State's Obligation to Ensure Safety in Japan and Mutual Assistance as Its Supplement

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1. Introduction

It has come to be questioned how much responsibility the State has for ensuring the safety of its people. Japan's Basic Law on Disaster Countermeasures enacted in 1961 sets forth the protection of "the national territory, the life and limb of the citizens and their property" in its objectives provision (Art. 1), and for this purpose the State has the responsibility to "use all of its organizations and functions" to "take all possible measures" (Art. 3). The prefectures (Art. 4) and the municipalities (Art. 5) also have the same responsibilities. It is an administrative responsibility called the obligation to ensure safety (*anzen kakuho gimu*).

However, the range of the obligation to ensure safety has been limited in the revision of the Basic Law on Disaster Countermeasures implemented in 2013 following the lessons learned from the 2011 Great East Japan Earthquake. A new "fundamental principles" provision (Art. 2-2) was established, which provided a framework for minimizing damage based on Japan's natural characteristics and socioeconomic conditions such as population and industry (no. 1), promoting disaster prevention activities conducted by residents and voluntary disaster prevention organizations (no. 2), integrated disaster countermeasures (no. 3), prioritizing the protection of human life and limb (no. 4), and providing appropriate assistance while giving consideration to not impeding self-help efforts made by disaster victims (no. 5). The responsibilities of the national government, prefectures and municipalities (Art. 3 through 5) were also revised to include detailed references to these "fundamental principles."

It can be said that an intention of this revision of the law was to limit the range

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of the obligation to ensure safety that had been guided by the interpretation of the existing provisions. Although the existing objectives provision (Art. 1) described the protection of "the national territory, the life and limb of the citizens and their property" as the range of the obligation to ensure safety, the newly added fundamental principles (Art. 2-2) prioritize the protection of human life and limb (no. 4) but there is no mention of "property". Further, the existing provisions provided that the national government had the responsibility to "use all of its organizations and functions" to "take all possible measures" (Art. 3), but the fundamental principles (Art. 2-2) emphasize "disaster reduction" by minimizing damage based on Japan's natural characteristics and socioeconomic conditions such as population and industry (no. 3), which is not aimed at total disaster prevention. Emphasis on "self-help" by residents and "mutual assistance" through voluntary disaster prevention organizations (no. 2), indicates an approach of narrowing the target of "public assistance" to those who are vulnerable based on factors such as age, gender and disability (no. 5), avoiding a moral hazard that impedes "self-help". Further, it does emphasize the integrated disaster countermeasures (no. 3), with an implication to the idea of "multi-level disaster prevention" that includes not only hard countermeasures but also soft countermeasures, as was emphasized in the recovery plan after the Great East Japan Earthquake, linked to the approach of limiting safety standards in hard countermeasures based on budget constraints.

Through these changes in the Basic Law on Disaster Countermeasures, it seems that, first, the effect of limiting the safety standards that the State owes to achieve has arisen. Second, the invigoration of self-help and mutual assistance, which is to compensate for the regression of the State's obligation to ensure safety, is to be an issue. In this paper, the first half will confirm how the State's obligation to ensure safety has been limited (Section 2), and the latter half will retrace the circumstances of the post-disaster town recovery processes regarding the institutional issues aimed towards the community-based safety measures to supplement for such regression by the State (Section 3). Additionally, institutional designs towards community-based safety measures will be explored based on the observation of procedural flow of land readjustment projects in the areas affected by the Great East Japan Earthquake (Section 4).

2. Regression of the State's Obligation to Ensure Safety

(1) Safety Standards as an Obligation – Compensation Standards for Defects in the Establishment and Management of Public Facilities

The specification that the protection of "life and limb" is the highest priority of the State's obligation to ensure safety in the 2013 revision of the Basic Law on Disaster Countermeasures, or in other words, the limitation of the obligation to ensure the safety of "property", has received attention (Art. 2-2, Para. 4). Certainly, the idea that defending citizens' private property from disasters is an issue of self-help and not within the range of public assistance which the state should spend taxes on is explained from a neo-liberal point of view, but it is also thought that in a welfare state, at the very least the protection of the minimum standards of living, such as housing and the basis of livelihoods, is a matter of state responsibility to secure the right to life (Art. 25 of the Constitution).[i] The attitude that the Basic Law on Disaster Countermeasures has placed the protection of "property" behind that of "life and limb" should be considered in the context of defining the scope of "public assistance" based on the right to life.

