who conclude a sale, gift, pledge or mortgage ... should apply for registration."

[20] However, an obvious deviation of the Japanese real property registration system from the Torrens system was that the Japanese registry was placed in the judiciary, namely the magistrate's court, and later succeeded by the Ministry of Justice (Art. 2–3). Objections were also heard at the court without any statute of limitation (Art. 12), which is in contrast to the Torrens system that featured the quick finalization of a title by a simple entry at the registry, backed by the "indemnity" principle.

[21] Art. 1 of the current Law on Real Property Registration simply provides that "[t]he registration is made for the creation, preservation, transfer, change, and restriction of disposition, or extinguishment of the rights on the properties listed in the following."

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2.2 *Possessory rights as* rights in rem*: materializing the adverse possession*

Second, Boissonade's Code established "possessory right" in the closed list of *rights in rem*, which was succeeded by the 1896 Civil Code of the Japanese drafters. Since these drafters, influenced by the German school, aimed at a strict separation of real property rights and personal rights, and applied the principle of *numerus clausus* (limitation of real property rights) with an intention to maximize the absolute value of ownership by limiting restrictive rights and interests thereon in transactions, the inclusion of the "possessory right" was a unique deviation and has invited scholarly debate on the intention of the drafters. The 1899 Law on Real Property Registration (Article 1) also provided the closed list of real property rights,[22] which seemed compatible with the "curtain principle" of the Torrens-style registration system that was then prevalent in Asia, meant for the denial of undisclosed rights and interests for the facilitation of land transactions at the maximized value.

One assumption is that Boissonade intended to secure a route for the farmers who had failed to obtain ownership status during the land revenue reform by restoring their status as owners through the system of acquisitive prescription (adverse possession), while the "possessory right" was expected to function as protection for their occupancy during the process towards the completion of adverse possession. The radicalness of such an attempt to protect unregistered farmers by the doctrine of adverse possession was remarkable, especially when we remember the abolition of adverse possession in many colonized Asian countries in the same era, since it could constitute a serious exception to the principle of "title by registration" of the Torrens system.

This assumption is supported by commentary from Boissonade stating that the rationale for the system of acquisitive prescription is a presumption given by the validity of the occupant's right, rather than the failure of the owner to make sufficient effort to maintain his right.[23] This design choice was succeeded by the three Japanese drafters in the 1896 Civil Code, with limited elucidation. Professor Ume, one of the drafters, gave an understated explanation that, while he duly recognized the long-debated question of whether possession is a fact or a right since the reception of Roman law, it was needed to be established as a right in their draft "for the purpose of summarizing the legal effects which the law authorizes to protect an occupancy."[24] But why was such a summary necessary? Given the social instability as a result of the aforementioned increasing number of farmers falling from landowner to landless status due to their failure to obtain *chiken* or title registration, the drafters knew the existence of occupancy as a right in the social reality, based on the firm belief of farmers' entitlement to ancestral land handed down for many generations, which required protection as a real property right beyond mere treatment as a fact of temporary occupation. As of the adoption of the 1896 Civil Code, the effective system of registration was the 1887 amended version of the Law on Real Property, which required compulsory registration not only for ownership, but also for other real property rights. The drafters knew that neither emphyteusis (permanent tenancy rights), superficies, nor real property leases could be a realistic basis for the protection of untitled farmers and hence they must

[22] In addition to ownership, the 1899 Law on Real Property Registration (Art. 1) included superficies, emphyteusis, servitudes, pledge, hypothec, and leasehold in the closed list of target *rights in rem* for registration. Since the same Law (Art. 26) required the appearance of the landowner himself at the registry office for the registration of these rights, in reality, the registration of restrictive *rights in rem* other than hypothec is extremely limited in Japan.

[23] See Boissonade's commentary *Saietsu Civil Code Draft* in 1886, Art. 544, note 75, contained in Boissonade Civil Code Study Group, ed. (2000), pp. 220–1.

[24] See Ume (1896).

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have thought of the need for a "possessory right," not only for the temporary mitigation of disputes, but ultimately as a bridge to acquisitive prescription.[25]

2.3 Protection of tenants

Third, Boissonade treated "leases" as one of the *rights in rem*, which was a peculiar choice for a French scholar given the constant stance of the Napoleon Code to treat "leases" as a contractual right. In his commentary,[26] Boissonade contended that even a lease under French law had a certain element of real property right, and that the protection of leases as a real property right would benefit the agricultural and industrial promotion of Japan. He also asserted that "emphyteusis" and "superficies," which had been the old categories of perpetual tenancy rights inherited from the Roman era but abolished in the Napoleon Code as remnants of the feudal land system, should be protected in Japan as special categories of "leases" as real property rights. His justification for this was based on a historical review such that the farmers' permanent tenancy rights in Japan had almost always been authorized based on the land cleared by the farmer himself within the estate of a feudal lord or religious body. It had enjoyed the same permanent status as freehold land and such permanent tenants could have established perfect ownership during the modern land revenue reform by purchasing the prevailing rights of the feudal lord over his land; however, in practice, there were many who could not afford to make such a purchase at that time, which called for protection.[27] Also, for land lessees in urban areas, Boissonade particularly mentioned the need for protection of their status as a real property right, especially because of the social reality in disaster-prone Japan in which the low-income class had a tendency to construct a house on leased land rather than lease a house, due to the lower rent under a land lease accompanied by the assumption of the high risk of loss of the house in a disaster.[28]

The 1896 Civil Code by the Japanese drafters succeeded Boissonade's measures to protect the "emphyteusis" and "superficies" in the closed list of real property rights. While they did not take up Boissonade's idea to treat "leases" as a real property right, they still inserted a special provision to allow a registered real estate lease to prevail over the new owner of transferred land (Article 605). This protection clause, in fact, did not make sense, since the Law of Real Property Registration (Article 26) necessitated co-operation by the landowner for the registration of a lease, which seldom occurred in economic reality. However, a series of case-law was formed by the Japanese courts toward the increased protection of unregistered tenant farmers and urban land lessees, such as assertion against the landowner's sale of the land if the buildings on the land are registered and the automatic continuation of the contract after the loss of such buildings in a disaster. Thereafter, a series of special legislation followed to gradually modify the Civil Code, such as the 1909 Law on Building Protection, the 1921 Law on Land Lease and Law on House Lease, and the 1949 Law on Temporary Measures for Solving the Issues of Land and Housing Leases in Disaster Stricken Cities.

Thus, the reformist spirit of Boissonade has been succeeded by the Japanese jurists to flexibly design the formal regime of property law toward a minimum policy balance, or "justice" in other words, for those who were adversely affected by the governmental modernist policy aimed at strengthening the national economy. In particular, those who

[25] Provided that the 1896 Civil Code (Arts 162, 163) by the three Japanese professors added proof of the land occupants' subjective status of mind.