However, regarding the standard of safety that the State should achieve, separate from a program provision that is left to the State's discretion in the context of the right to life, there is also the context of the State's liability to provide damage compensation in times of disaster, as a minimum basis of the safety measures that the State is responsible for as an obligation. For example, even if the State is free to place limits on the amount of "public assistance" it provides in its discretion, it is illegal to place a limit on the state's liability to provide damage compensation, which is a liability. It is possible to approach by placing the standard for State damage compensation as a minimum safety standard, and on top of that amplified safety standards by adding public assistance by discretion.

Then, what kind of standard is such minimum standard for the State's obligation to ensure safety?

In relation to State damage compensation in times of a disaster, Art. 2 of the State Redress Law defines the criterion as whether there was "a defect in the placement or administration of a road, river or other public structure". There are various interpretations of this "defect" in a public structure, and a tendency is found

in court precedents to treat man-made public structures and natural public structures separately. That is, with regard to the responsibility to administer roads, which are man-made public structures, if there is an objective "defect" then negligence will be presumed without closely examining the factors of negligence (i.e. breach of a duty of care premised upon the foreseeability and the possibility of avoiding the outcome), in other words strict liability has been applied (Supreme Court judgment dated 29 August 1970, concerning a landslide on roads in Kochi prefecture, *Minshu* Vol. 24, No. 9, p. 1268). However, regarding river management, which is a natural public structure, the court's stance has required evidence of not just an objective "defect" but also subjective negligence (breach of duty of care). Prominent judgments include a case that excluded the State liability due to an Law of god (Nagoya District Court judgment dated 22 October 1962 regarding the Ise Bay Typhoon, *Hanrei Jihou*, Issue 313, p. 4), and the famous Daito flood case, which endorsed provisional safety standards that were acceptable based on social norms in view of financial, technical and social constraints (Supreme Court judgment dated January 26, 1984, *Minshu* Vol. 38, No. 2, p. 53). In this way, the evidentiary hurdle for negligence in relation to natural public structures such as river levees is higher, making it harder to claim damage compensation against the State.

A thesis by Ichiro Kato (Kato 1953), leading civil law scholar, provided a theory that influenced the binary stance of treating man-made public structures and natural public structures separately, making the evidentiary requirements for "defects" higher in relation to the latter. Kato's paper introduced the concept of "planned water levels" in relation to river administration, and set forth the view that the State's liability to compensate extended to the damage caused by the collapse of levees that occurred at water levels below the planned water level, but it did not extend to the damage caused by flooding in circumstances where levees did not collapse, nor to the damage where levees collapsed in circumstances where water levels exceeded the planned water level. This displays the stance of considering the "defects" in the placement or administration of natural public structures that are not based upon objective standards, but are dependent upon subjective requirements (breach of duty of care) that are required for the proof of traditional negligence. It is assumed that "planned water level" standards are the basis of judging such subjective requirements.

(2) Unscientific "Design Tsunami"

Therefore, how "planned water levels" are determined becomes a problem. The term gives an impression that feels as if it is objective, but its substance is quite ambiguous. In the Supreme Court judgment in the above Daito flood case, it was found that provisional safety standards that were acceptable based on social norms in view of financial, technical and social constraints were sufficient. Since the national finances of Japan's government are currently at the worst level of deficit in the world, if the reason of financial constraints is given, it becomes possible for the "planned water levels" to be lowered to suit the circumstances of the administration. To what extent this lowering can be stopped based on the "social norms" of the people continues to be questioned in each individual case, and ultimately it is left to be settled in the next court judgment.

In the recovery after the Great East Japan Earthquake, setting of "planned water levels" to determine such provisional safety levels is considered to be called into question. While the Law on Special Zones for Recovery in Response to the Great East Japan Earthquake was enacted at the end of 2011 to facilitate publicly-financed recovery projects such as the development of seawalls, disaster prevention collective relocation projects and land readjustment projects, envisioned as "recovery adjustment projects" as a whole, tsunami simulations had to be carried out repeatedly to determine the scope of application of such projects. According to the Ministry of Land, Infrastructure, Transport and Tourism's "*Guidelines for Tsunami-Resistant Design of Seawalls* (MLIT 2013), a disaster prevention group was established under the ports and harbours subcommittee of the transportation policy council in May 2011, about a month and a half after the Great East Japan Earthquake, and according to its report of June 2012, *Forms of Earthquake and Tsunami Countermeasures for Harbours*, the standards of safety were decided according to two levels of tsunami which are assumed based on the scale and frequency of the tsunami. Namely, against the class of "frequently occurring tsunami," the goal of safety was set on the "prevention of disaster (*bo-sai*)" using structures that can protect life and property, but against the very rarely occurring "maximum class tsunami," the aim was "mitigation of disaster (*gen-sai*) " by protecting human life at the minimum, yet in that case also "resilient construction" of seawalls that might deform but could not collapse were intended, which established an approach of seeking to delay the time it would take for a tsunami to reach the hinterland. This guideline introduced the concept

of “design tsunami” that formed the standards for the safety design of seawalls, and that level was set as a design external force that was to be determined somewhere between the “frequently occurring tsunami” and “maximum class tsunami”, which seemed to be an approach corresponding to the “planned water level” described in the Kato’s article mentioned above.