[26] See Boissonade's comment to Art. 621, note 166 (Boissonade Civil Code Study Group, *supra* note 23, p. 460).

[27] See Boissonade's comment to Art. 666, note 217 (*ibid.*, p. 614).

[28] See Boissonade's comment to Art. 683, note 240 (*ibid.*, pp. 660–1).

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were deprived of properties that constituted the basis for their lives and livelihoods by the land-titling system were the primary target for the endeavours of reformist lawyers.

3. "Land without identifiable owners" in the post-disaster recovery

3.1 Governmental attempt at compulsory registration

Thanks to the voluntary nature of registration that succeeded from Boissonade's Civil Code, up to the present, an unregistered party in Japan can assert his/her ownership of land in court, which has formed case-law known as the doctrine of "natural determination of ownership" that decides ownership based on the most substantially significant control over the land.[29]

However, in the recent context of the post-2011 East Japan Earthquake recovery, the conservative Liberal Democratic party's government started to emphasize the problem of delayed post-tsunami reconstruction works due to the existence of numerous land parcels "without identifiable owners"[30] and achieved a series of law amendments toward the promotion of land transactions. "Land without identifiable owners" does not, however, always mean the actually abandoned status of land, but is defined as land "the owner of which is not immediately identified in the real property registry, or the contact to the identified owner is difficult for the purpose of identification." The primary causes of such unidentifiable ownership are considered to be the prevailing social custom not to register ownership upon inheritance[31] and the "irregular types" of land registrations carried over from the modernization era.[32]

One of the major products of such a campaign was the enactment of a series of new legislation for facilitating the utilization of such "land without identifiable owners." In 2018, the Law on Special Measures for the Facilitation of Utilization of Land Without Identifiable Ownership was introduced. In 2019, the Law on the Adjustment and Administration of Land with Unidentifiable Ownership in the Heading Section Registry introduced a procedure for land development through a court order for the management of land with an unidentified owner that is issued to a land manager after an *ex officio* survey by the registry officer (Articles 3 to 8) or by an independent body (Articles 9 to 13). The Law enables the court-nominated land manager not only to use, but also to dispose of the entrusted land, including its sale (Article 21), without indicating any substantive legal nature of such authority to buy and sell someone else's land for profit.

3.2 Origin of irregular-type registration: communal land right iriai-ken

The "Guidelines for the Investigation and Utilization of the Land with Difficulties of Identification of the Owner," issued in 2016 by the Ministry of Land, Infrastructure and Transportation (hereinafter the "MLIT 2016 Guidelines") provided the typical categories of "irregular-type" registrations, such as (1) with the name of a local community body corporatized during the wartime in the heading section of the registry (sections 3 to 5); (2) with the names of one or several individuals or "others" who are supposed to be the community members as of the registration appearing in the heading section of the registry (sections 3 to 6: *kimei-kyouyu-chi*); (3) with the name of a single person who is supposed to

[29] The Mita aqueduct case (Supreme Court decision dated 18 December 1947, reported in *Shoumu Geppo*, 15(12): 1401) and the Dotonbori case (Osaka District Court decision dated 19 October 1976, reported in *Hanrei Jiho*, 829: 13), etc.

[30] See e.g. Study Group on Legal Institutions for the Problem of Land Without Identifiable Owners, *supra* note 6.

[31] The 2018 issue of the *White Paper on Land* by the Ministry of Land, Infrastructure and Transportation (MLIT, 2018) reported that the land parcels lacking registration upon inheritance amounted to 66.7% of the cadastral survey conducted nationwide in the same year.

[32] Civil Department Division 2 of Ministry of Justice of Japan (2019).

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be the leader of community as of the registration appearing in the heading section of the registry (sections 3 to 7: *kyouyu-soudai-chi*); (4) with the name of the old community appearing in the heading section of the registry (sections 3 to 8: *aza-mochi-chi*), etc.

The origin of most of these irregular types of registration is believed to date back to the land revenue reform (*chiso-kaisei*) in the early modernization stage of Japan in the 1870s, when the government unilaterally declared a policy of separation of public land and private land (*kan-min-yu kubun*) in 1874, which resulted in the nationalization of the majority of *iriai-ken* common land held by local communities, unless such land areas were categorized as private land. Compulsory eviction of community people from thus decided national land turned serious as the forestry industry grew, inviting numerous legal disputes known as the "nationalized *iriai* problem" up to the present,[33] which was nothing but a replica of the "wasteland management" scheme that prevailed in the Asian colonies of Western powers at that time as one of the primary means of land exploitation in the nineteenth century.[34] To avoid the fate of nationalization, it became a nationwide phenomenon that a variety of attempts were made by local communities to apply for the entry of their *iriai-ken* as private land in the land revenue record, under the name of either the community or the community chief or by taking a form of co-ownership between community members.[35] The land registration system was introduced in 1876 separately from the land record system, but later weakened to a voluntary one by Boissonade's 1890 Civil Code. Then, particularly after the explicit clauses providing for *iriai-ken* were formally incorporated into the 1896 Civil Code by the Japanese drafters, who reflected the results of the so-called *Iriai-ken* Survey conducted in response to the vocal calls throughout the nation,[36] the immediate needs for the registration of *iriai-ken* ceased and were almost completely forgotten by the succeeding generations. Even after the postwar modernist critiques headed by Professor Takeyoshi Kawashima were negative on the continuation of its post-modern practice,[37] various forms of *iriai-ken* practice have been a social fact throughout Japan up to the present day.[38] Meanwhile, in 1960, when the integration of the former land revenue record system and the real property registration system was performed as a result of the postwar decentralization of land-based tax to the municipalities, most of the old entries of *iriai-ken* under the disguise of private land were simply transferred by the government to the heading section of the new real property registration, without any investigation or upgrading, resulting in "irregular-type" registrations nationwide. Now, the current government's commentary on the 2019 Law emphasizes that the irregular registrations are "causing serious impediments to the smooth transaction of real estate" as well as hindering public construction works and concludes that "immediate countermeasures are necessary to eliminate the irregular registrations."[39] However, given the origin of such irregular registrations caused solely by the government performance in 1960, it is obviously unfair if the campaign for these irregular registrations is used as the logic for the elimination of *iriai-ken*.

[33] See Nakao (2009).

[34] For wasteland management as an apparatus for colonial land policy, see Kaneko, *supra* note 7, p. 20.

[35] For details, see Takamura & Yamashita (2022).