However, the basis for setting such “design tsunami” levels is extremely ambiguous. Before that, the expressions “frequently occurring tsunami” and “maximum class tsunami” that are the premise of such setting are already ambiguous. Regarding the method of determining “frequently occurring tsunami”, based on the report *Methods of Determining Design Tsunami Water Levels* issued jointly by the Ministry of Agriculture, Forestry and Fisheries and the Ministry of Land, Infrastructure, Transport and Tourism on July 8, 2011, it was said that tsunamis that “occur once every several decades to several centuries... can be used as a reference”, taken from surveys of the height of marks left by previous tsunami and historical records and literature, as well as tsunami simulation data (Guideline p. 6 (1)). “Maximum class tsunamis” were determined from a survey based on scientific knowledge such as analysis of ancient and other historical documents, investigation of tsunami sediments, and surveys of coastal topography, with those results “organized broadly and analyzed from the viewpoint of disaster prevention in the areas surrounding the relevant port, with consideration given to all possibilities” (Guideline p. 6 (2)). “Design tsunamis” were then decided discretionally based on “frequently occurring tsunami” heights and “maximum class tsunami” heights, which were determined in this ambiguous manner. In other words, “design tsunami” were generally decided at the level of “frequently occurring tsunami”, but when “protecting facilities of extremely high importance such as power plants, or protecting areas with a high concentration of people, property and industry” in the hinterland, heights were flexibly decided with reference to the “maximum class tsunami” height (Guideline p. 6 (2)).

The approach of classifying level 1 tsunami (Meiji Sanriku Tsunami class) and level 2 tsunami (Great East Japan Earthquake class) and generally using level 1 tsunami as the “design tsunami” for safety standards in the recovery adjustment projects after the Great East Japan Earthquake was already shown in the national government’s “Basic Recovery Policy” that was published in July 2011, and was

finally settled upon in the "Report of the Committee for Technical Investigation on Countermeasures for Earthquakes and Tsunamis Based on the Lessons Learned from the 2011 Pacific Coast of Tohoku Earthquake" by the Central Disaster Management Council dated 28 September 2011. After that, the basic recovery plans of each affected municipality followed this national basic policy.

However, although the "design tsunami" was basically supposed to correspond to level 1 tsunami (Meiji Sanriku Tsunami), time and effort has been spent on small modifications. The vicinity of sites where seawalls are to be constructed have been established as "disaster risk areas" as defined in Art. 39 of the Law on Building Standards, involving the permanent restriction of use of the land for dwellings (in Iwate Prefecture, designation based on municipal ordinance was delayed, so was initially implemented as the administrative guidance), and many of which have been subject to promotion of relocation through the disaster prevention collective relocation projects. Regarding the reason for establishing "disaster risk areas", it was explained at explanatory meetings for residents that if a level 2 class tsunami occurs, the tsunami would pass over the seawalls and the relevant areas were expected to be subject to inundation exceeding 2 meters in height. However, according to experts who were also involved in the policy making, because the seawalls are intended for "design tsunami" of the level 1 tsunami class, and therefore in a level 2 tsunami either overflow will occur and a tsunami pool will form in the hinterland behind the seawalls or the seawalls will collapse and concrete pieces will damage the surrounding area, the areas facing such risks have been labelled as "disaster risk areas" or "relocation promotion area" subject to restrictions on residing and promotion of relocation. However, because the establishment of large "disaster risk areas" or "relocation promotion areas" in commercial districts or densely populated areas is unrealistic or very expensive, it seems that the option of rebuilding the original land through land readjustment projects after the elevation of the land has been selected, and as a result, a total of 3,600 hectares has been subject to large-scale land readjustment projects.

On the other hand, in areas where the opposition by residents is deeply rooted, there are areas where there has been success in increasing the safety standards by raising the "design tsunami" height of the seawalls to close to level 2, or conversely, by lowering the "design tsunami" height to below level 1 heights and making an entire

community subject to the integrated collective relocation (for example, the Akahama area of Otsuchi Town and Nebama area of Kamaishi city).

In this way, the "design tsunami" that are the safety standards in the construction of seawalls, which became a pillar of the recovery after the Great East Japan Earthquake, have been set at the level of the Meiji Sanriku Tsunami that was a "frequently occurring tsunami", but the basis for such designation is unclear, and furthermore, have been subject to unfounded adjustments due to the circumstances of the hinterland and the resistance of residents.