[36] Namely, Civil Code, Art. 263 on *iriai-ken* with a nature of co-ownership; Art. 294 on *iriai-ken* without a nature of co-ownership.

[37] See Kawashima, Shiomi and Watanabe (1961).

[38] For the origin of empirical approaches to comprehend *iriai-ken* based on its functions instead of theories, see Kainoh (1943).

[39] See Civil Department Division 2 of Ministry of Justice of Japan, *supra* note 32, p. 3.

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4. Survey results from the 2011 East Japan Earthquake recovery

4.1 Disaster victims in defence of private properties

To ascertain the impact of the national government's campaign for the utilization of "land without identifiable ownership" that was started in mid-2013 amid land acquisition for the post-East Japan Earthquake recovery projects, the author conducted a series of interview surveys with the prefectural government officers in charge of land acquisition for the construction of seawalls and town reconstruction projects, as well as the leaders of target communities. An officer in charge at Iwate Prefecture government revealed that more than half of the 20,000 cases of land parcels being negotiated for land acquisition had involved difficulties, in which merely 60 cases were genuine cases with unidentifiable ownership, while 2,000 cases were those of irregular-type registration containing plural names in the heading section, another 2,000 involved accumulated mortgages, and the more than 6,000 remaining cases involved both problems of irregular registration and mortgage.[40] It was obvious that the forefront of the implementation of 32 trillion yen disaster recovery budget was under enormous pressure, but it was not always clear from these data whether the "land without identifiable ownership" was a genuine problem that impeded the progress of post-disaster recovery. Rather, what these data implied was that the majority of difficult cases for land acquisition projects involved "irregular-type registration," including the *iriai-ken* commons of local communities. The author came to realize the risk that the cancellation of "irregular-type registration" for the progress of post-disaster reconstruction works could result in an evasion of the requirements for due process and fair compensation for the public taking of the properties of disaster victims and communities, and started further interview surveys in the affected communities. The following three cases represent typical outcomes for communities in the Iwate coastal areas that were targeted by the large-scale post-2011 tsunami construction projects for infrastructure rebuilding.

4.2 Memories of homeland: the case of Unosumai River and Katagishi Coast

The basic principle of the national government for the post-2011 East Japan Earthquake recovery issued in July 2011 emphasized the concept of "a multiple approach to disaster prevention (*taju-bosai*)" that was centred on the construction of great seawalls in 594 places over 400 kilometres alongside the entire coastal line of East Japan. To expedite the land acquisition required for this goal, the MLIT established a task force together with the prefectural governments and the Ministry of Justice, and a project of seawall and water gate construction in Unosumai River and Katagishi Coast was selected as a model case by the name of the newly established Reconstruction Agency.[41] The seawall was planned to be a total of 1 kilometre long, with a height of 14.5 metres and a base width of 78 metres, for which 5.2 ha of land acquisition was required, involving 113 parcels owned by 177 persons. A number of these land parcels lacked updated registrations for many generations and much effort was needed for the investigation of present ownership for the purpose of land-taking compensation; one case of inheritance involved 38 heirs and was settled through interaction between the Ministry of Justice and the secretariat of the Supreme Court to realize a procedural bypass to expedite the utilization of the inheritance estate manager system under the Civil Code. Among the cases with difficulties was a land parcel with an "irregular-type registration" of 41 persons' names appearing in the heading section of the

[40] The author's interview with planning officers at the recovery construction bureau, Iwate Prefecture government office in Morioka city, and also at its onsite branch in Kamaishi city, as of January 2014.

[41] Press release by the Recovery Agency: "On the Attempt to Expedite the Land Acquisition as the Unosumai-iver-Katagishi Coast Seawall Construction Project as a Model Case" (26 April 2013).

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registry since the Meiji modernization era. This was settled through a specially deregulated procedure of land acquisition such that the decision of the acquisition of land without identifiable owners was made by a single person council instead of a formal procedure that required the decision of the Land Expropriation Council formed by seven members. Such a deregulation to bypass the Land Expropriation Law was justified by creating a lawless area through the Law on Special Zones for Post-East Japan Earthquake Recovery enacted in 2011.[42]

Thanks to these series of deregulations, land acquisition for Unosumai-Katagishi project was completed within a year instead of the normally required time length of several years and the construction works went smoothly, according to plan. The seawall was completed by 2019 using 12.3 billion yen and the water gate by 2020 using 18.8 billion yen. Now, government-sponsored "infrastructure tourism" is being vigorously promoted, with the support of local residents appearing as a storyteller "*kataribe*" in part of the tour walking around the seawall.

Behind this successful tale of great government-led seawall construction, however, there is a hidden true story that has never been reported by governmental documents. The splendid achievement of the land acquisition of a total of 113 parcels within one year could never have been possible without the leadership taken by local residents, particularly Mr Ryutaro Kashiwazaki—a leading member of the local council for recovery who lost his beloved daughter in the tsunami and had his mind set on expediting the town rebuilding for community residents.[43] He never hesitated to speak to the government at any level and was influential in creating consensus back in the community; the local people still frequently refer to their memory of "Ryutaro san" even after he passed away due to overwork without seeing the completion of the seawall.

One time, during one of the author's several interview visits, Mr Kashiwazaki wistfully mentioned a memory of his adolescence when the local youths occasionally gathered for seasonal events such as summer barbecues in a certain flat area of the coastal bush that belonged to no particular owner; there was a natural fresh water spring in the bush to which anyone had access—in particular, any fishermen in the community used to carry their boats there to clean off the debris, as if it was taken for granted that the land belonged to everyone in the community. This memorial wet land was none other than the land parcel with an "irregular-type" registration of 41 persons' names appearing in the heading section of the registry, and was targeted in the land acquisition for the construction of the seawall. Despite the enormous efforts of Mr Kashiwazaki to collect documentary evidence to identify the history of this land, concrete information was not available. Perhaps the land was the remaining *iriai-ken* that was indispensable for the agricultural and fishery-based livelihoods of the Unosumai/Katagishi community at the time of the state-private land separation in the Meiji modernization period until the community's predecessors at that time secured it by making an entry into the land revenue record as being under the co-ownership of community members. But such importance has been lost as the local socio-economy has changed, especially since the establishment of the nation's largest New Nippon Steel Co.'s Kamaishi steel plant, including a blast furnace, in the postwar period. Now, the wet land has no particular function other than living in the nostalgic memories of elderly community members. It must have been a natural and reasonable choice for Mr Kashiwazaki and his colleague leaders to decide to accept the governmental policy to apply a specially deregulated procedure for the public taking of "land without identifiable owners."

[42] Law on Special Zones for Post-East Japan Earthquake Recovery, Art. 73–2 to 73–4.