(3) The Obligation to Ensure Safety and State Compensation

Given the fact that "design tsunami" are assumed to be inundated in a level 2 tsunami, and furthermore that "disaster risk areas" have been established in consideration of the collapse of seawalls, it can be thought that the approach to "planned water levels" conceived in Ichiro Kato's thesis has been followed in relation to "defects" in the placement and administration of public structures under the State Redress Law.

However, whether the "design tsunami" that is the minimum standard of safety which delineates the liability under the State Redress Law should be identified as being the same as the range of the obligation to ensure safety under the Basic Law on Disaster Control Measures is a separate issue. It is clear that this "design tsunami" does not involve taking "all possible measures" (Art. 3) to protect the "life, and limb of the citizens and their property" (Art. 1) that is the stated purpose of the Basic Law on Disaster Countermeasures, but rather, the addition of "disaster mitigation" (Para. 1), multi-level disaster prevention (Para. 3), and the prioritization of the protection of "life and limb" (Para. 4) in the "fundamental principles" (Art. 2–2) added in the 2013 revision is in line with the converse trend of regression from the protection of "property".

The idea of identifying the minimum standard of the obligation to ensure safety as the same as the range of the state's liability to provide damage compensation can be one approach. This approach assumes that ensuring safety uniformly to the level of the State's liability to damage compensation is the minimum basis, and that the safety measures beyond that line are not necessarily the obligation of the state, but discretionary public assistance in the sense of welfare, which depends on the socio-economic circumstances in the hinterland and negotiations with residents. However, the

thought of linking the relationship between the obligation to ensure safety in disaster countermeasures and the state's liability to damage compensation leaves several problems.

First, there is the question of fluctuating safety standards targeted by the Basic Law on Disaster Countermeasures, which are the basis for the avoidance of liability under the State Redress Law. In the above Ministry of Land, Infrastructure, Transport and Tourism guidelines, it is suggested that the "design tsunami" height, which is the criteria for responsibility under the State Redress Law, will be raised according to the concentration of property in the hinterland, but this is a concept of raising safety levels in areas of high economic value in advance so as to avoid the possibility of being responsible for a large amount of state compensation. As a result, land with higher economic value receives protection of not only "life and limb" but also "property" under the Basic Law on Disaster Countermeasures, but land with low economic value, it is necessary to preserve only "life and limb", which can give rise to unequal treatment under the obligation to ensure safety.

Secondly, if limiting the state's responsibility to provide compensation is planned by restricting the obligation to ensure safety under the Basic Law on Disaster Countermeasures, it is getting the priorities backwards. The administrative obligation to ensure the safety has had a goal of ensuring that "all possible measures" are exhausted to the extent possible, as stated in Art. 3 of the Basic Law on Disaster Countermeasures. Although the fundamental principles added to Art. 2-2 in the 2013 revision of the Law has given priority to the protection of "life and limb" and regressed the protection of "property", there should be no debate about trying to lower the standard of State's liability to provide damage compensation for this reason by manipulating the "design tsunami" heights as the safety standard. "Defects" in the placement and administration of public structures under the State Redress Law should be determined through the accumulation of interpretive judicial precedents, on a gradation that should be judged according to the individual circumstances of the case, as the "design tsunami" height will not suffice to have a firm binary classification that protects "life and limb" but ignores "property". Regarding the scope of that gradation, it seems that it is impossible to draw a firm line as there is continuous overlap between the policy elements of the obligatory administrative safety measures and other safety

measures as welfare assistance. Especially in disaster-prone countries such as Japan, there is the reality that the poor households have lived in areas with low land values that are at risk of disaster, and that disaster prevention measures have historically been closely linked to welfare support.

Third, there is the problem of due process for determining safety standards. Local residents are not always satisfied with the method of deciding the lowest line of the State obligation to ensure safety based on the standard of State's liability to provide damage compensation, which is determined by the "design tsunami", which is difficult to call a scientific method. The determination of safety standards is the basis for determining the scope of recovery adjustment projects such as the construction of seawalls which involve the land-takings and other restrictions on private property rights, inviting constitutional questions. It is a situation of police regulation by the "public welfare" that is referred to in Art. 29, Para. 2 of the Constitution. In other words, safety standards are the very criteria for interpreting "public welfare", which is essential to secure the constitutionality of placing restrictions on private rights without compensation under public projects. In today's democratic society, unilateral administrative decisions in the determination of these safety standards should not be permitted.