[43] See for the related news report http://www.asahi.com/area/iwate/articles/MTW20140911030940001.html (accessed).

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Now, the local guide for "infrastructure tourism" in Unosumai/Katagishi takes us to the seawall, watching and walking alongside a calm water pond surrounded by wild flowers and birds singing in gentle green light in the reflection of mountains, which is all that remains of the old communal land that is now under the base of the great seawall.

4.3 Taking without compensation: the case of Kanehama

The approximately 1 kilometre of coastline in Kanehama area in Miyako city, Iwate Prefecture, was targeted as another model case selected by the MLIT for land acquisition for the "multiple approach to disaster prevention" in the post-East Japan Earthquake recovery. In Kanehama, the MLIT intended the construction of an experimental "double seawalls" project, which envisaged using the waterfront area of Kanehama as a "tsunami pool" to protect the inland industrial areas from future tsunami inundation. The Iwate Prefecture government took charge of negotiating the acquisition of the land for the seawalls, which involved the problem of "irregular registration," while the Miyako city government was in charge of the eviction of residents whose land was located between the planed areas of the two levees.

As for the land acquisition for seawall construction, although all current residents in the Kanehama community unanimously confirmed the existence of traditional *iriai-ken* communal ownership of the coastal land—which was believed to have been maintained for several centuries up to the present, as shown by documentary evidence including the court records on a dispute settlement in the course of litigation in recent times—the Iwate Prefecture government intended to negotiate the purchase of the land with individual heirs of each person whose name appeared in the land registry. Namely, a total of 72 heirs of the 42 people whose names appeared in the title section of land registration carried over from the Meiji period were identified in a survey conducted by Iwate Prefecture and signatures were collected from each of the 72 heirs as evidence of their approval of the sale of the target land to the government. This method of handling a case of "irregular registration" is, however, highly questionable when the case-law on *iriai-ken* accumulated in the Japanese courts is recalled: the courts have required a "consensus" of the "current" members making a living in an *iriai* community, while denying the interests of those who had left the community to make a living on their own (*rison shikken*). The Iwate Prefecture government's plan was to use the pressure from the majority of the heirs who had already left Kanehama for a long time to overrule the minority opinion of the current members inside the community.[44] As a result of such speedy land acquisition, the double levee was smoothly constructed as scheduled, but the Kanehama community group was dissolved and most of the fishery households abandoned the renewal of their fishery rights under the law due to having lost access to the sea because of the sale of the coastal *iriai* land.

On the other hand, the Miyako city government increased the pressure on the last remaining fisherman, Mr T. N.,[45] who opposed eviction from his ancestral land, which was located between the planned double seawalls. During this lone resistance, he became ill, but his wife has continued the protest. According to the author's several interviews with this fisherman, the farmland that he personally owned not only functioned as a small-scale paddy field, but was also indispensable as land to access the ocean for fishing. He emphasized that all of the community-owned coastal land, his personal paddy field, as well as the *iriai* mountains behind that served as a source of water and other lifelines had together constituted the indispensable basis of the Kanehama community's livelihood. If

[44] For details, see Kaneko (2014); Kaneko (2016).

[45] After Mr T. N. passed away in the middle of his efforts for life reconstruction, the author obtained a permit from his wife to state his real name in this paper in his memory. However, his name is covered in this section according to the research ethic standard of the Journal.

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one of these elements were lost, no one could survive in Kanehama, according to his words. As for the compensation for his eviction from this indispensable basis of his livelihood, what the government proposed was the mere purchase of his residential area at a nominal "post-disaster recovery price," without regard to his paddy field, the access to the ocean fishery, nor the access to the *iriai* mountains. This was based on the reason that the post-disaster public works for the construction of the seawalls were dedicated towards "public welfare" for safety and the residents should endure the inconvenience without compensation, which was the government's logic based on Article 29, section 2 of Japan's Constitution. In response to this offer from the government, the fisherman counterclaimed for the provision of alternative land as fair compensation for a special sacrifice for the public purpose under Article 29, section 3 of the Constitution. But the city government ignored this legal argument based on his individual ownership and instead increased pressure through physical nuisance, such as piling up dirt to several metres in height around his paddy field and threatening him that the city had the power to immediately bury everything he owned under the dirt. The author herself quickly took a visit to see the piled dirt hill in Kanehama only to realize the terrifying, violent, imperative power of the authoritarian government of Japan.

The logical inconsistency of the government was obvious in this case. Even though the law for the facilitation of disaster-preventive relocation only provided for voluntary relocation, the government forced Mr T. N. as if it was a compulsory eviction for public purposes, but the compensation by the provision of alternative land that Mr T. N. required was not offered under the justification that the relocation was voluntary. Looking up at the top of the piled dirt hill, Mr T. N. told the author that he would not accept what lacks justifiable reasons. It was a portrayal of an owner who alone stands to defend his liberty against the authoritarian government.

What he wanted to defend—even risking his own life to do so—was not just a parcel of paddy land, but the entire functioning of the communal property as a whole, which consisted of the coastal communal land offering access to the sea for all fishery households, as well as the mountains in the background that were the source of water, timber for housing construction, wild vegetables, fuel for daily cooking, and every other need. He emphasized that living in Kanehama had been made possible by mother nature, outside of the monetary economy, still now not very much different from how it was in pre-modern times.

Under the government practice of land acquisition since the 1970s in Japan, communal livelihood in its entirety had been targeted in public compensation through the special procedures. Even if the *iriai-ken* over the coastal land was promptly taken by the aforementioned tactics of "irregular registration" by the government, still the purchase of the farmland by the government should not have been easy due to the procedural protection under the 1952 Law on Agricultural Land, which prohibits farmland sales without a permit by the local agricultural committee,[46] and the exclusive right of the local community to the coastal fishery that has been firmly secured under the 1949 Law on Fishery.[47] Particularly in the context of the post-disaster reconstruction of livelihoods in

[46] To secure the owner-cultivator principle established as a result of drastic land redistribution to tenants by the post-World War II agricultural land reform, the 1952 Law on Agricultural Land has maintained the control of land transfers and leases under the permit system issued by the local Board of Agriculture (Art. 3) and land use change is subject to a permit by the prefectural governor (Art. 4).

[47] Since the 1876 Circulate by the Great Council of State, the continuation of customary fishery orders was explicitly recognized and the former 1891 Law on Fishery introduced the concept of "fishery rights," which has been succeeded by the current 1949 Law on Fishery. The current Law makes much of the Fishery Association to be formed by each locality as the basis for autonomous rulemaking for fishing and the preservation of resources. The members are required to undertake a review for the renewal of their fishery rights by the prefecture government every five to ten years.