To summarize the above points, the obligation to ensure safety, which is the aim of the Basic Law on Disaster Countermeasures, can invoke the State's minimum responsibility to provide damage compensation as a baseline using a uniform approach, while also providing additional safety using "all measures" based on the local circumstances. During this, because administrative decisions regarding State damage compensation standards are lacking scientifically, it is necessary for there to be a supplementary step using participatory decision-making procedures involving local residents to procedurally correct substantive ambiguities. I would like to discuss the form of such participatory procedures in the next section.

3. A Framework for Regional Participation in the Setting of Safety Standards

(1) Experience from the Hanshin-Awaji Earthquake – Two-Stage City Planning Decisions

In the recovery process after the Great Hanshin-Awaji Earthquake, building restrictions were put in place immediately after the earthquake (extending to two months in accordance with Art. 84 of the Building Standards Law), during which time a zoning method under the Earthquake Recovery Emergency Maintenance Ordinance was used to designate 5,887ha as "earthquake disaster recovery promotion areas" subject to building restrictions (notification requirements, administrative guidance), of which 1,225ha area was designated as "critical recovery areas" subject to stricter building restrictions (notification, negotiations). Furthermore, on March 17, two months after the earthquake, city planning decisions were made for 125ha for land readjustment projects and 26ha for redevelopment projects, and building restrictions based on the City Planning Law commenced. These zoning and city planning methods were safety measures primarily targeting densely residential areas where fires caused by the earthquake had spread.

However, because of heavy criticism by residents that the decision regarding the scope of such safety measures was carried out by the municipality's administration alone and in a short period of two months, the Governor of Hyogo Prefecture imposed additional conditions on the determination of the urban plans, in accordance with an inquiry by the Urban Planning Council and requested that residents' participation procedures be taken into account. In response to this, Kobe City applied the Kobe City District Planning and Town Planning Agreements Ordinance, which was enacted in 1981 and had a record of implementation, for the purpose of inviting residents' participation under the philosophy of "two-stage urban planning decisions". Although it was within the scope of rough designs restricted by the conditions of budgetary aid from the national government, a consultative method between the residents and the administration decided the design of fine-level town planning such as the placement of regional roads and parks.

In this process of consultation between the administration and residents, safety considerations from the unique viewpoint of citizens were incorporated, for example,

increasing the number of North-South evacuation routes which allow evacuees to see the outline of the mountains while evacuating, which placed emphasis on the recollection of residents who were able to evacuate using the outline of Mount Rokko as a landmark in the pre-dawn darkness, as well as installing pumps that draw ground water in every park, which was based on the bitter experience of the water supply stopping due to power outages following the earthquake.[ii]

In this way, in the experience of creating safety measures after the Hanshin-Awaji Earthquake, although there was criticism of administrative-led decision making in the early stage, through the consideration of subsequent participatory procedures it became an example of cooperation that incorporated safety measures for rebuilding community development through cooperation between the administration and residents.

(2) Attempts at Participatory Processes via Ordinance

After the Great Hanshin-Awaji Great Earthquake, inquiries into ordinances that would form a systemic foundation aimed at citizen-cooperative pre-disaster recovery took place. The establishment of municipal-level disaster prevention ordinances, town development promotion ordinances, as well as municipal basic ordinances and citizen participation promotion ordinances progressed, which was expected to provide the systemic foundation for participation by residents.

As an example, the Tokyo Metropolitan Government established the Ordinance on Earthquake Disaster Countermeasures in 2000, which each of the special wards further refined. For example, taking a look at the case of Katsushika Ward, through the establishment of a series of ordinances (such as the Katsushika Ward Disaster Countermeasures Ordinance in 2003, the Ward Residents' Participatory Community Planning Promotion Ordinance in 2006, and the Katsushika Ward Disaster Recovery Measures Ordinance in 2010), Katsushika Ward formed a masterplan for participatory urban planning, and attempts are being made to link this with the initiatives of disaster prevention measures by residents, such as flood hazard mapping and pre-disaster recovery plans. Among these ordinances, under the Community Planning Promotion Ordinance, residents' groups that represent the majority of local residents are recognized as town planning groups through administrative registration, and the outcomes of agreements by the groups are publicly declared and respected by the ward

administration (Ordinance Art. 11), and by using the system for submitting proposals for district plans and urban plans under the Urban Planning Law (Art. 16 Para. 3, Art. 21-2 Para. 2, etc.), a system design has been created that can manifest a degree of binding force against the ward administration's urban planning (obligation to respond without delay, the provision of reasons for refusal) (Ordinance Art. 18, 19). The Tokyo metropolitan government respects these initiatives by wards to create their own ordinances and does not impose guidance or control.[iii]

In this way, it is noteworthy that attempts at institutional infrastructure based on ordinances was developing at the fundamental level of municipal government for the purpose of community planning that incorporates safety measures with participation by residents.