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the rural economy, these existing procedural protections for primary industries should have been recognized as indispensable.[48] However, as a result of the political inclination toward neoliberalism after the East Japan Earthquake, the Law on Special Zones for Post-East Japan Earthquake Recovery was enacted at the end of 2011 (succeeded by the 2013 Law on Large-Scale Disaster Recovery as a permanent law), which established the so-called method of "Special Zones" as a fast track to finalizing the legal effect of the post-disaster public construction projects by way of bypassing the procedures under existing legislation in relevant areas, which resulted in the suspension of the procedural requirements under the Law on Agricultural Land and the Law on Fishery.[49] As a result, despite the resistance of the fisherman, it did not take long before most of the households along the Kanehama coast agreed one by one to the sale of their farmland to the government, abandoned the renewal of their fishery rights, and left the community. This example of Kanehama tells us the fundamental lesson that property is a value not only in terms of the monetary price of a mere parcel of land, but also in its functions in reality.

The essence of what happened in Kanehama was the government's taking of the entire value of the functioning of the mutually interlinked communal and individual properties in Kanehama as a special sacrifice for use as a "tsunami pool" by constructing double levees to protect the inland industrial areas from future tsunamis, which is obviously an expropriation for public purposes in the context of Article 29, section 3 of the Constitution. However, the government used the logic of the cancellation of "irregular registrations" as the means to expedite the land sales while avoiding the formal procedure and fair compensation involved in public taking. The Kanehama case leaves fundamental questions, not only about the validity of the technical methods applied by the government to ignore the *iriai-ken* without regard to the case-law on *rison shikken*, but also the constitutional question of the validity of using legal frameworks on "irregular registration" as a means to bypass due process and fair compensation under the Land Expropriation Law.[50]

4.4 *Refusal of post-tsunami relocation: the case of Akahama*

Akahama—an ordinary fishery community located in the peninsula area of Otsuchi town in Iwate Prefecture—became the origin of a nationwide campaign for the solution of "land without identifiable ownership." Otsuchi town lost nearly 10% of its pre-disaster population of 16,000 people in the 2011 tsunami when the mayor himself was victimized, swallowed by 10.7 metres of tsunami water while he was leading the residents' emergency evacuation. Lacking a decision-making leader, the path of Otsuchi's reconstruction was especially destined for enormous delay among the tsunami-affected municipalities. Akahama area was, however, quick to establish a unique consensus among the residents within six months of the disaster, with a community-initiated recovery plan featuring the

[48] Hamada (2013) emphasizes the unique characteristics of the Japanese model under the Law of Fishery, which secured the continuation of traditional customary fishing while enabling democratization and systematization as a Fishery Association, which is internationally recognized as a success in efficient resource management.

[49] "Tokku" (special zones) featured in the context of disaster recovery was also promoted in the "national strategic special zone" policy launched by the conservative Abe administration, which included the experimental deregulation of the Law on Agricultural Land in Yabu city in Hyogo that created an extraterritorial zone that was exempt from the farmland system and protective of the owner-cultivator principle (such as the 2009 Amendment for the liberalization of investments through farmland leases by companies and the 2015 Amendment to the selection of the Board of Agriculture members, changing from election among farmers to a unilateral nomination by the mayor).

[50] It has been the established practice of the Japanese government to apply the standard for "public compensation" that realizes compensation for communal properties, outside of compensation for individual properties.

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relocation of the entire community to higher ground behind the original residential area that was entirely inundated by the tsunami. Such consensus was enabled by the strong social bonds of a traditional fishermen's village, with the leadership taken by the community voluntary association for Akahama's recovery (*akahama-no-fukko-wo-kangaeru-kai*) on the one hand and the constant support provided by a team of specialists in spatial planning from Tokyo University on the other.[51] The media frequently covered Akahama as a rare success story of community-led reconstruction planning and the relocation was expected to be completed within a year or two. However, the plan turned into a vain attempt when the department of post-disaster recovery construction within the Otsuchi town government found it difficult to approve the targeted land area for community relocation due to the problem of "irregular registration." Instead, new relocation spots were selected in two separate areas, which made it difficult for Akahama to be reconstructed as an integrated community and, accordingly, the construction period was extended by double. There have been some academic works that reported certain evidence of deterioration of the mental health of Akahama residents afterwards, since the pride of the community immediately turned into a story of failure, solely due to the land matter that seemed to be beyond their control.[52]

However, according to the author's survey, what was explained as a problem of "irregular registration" in the Akahama case was actually a series of land transactions that could have been realized smoothly based on the established Japanese case-laws for identification of genuine ownership, but the government impeded such transactions based on the logic of "irregular registration." Mr Yoshinobu Kanda, the chairman of the Akamaha Citizens' Center (*kominkan*), who has been one of the active members of the voluntary association for Akahama's recovery, explained to the author in her repeated interviews that the owners of high grounds were originally willing to sell their land to support the relocation plan and were almost immediately signing the sales contracts but later turned negative due to the government's refusal to use their land parcels unless documentary evidence of ownership was shown. According to Mr Kanda, any members of the Akahama community know very well that these land parcels had historically belonged to the community but were separated into private ownership of particular owners in the 1910s, but they lacked registration. Given that registration has not been the compulsory requirement for ownership under the Civil Code of Japan since Boissonade, the government's negative response to the community's relocation seemed legally groundless and a court order should have been sought for the identification of ownership based on the doctrine of actual control or adverse possession. But the government continued to punctuate the consents of all possible heirs and relevant parties in each target land parcel, which only invited complicated relationships between distant relatives and discouraged many owners from getting involved in the transactions.

Also questionable was the governmental response to cases that involved the names of many persons appearing in the heading section registry, maintained since the era of state-private land separation (*kan-minyu kubun*), in which *iriai-ken* communal land is involved. A judicial scrivener who was dispatched by the Japan Federation of Judicial Scriveners to Otsuchi town to support the post-disaster recovery recalls that, throughout the reconstruction phase, the local administration's response to the "irregular registration" was always directed at the tremendously hard work involved in identifying individual owners and their heirs based on the partial clues appearing in the registry and other documentary resources. However, he also commented that

[51] For details, see Kubota et al. (2018).
[52] See Mugikura, Takamatsu and Kajihara (2017).