(3) The Special Zones Method under the Large-Scale Disaster Recovery Law

The 2013 Large-Scale Disaster Recovery Law introduced national government-led disaster recovery. However, where local governments have community planning ordinances that define procedures for residents' participation, or where pre-disaster recovery plans have already been determined based on ordinances, is there an intention to exclude such local measures and impose the national government's policy? Art. 94 of the Constitution of Japan recognizes autonomous ordinances by local governments "within the scope of law", which poses a problem of interpretation. Here, because the Large-Scale Disaster Recovery Law (Art. 12, Para. 8) refers to examples of procedures from the Urban Planning Law and other laws and ordinances in relation to determining and amending urban plans, it seems that community planning ordinances can be argued as being in the form of delegated ordinances under the Urban Planning Law.

However, it seems that, using the Great East Japan Earthquake as an opportunity, the trend of selecting safety standards with citizen participation met resistance. The December 2011 Law on Special Zones for Recovery in Response to the Great East Japan Earthquake (hereinafter "Special Zones Law") was adopted with three pillars, namely "recovery promotion plans" that encourage economic and industrial recovery through deregulation and preferential measures, "recovery adjustment plans" procedures to speed up disaster prevention planning based predominantly upon urban planning methods, and "recovery grant funded project plans" that supplements the

regional government's fiscal burden arising from these plans through allocation of regional recovery taxation measures. On the procedural side, a consolidated decision-making method based on one-stop "consultation meetings" for consultation between relevant national and regional administrative departments was propagated as a deregulation measure to rationalize the various related administrative decision-making procedures. This method was the reappearance of the "special zoning" method which was a method of deregulation policy adopted by the Koizumi government's structural reforms in the 2000s (Ando 2012). In the process of formulating "land restructuring plans", planning decisions and project decision procedures for recovery-related projects such as urban development, integrated recovery projects, collective relocation, tsunami protection facilities and fishing port recovery projects were consolidated (Art. 46 (2), Para. 4), agreement procedures via the recovery adjustment council composed of administrative departments from the national and regional governments were added,[iv] and the publishing of the results of such agreements gave automatic effect to them as administrative decisions (Art. 50).

The effect of this consolidated decision-making procedure can be seen as the intention to speed up administrative decisions by avoiding participation by residents. Only opportunity available for participation by residents envisioned by the law was a sole provision that effort should be made to take measures that reflect the opinions of residents such as by holding a public hearing (Art. 46 (5)). Participatory provisions that have been accumulated step by step through repeated reforms to the urban planning legislation in recent years were not clearly referred to,[v] with only an ambiguous mention of "procedures shall be followed" from the Urban Planning Law and other laws and ordinances (Art. 48 (8)).

Furthermore, in June 2013, the "Large-Scale Disaster Recovery Law" appeared as a permanent law governing recovery after large-scale disasters and followed the above "special zone" method. A recovery council composed of mayors and governors of the affected municipalities and related ministries and agencies is formed (Art. 11) and with the publication of "recovery plan" after consultation with the council, a consolidated decision gives effect to an integrated urban plan and the deregulation of conservation areas under the relevant Laws (Law on Establishment of Agricultural Promotion Regions, Forest Law, Natural Parks Law and Law on Development of Fishing Ports

and Grounds in Art. 14 (2)). Opportunities for participation by residents are minimized in this simplified consolidated procedure, with the only provision in place referring to minimum measures for reflecting the opinions of residents such as a public hearing (Art. 10 (5)).

4. Resident Participation in Safety Measures in the Areas Affected by the Great East Japan Earthquake – Comparison of Land Readjustment Projects

(1) Flow of the Administrative-Led Process and its Result

In the various parts of eastern Japan where the Special Zones Law was applied, land readjustment projects were implemented as safety measures over 3,600 hectares of land via land restructuring projects, and the abovementioned "special zoning" method was applied in the procedural process. How could residents in any way participate in the selection of regional safety measures during this time? The author has continued to monitor this issue in the coastal area of Iwate Prefecture since the disaster,[vi] but in the 2017 fiscal year, the seventh year after the disaster and when the final stage of land substitution decisions commenced in many project sites, interviews were conducted with recovery authorities, local chambers of commerce, and residents' groups in Miyako city, Yamada town, Otsuchi town and Kamaishi city and as a result, several variations were found in the involvement of residents in safety measures.

The procedural flow of administrative enforcement of land readjustment projects is as follows: (1) administrative decision on the urban plan, (2) administrative decision on the project plan, (3) establishment of a land readjustment committee, (4) land substitution planning, (5) provisional land substitution designation, (6) administrative decision on land substitution, (7) collection of payment for settlement of gaps on land value or payment of compensation for reduced land value.

The administrative decision on the urban plan under (1) took effect according to the publication of the "recovery adjustment plans" prepared using the abovementioned "special zones" method from mid-2012 onwards, but there were no representatives of residents at the "consultation meetings" conducted at this stage in the municipalities where the author conducted interviews. In the middle of 2011, the year the earthquake occurred, the local autonomous associations and the formation of new resident

representative organizations had already occurred in various places, and proposals for recovery planning centered on safety measures were repeatedly submitted to the administrative side within the year,[vii] yet these residents' proposals had not been reflected even in the "recovery basic plans" which had already been administratively determined in various places in the end of 2011, prior to the determination of the "recovery adjustment plans" from 2012 onwards.

The stage of administrative decision on project plan of above (2) had involved procedures for public inspection and submissions performed in mid-2013, and the prefectural governor made immediate determinations. In response to this, the procedure quickly progressed with above (3) land readjustment committees established, (4) land substitution planning quickly implemented during the 2013 fiscal year, and (5) the designation of provisional land substitution at the end of the fiscal year. In this way, as the circumstances quickly evolved under the procedural flow of the Land Readjustment Law, the extent to which residents were able to participate in the substantive discussion on safety measures is of concern.

According to surveys by the author, differences are found in the development of these projects in various municipalities during this period. In the land readjustment projects in the Taro area[viii] and Kuwagasaki/Kouganji area[ix] of Miyako city, an explanatory session for residents was held at each milestone in the procedure, including the project planning stage and provisional land substitution designation stage, and the city emphasized that it had been attempting to achieve resident-led planning decisions.[x] However, in the interviews conducted with residents by the author's group, it was revealed that these sessions were a pretense and the city did not display an attitude of wanting to receive substantive opinions from the residents, and from the residents' position also, they were at the stage of giving up, as submitting any further proposals would be pointless due to the painful experience of the city ignoring their submission in 2011.[xi] In the Kuwagasaki district, a movement in opposition to seawalls was reignited by some residents in the 2015 fiscal year, but it waned due to the negative opinions among the victims that to oppose a decision by the administration at that stage would only lead to delay in the rebuilding of housing. In addition, the land readjustment committee was conducted in secret and it has been said that the details of the committee's deliberation process were not disclosed to the residents until the

stage of provisional land substitution designation. According to a questionnaire survey conducted by the author's group, although many of residents in these areas were land leaseholders[xii], there was no evidence that the administration had sufficiently explained the procedure for declaring leaseholds in the land readjustment project (Art.19 and 85), the parties performing the project were generally unaware of the existence of the leaseholders, and there was only a perfunctory appointment of a leaseholders' representative to the land readjustment committee.[xiii] In the case of leaseholders the author interviewed in Taro, the Legal Affairs Bureau under the Ministry of Justice conduced the ex officio cancellation of registrations of all buildings lost in the tsunami simultaneously in March 2013, two years after the earthquake disaster, and at the same time landowners sold their land to the city administration without authorization from the leaseholders; because the leasehold rights were treated as extinguished due to the loss of building registration (which was a requirement for raising an objection under the Law on Land and Housing Lease), the leaseholders' participation in the land readjustment project was not approved. In this case, leasehold rights satisfied the requirements through conservatory registration of buildings on leased land, but due to the ex officio registration of loss by the Legal Affairs Bureau, as well as the abolition of the Law on Temporary Treatment of Land and Housing Leases in Disaster Stricken Cities in 2013, which had previously helped to protect leaseholders, it was considered that the protection was lost (Kaneko 2014, Kaneko 2017a). As a result of this institutional obstruction of leaseholders who suffered damage, the land readjustment committee was formed by representatives of some influential absentee landowners and could not be a forum for extensive discussion of regional safety measures. As a result, residents sense that the outflow of population equated to approximately half of the population in Taro and about two thirds of the population in Kuwagasaki.[xiv]

In Otsuchi town's case of the Machikata area land readjustment project (30ha), the project progressed consistent with the procedure in the Land Readjustment Law, being led by the administration at all times. Local restoration councils and community councils were established under an ordinance, but meetings were held about only twice a year, and that they came to be described as perfunctory is the same as the scenario in Miyako city mentioned above. However, it is noteworthy that the administration persistently felt a sense of crisis concerning the outflow of population, and repeated

consideration given to measures to avoid the scattered vacant land areas as the result of the land readjustment project. During the 2016 fiscal year a report on *The Current Status of the Central Urban Area and the Direction of Efforts Towards Rehabilitation* (Otsuchi town, 2016) was published, which initiated independent programs such as the publication of "visualization" maps, a "vacant land bank" system for the administration to match landowners and land users, and measures to promote housing construction that increased subsidies to households that rebuilt in Machikata. However, there was criticism of the publication of vacant land and additional subsidies, with the reception of such belated program attempts by the administration met with what can be called indifference by residents who had already been through a waiting period of several years.[xv] As of March 2018, in a field survey by the author's group, a certain amount of rebuilding of houses was seen in the Machikata district, which could be the result of the housing construction promotion measures, but noticeable change in the rebuilding of commercial shops was hardly seen.