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> since many of the cases involving co-ownership were in fact areas of land belonging to the local community, such cases could have been resolved by permitting registration in the name of the certified local community (*ninka-chieen-dantai*), as defined in the Law on Local Autonomy (from Article 260–2 onwards).[53]

Akahama should have been remembered as a rare triumph of community-led relocation that achieved absolute safety in high ground instead of accepting the government's "multiple approach to disaster prevention" policy centring on the seawall construction that would merely result in a compromised level of safety.[54] It is ironic, however, that Akahama has been impressed more as a "failure" due to the problem of "land without identified owners." To this, Mr Kanda answered with a grim smile:

> If you ask me what is the most serious lesson from Akahama's experience, I would definitely say that the disaster recovery should be handled by the local officers who know the community well. Do you know that all officers in charge at the town government of reconstruction works were the outsiders who were dispatched by the national Reconstruction Agency, mostly the officers from the other municipal governments? To our regret, they lacked sufficient knowledge, and courage, to deal with the local reality.

5. Summary of findings

5.1 Special zone for the magic effect

A remarkable fact found in the author's survey in East Japan has been opposite outcomes in the commonly categorized cases of "land without identifiable ownership": in Akahama's case, the government refused to accept the land selected by the local community due to the existence of "land without identifiable ownership" while, in the cases of Unosumai-Katagishi and Kanehama, the government facilitated the acquisition of "land without unidentifiable ownership" for public works to construct seawalls, outside the formal procedures of the Land Expropriation Law. As for the method, however, a similarity across these cases was the application of a "special zone" method under the 2011 Law on Special Zones for Post-East Japan Earthquake Recovery, which endorsed the governmental operations to bypass the due process requirements in normal times. The "magic effect" of land registration was utilized in this attempt to bypass the due process under the existing legislations that would have protected the property regime: investigation of ownership was done on the information appearing in the registry instead of starting from the facts of actual control over the land, requiring the consent of all remote heirs derived from the registry information, without paying respect to the consensus among the existing community members, nor their individual status otherwise protected by the Agricultural Land Law and the Fishery Law.

This registry-centred governmental practice reminds us of the Torrens-style title registration that prevailed in Asia in colonial times and was overcome by the post-independence legal reform, but again revived in the contemporary World Bank's land-titling projects that were meant for structural adjustment. Featuring the title registration as final evidence of ownership, or the so-called "statutory magic" of "title by registration," the Torrens system has been implemented as a compulsory scheme for the nullification of unregistered rights and interests in Asia. Theorists explain such finality of title as a

[53] See Ishikawa (2019).
[54] See for details, Kaneko, *supra* note 5.

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"mirror effect" of registration that reflects the fact[55] but, in reality, the Torrens system has functioned to the opposite effect in Asia for a long time: as a "mirror effect" that reflects the registration over the fact.

Such compulsory title registration was once introduced by the government in Japan, as discussed in Section 2 above, in the land revenue reform and the initial Law on Real Property Registration in the early phase of Westernization in the late nineteenth century, but it was blocked when the present Civil Code provided a mere publicity effect for registration, succeeding the original design of Boissonade's first Civil Code. Since then, the inheritance of real properties in Japan has been valid without registration for not only the pre-modern tradition of farmland succession by the eldest son (*katoku-souzoku*), but also the present equal inheritance under the postwar-amended Civil Code. The communal land *iriai-ken* is also valid without registration, even after the 1960 integration of the old land revenue record into the heading section of the present real property registry. Given the gap thus created between what appears in the registration and the social fact, the government's post-disaster construction works are obliged to start from the investigation of the facts of actual control over land, instead of depending on the obviously unrealistic information appearing in the registration. Nevertheless, such investigation was bypassed in the campaign for the settlement of "land without identifiable owners" and such deregulation was legalized by the "special zone" method that created a lawless region for facilitating disaster recovery.

5.2 Revival of wasteland nationalization

Even if the "special zone" method justified the evasion of due process in the context of post-disaster reconstruction, a series of permanent pieces of legislation that followed it in normal time lack the same justification. Both the 2018 Law on the Special Measures for the Facilitation of Utilization of Land Without Identifiable Ownership and the 2019 Law on the Adjustment and Administration of Land with Unidentifiable Ownership in the Heading Section Registry incorporate two story procedures: first, designation as owner-unidentifiable land and, second, the nomination of land managers who are vested with the freedom of disposition of entrusted land, including sales. Given the governmental practice in the first stage of owner identification that primarily focus on the information appearing in the registry, paying merely secondary respect to the true facts of actual control over land,[56] as seen in the Akahama case, and also another tendency of governmental practice that requires the consent of all remote heirs without paying attention to the consensus of existing community members,[57] as seen in the Kanehama case in which outsiders functioned as a pressure to realize a quick sales to the government, there is an obvious risk that the second stage for the disposition of land by court-

[55] Gray and Gray (2011).

[56] According to the Ministerial Notification No. 599 dated 21 November 2019 for the implementation of the 2019 Law, *ex officio* investigation of ownership by the registry officer is primarily made based on the relevant information to the registry, while the fixed tax record is referred to only optionally. The author's interview with the registry officers at the Kobe Registry Bureau as of January 2023 confirmed this practice.

[57] The 2019 Law, Art. 15, ss. 1–4 require entry into the land registration that "the owner was not identified" (for the case of Art. 14, s. 1, No. 4, Item-i) or "the person to be appeared in the Title Section Registry is not identified" (for the case of Art. 14, s. 1, No. 4, Item-ro), which constitutes the basis for land developers to start applying for asset management including sales (Arts 19, 30). On this, elucidation by the officers of the Ministry of Justice (Eguchi and Tsukano, 2020, p.4) explains that the entry to registry as "the owner was not identified" is required to be made unless all heirs are identified without any single exception; and that the entry into the registry as "the person to be appeared in the Title Section Registry is not identified" is required unless the representative of the community body is identified or the names of all members are identified without any single exception. Such narrow interpretation necessitates a wider range of *ex officio* entries and facilitates land development.

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nominated developers can result in a lawful deprivation of private properties from true owners, outside the due process of the Land Expropriation Law.

This two-storey structure of land utilization law reminds us of the "wasteland management" method—apparatus for the lawful deprivation of properties devised by colonialists in nineteenth-century Asia: the first stage was the Torrens-style title registration with a "mirror effect" that negates unregistered rights; the second stage was the "wasteland management" that automatically nationalizes unregistered land and grants them for development projects, while all existing occupants are treated as criminal trespassers to be forcibly evicted.[58]

Also in recent times, in the name of "structural adjustment," leading donor agencies such as the World Bank have eagerly led a set of land law reforms in contemporary Asia utilizing the same design: featuring the Torrens-style registration system, coupled with the law for wasteland management. The 1954 Land Law of Thailand has often been referred to by these agencies as a successful case, followed by the recent series of legislation in emerging economies.[59] A common phenomenon triggered by such legal reforms throughout these Asian jurisdictions is the resounding protests by the nation's people, even jeopardizing political stability.[60] None can deny the same fate in Japan as a result of a recent series of similar legislation for wasteland management.

5.3 Constitutional question uncovered

Even though the "special zone" method was the genius device of a neoliberal government for the evasion of due process requirements with the justification of post-disaster reconstruction, such a method cannot create a vacuum zone to exclude the Constitution itself. In the model case of the double-seawall construction in Kanehama, the voluntary sales of coastal *iriai* land as well as individually owned land parcels were each concluded separately with the government at a nominal price, instead of applying the formal procedure and fair compensation considering the entirety of the communal land order, and this resulted in the destruction of the Kanehama community. The government approach is a division policy, negating the constitutional requirement for the protection of private properties as an integrated regime.

Even if the disaster recovery excuse in the context of "public welfare" as a justifiable basis for state intervention in private properties without compensation (Japanese Constitution, Article 29, section 2) is employed for the Kanehama case, a recent series of neoliberal legislation introduced in the name of solving the problem of "land without identifiable owners" obviously goes beyond the limit of that excuse. The balance required by the Supreme Court as aforementioned for the "public welfare" justification under Japan's Constitution, Article 29, section 2 is tested more severely here between the public works in normal time dedicated to economic growth on the one hand and the indispensable property rights of ordinary people and their communal relations as a whole on the other. In the author's recent interviews during January through to March 2023 at the headquarters and local branches of the Kobe Regional Legal Affaires' Bureau in Hyogo prefecture on the status of the implementation of the *ex officio* investigation of unidentified ownership in the Title Section Registry, it was found that the registry officers are urged by the annual numerical goal of investigation set by the national department; they therefore naturally tend to focus on the target areas of immediate public works, particularly under

[58] They included the 1870 domain declaration (*domeinverklaring*) and the agrarian law of the Dutch East Indies, the 1879 Upper Burma Land & Revenue Regulation in the British colony of Burma, the 1909 Land & Revenue Act in Thailand, and also in Manchuria as a Japanese colony. See for details Kaneko, *supra* note 5, pp. 13–9.

[59] Recent cases include the 2001 Cambodian Land Law (Art. 12) and the 2003/2013/2023 Vietnam Land.

[60] See Kaneko, Kadomatsu and Tamanaha (2021).

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the auspices of the national government's recent campaign for "Building National Resilience" or an idea for tackling global climate change by the strengthening of hard infrastructure. Uncovered here is implementation of the land registration system for facilitating public works by the evasion of due process and fair compensation under Japan's Constitution, Article 29, section 3. The question of unconstitutionality will be tested in future disputes raised by local residents.

5.4 Hints from Asian disaster recovery

Apart from judicial confrontation to question the unconstitutionality of legislation, which is not always a realistic way in a society that is gradually returning to the authoritarianism, a community-based approach can be an alternative. Akahama's community-led relocation was a rare success story in East Japan, but plenty of similar stories can be found in Banda Aceh, Indonesia, which lost 100,000 lives in the 2004 Indian Ocean Tsunami, where the 1999 (2004 rev.) Special Local Autonomy Law introduced in the reformation era after the collapse of the Suharto authoritarian regime enabled a series of provincial ordinances that entrusted initiatives to the leaders of traditional villages (*gamphong*). Though the original blueprint prepared by the central government aimed at dwelling bans in coastal areas to set back the entire city to one kilometre from the seashore, together with land purchases as public support for the affected households that were obliged to relocate, the local residents strongly opposed such a plan and an open choice of whether to relocate or reconstruct in the inundated area was given to each village instead. More than a few fishery villages chose to reconstruct on the original ground, but their choices were further divided into whether to accept the land readjustment project (RALAS) led by an international donors' alliance headed by the World Bank or to attempt reconstruction by themselves.

According to the author's interviews with the leaders of several villages that chose to conduct their own reconstruction,[61] the primary concern in their choice was to secure the continuation of local customary rules. Some of them refused RALAS, as it applied the modern system of individual ownership (*hak milik*) under the 1960 Basic Agrarian Law, which could never suffice as a legal basis for interpreting the delicate details of their customary orders. In fact, the customary orders in Aceh vary greatly from village to village; sometimes a paternal-line inheritance system applies to a village, in which ownership of all of the properties inside the village is concentrated in the eldest son of the head family of a clan, but the next village may apply a Minangkabau culture of maternal-line inheritance. Such diversity makes it difficult to be interpreted under the words of the formal law. For example, if the legal status of the eldest son of a clan's head family is described as ownership (*hak milik*) under the Basic Agrarian Law, then there are no suitable rights to describe the rights or interests held by the rest of the clan due to the limited list of property rights under the *numerus clausus* principle of the Law. If their rights are described as a leasehold (*hak guna bangunan*) that ought to be formally registered and has a transferrable nature, then this would contradict the customary rules. Some villages are centred on a regime of communal ownership but, if such a system is considered to be a communal right (*hak ulayat*) under the Basic Agrarian Law, then their land could easily be taken by the government without compensation, as had been the practice in the implementation of the same Law during the Suharto era. Thus, the village leaders had

[61] The author's interviews were conducted in December 2014 and again in December 2019 with the leaders of Neuheun village (relocation from Banda Aceh), Deyeh Man Plam village in Banda Aceh (reconstruction in seashore outside RALAS), Lambung village in Banda Aceh (reconstruction in seashore by land readjustment), LhambadaLohk village in Baitsussakam district (reconstruction in seashore by RALAS), and Cadek village in Baitsussakam district (reconstruction in seashore outside RALAS). See Kaneko (2016) for details.

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reason to refuse the application of the formal law, especially for the purpose of realizing a justifiable reconstruction of the lives of the villagers.

A series of Aceh provincial ordinances (*qanun*) were introduced to offer formal recognition to the results of village-level reconstruction based on the customary orders. According to Dr Taqwaddin Husin at Siyah Kuala University, who was the drafter of these ordinances,[62] they were designed to first establish a community-based dispute resolution system for ascertaining the substantive contents of customary law. Then, the community-based system was connected with the formal judicial system through the appeal system, which was automatically reflected in the formal land registry if the villagers wished to have formal land certificates; to facilitate this formal endorsement process by the judiciary, he established a mobile sharia court system to allow the judges dispatched to each village to give a speedy judgment to endorse the village-level dispute resolution.[63]

In March 2020, after 17 years had passed since the Indian Ocean Tsunami, the author collaborated with Dr Taqwaddin and his colleagues at Siyah Kuala University for a survey in three traditional villages that chose different methods of post-tsunami reconstruction. In particular, the status of the reconstruction of housing, livelihood, and mental conditions was found to be the most positive in LhambadaLohk village, which chose to reconstruct along the sea coast by applying the customary land order; next was Neuheun village, which chose relocation to high ground, compared with the results in Lambung village, where a large-scale land readjustment project was implemented by the Japanese official development assistance. Also, another finding was a trend for equality in the recovery of livelihoods between households with different categories of property rights,[64] which is quite a contrast to what was found in the author's survey in East Japan, where lessees showed slower recovery and more difficult situations.[65] These positive, equal results in the reconstruction of lives of affected populations in Aceh imply the strength of community-chosen recovery, which made much of social justice instead of compelling formal procedures.

Similarly, the ultimate success of community-led recovery in East Japan will be tested in the long run, with a focus on empirical evidence of the recovery status of the affected populations.[66]

6. Conclusion: a realist approach beyond legal instrumentalism

This article drew attention to the facts of property rights of disaster-affected individuals and communities in Japan in the path of post-2011 East Japan Earthquake recovery, which were hidden behind the exaggerated success of hard infrastructure works including the great seawalls surrounding the entire 400 kilometres of the coastline. Sacrifice of private properties has been justified in the context of the state's regulatory power for "public welfare" under Article 29, section 2 of the Japanese Constitution. However, as mentioned at the beginning of this article, there is case-law from the Japanese Supreme Court that

[62] Dr Taquaddin is a justice at the Aceh High Court, former Ombudsman of Aceh province, and also a lecturer at the faculty of law of Siyah Kuala University.

[63] Taqwaddin and Teuku (2016).

[64] Alvisyahrin, Rizki Wan Oktabina Taqwaddin Husin & Sunarty (2023).

[65] See Hokugo, Kaneko, Toyoda, Honjo, Shiomi, Pinheiro & Ghezelloo (2023) in Tables 3–6, etc.

[66] *Ibid.*, Hokugo et al. was an attempt at empirical appraisal of the recovery status of affected populations by applying the method of the "Recovery Calendar" consisting of 12 elements of recovery factors including safety, housing, livelihood, mental, community, local economy, etc., which has been a frequently applied analytical method since the 1995 Hanshin-Awaji Earthquake in Kobe, Japan. There was an implication that Akahama's residents showed high interest in safety, while the physical aspects of reconstruction such as housing and livelihood were delayed.

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requires proportionality between the regulatory purpose and the mode and substance of the affected property rights.

Guided by this proportionality requirement, in this article, first a quick review of the modern legal history in Japan since the reception of Western legal system was provided to confirm that the property rights that constitute the indispensable basis for the lives have been the target of special consideration in the drafting stage of the Japanese Civil Code and in the succeeding formation of case-law throughout its modern legal history. Then, this article turned its eye to the empirical facts found through the author's continued surveys in the tsunami-affected areas in East Japan, and identified the recent tendency for changing formal law being implemented toward the cancellation of vulnerable parties' property rights in order to facilitate construction works.

It is an attempt of the government at "legal instrumentalism" using the formal law as a tool for the lawful deprivation of private properties, which was what Boissonade purported to challenge in the nineteenth century. This slavery of law to politics is occurring in present-day Japan, with the overwhelming majority of the conservative party in both houses of the National Diet since the post-East Japan Earthquake political campaigns, in which perhaps the law-makers are trapped in the myth of economic growth, as a goal in itself, instead of an indicator of the productive efforts of modern human society. Post-disaster infrastructure building works are prioritized by Keynesian bureaucrats at the sacrifice of disaster victims' properties and the "magic effect" of land registration is utilized as a means. The contradiction here is obvious when we are reminded of the genuine goal of disaster recovery—"public welfare" under Japan's Constitution Article 29, section 2, which is the concept derived from the French Napoleon Civil Code, Article 544 providing for "regulation" interpreted as a mutual restriction of individual ownership for the wellbeing of communal lives between the owners themselves. The Keynesian prioritization of public works for stimulating the economy at the sacrifice of disaster victims obviously goes beyond the regulation in the sense of the Constitution, Article 29, section 2 and it is nothing but "public taking" under the Constitution, Article 29, section 3, in which due process and fair compensation are necessary. Howsoever the issues of "land without identifiable owners" interfering with disaster recovery are emphasized, there is no constitutional logic to justify the bypassing of procedures under the Land Expropriation Law to take the properties of disaster-affected populations without compensation.

The procedural bypass has been attempted through the "special zone" method—an establishment of a geographical territory in which the application of certain laws or regulations is exempted, which has frequently been applied by Asian developing countries for the encouragement of foreign investments at the sacrifice of otherwise indispensable legal policies such as labour protection law, environmental law, human trafficking law, as well as land law. The "special zone" method in the post-East Japan Earthquake recovery's context was legitimated by the Law on Special Zones for Post-East Japan Earthquake Recovery, which created a comprehensive framework in which to create various exceptions to the normal time law, including the procedures of the Land Expropriation Law. There should be a constitutional limit, however, on the overuse of this "special zone" method by the authoritarian governments, which is front-door evasion of the "rule of law," by creating a lawless space for extraterritoriality to exclude the check and control by the legislature.

Neoliberalism led by an authoritarian government seems to be what we face in contemporary Asia, but it is what has been repeated in the modern history of Asian law. A hint for getting rid of this lawless world may be found through a historical review: in the era of the reception of Western law by modern Japan in the mid-nineteenth century, there was an attempt of realist lawyers to overcome the gap between the formal law created by the authoritarian Meiji government based on the colonial law model then prevailing throughout Asia such as the Torrens-style title registration and the wasteland

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management, and the socially recognized normative regime. Even though the colonial law was a bundle of formal legal apparatus for the lawful deprivation of existing property rights and, in one sense, the law was a means of self-colonization by the government of its own people, on this, Boissonade stayed in Japan for 22 years to teach that the law is the norm. The spirit of jurists as a profession being devoted to maintaining the law as justice was what Boissonade left Japan with in the late nineteenth century.

A hint is also obtained from contemporary Asia. The similar bundle of legal apparatus to the post-East Japan Earthquake legislation is vigorously promoted in contemporary land law reforms led by international financial organizations such as the World Bank. But we have also noticed the existence of local jurists, such as the provincial ordinance drafters in Aceh, Indonesia, who apply the same spirit and devotion as Boissonade did in designing formal law to incorporate social justice, to respect the indispensable basis of the reconstruction of living of disaster victims and communities. As long as we keep our eyes on such success stories of the struggle of realist lawyers to defend justice in the face of the "legal instrumentalism" attempted by numerous pieces of legislation produced by the legislative body that is captured by the authoritarian government, then there will still be chances to fill the gaps between such captured formal law and justice.

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