(2) Governance Issues Concerning Community Development Meetings

In the Unosumai district land readjustment project in Kamaishi city,[xvi] as the only example within the disaster-affected areas of Kamaishi city where a resident-led community recovery council was established, which gave an expectation of incorporating resident participation into the procedural flow under the Land Readjustment Law. That is, in each disaster-affected area of Kamaishi, the Community Recovery Discussion Meeting was held between April and July 2012, prior to the "Land Restructuring Plan", but at this time there was no disclosure of specific information on the land readjustment project, and instead only encouraged the establishment of community recovery councils and landowner groups. After the publication of the "recovery adjustment plans" from August 2013 onwards, community recovery councils were gradually established as a method of obtaining residents' agreement led by the administration, but only in Unosumai the residents launched their own community recovery council. Due to this, the administration respected the council members even more and maintained efforts to diligently confirm its intentions.[xvii] However, according to continual interviews with residents in the region by the author's group, it seems that during the process of implementing the land readjustment project, the council's

information disclosure to the general population was insufficient and had difficulty in realizing a wider range of participation (Kaneko 2017). It is a case that is instructive on governance problems for a community-led recovery, such as the requirements for internal decision-making and the external representation to fulfill the function of representing residents while maintaining a sense of distance from the administration.

(3) Private Sector-Led Processes

In the case of Yamada area land readjustment project in Yamada town, in response to the administration's recovery adjustment plan, the concept of "living town" was initiated as a guiding spirit of area's recovery planning by the Yamada Chamber of Commerce and Industry (YCCI). This "living town" concept was the result of consciousness of the YCCI leader that the flow of people should not stop with mere restoration to pre-disaster conditions, but should be developed successfully through the community development. According to the president of the YCCI, what made it possible was the victory of "Team Yamada", which was the axis for cooperation between the YCCI's consultants of the commerce side and the Urban Renaissance Agency that was the administration's consultant.[xviii] Following the earthquake, by the end of 2011 the YCCI had already created the "Commerce and Industry Revival Vision" and in 2012 which was developed into the "Commerce and Industry Recovery Plan" which was successfully incorporated as part of the Yamada Town Recovery Plan. The Plan centered on the idea of "townscape revitalization plan" to construct a new urban area in front of JR Yamada Station, to realize which, a management company was established under the YCCI Chamber of Commerce for the purpose of seeking the national subsidy for the reconstruction of commercial facilities, which was successful as the second behind Onagawa town in Miyagi prefecture. In addition, by arranging the location of parking lots etc., the town center was linked to the areas of land readjustment project that consolidated integrated commercial/residential facilities. Further, disaster-assistance public housing was placed adjacent to this shopping district, and cultural facilities such as a children's library were brought nearby. It was a concept of creating a new "living town" that is not merely a restoration of the previous shopping precinct. Yamada town government entrusted the conception of town center's formation and subsidy application to the YCCI's leadership,[xix] and in a sense, it is an example where

the recovery adjustment project developed in a form that depended upon the private sector. As a result of that, as of March 1, 2018, the population of Yamada town was 15,964, a decrease of only 3,000 from the time before the disaster, and it can be seen as having stopped the large population outflow that had been a concern.

Though the case of Yamada town is easy to interpret as merely the successful recovery of the shopping district, it was a result of a choice of safety measures by private sector as the foundation for this conceptualization of central urban area. In response to the town's safety measures that involved the construction of a uniform 9.7-metre seawall, establishment of a 100-metre wide disaster risk area where inhabitation is prohibited behind the seawall, and raising the elevation of the land on the mountain-side of the disaster risk area by 3 meters, the local private sector used its utmost wisdom to reach an understanding with the town government to seek an optimal solution for safety and livelihoods.

5. Conclusion – Towards A Community-Based Safety Measures

The first half of this paper retraced the trend of regression of the State's legal obligation to ensure safety under the Basic Law on Disaster Countermeasures and predicted that the role of "mutual assistance" in future disaster management will strengthen in response. Accordingly, it must be recognized that there is a high necessity for the community to be substantially involved in the selection of safety measures in recovery planning instead of leaving it to the administration. However, in the recovery procedural law represented by the 2011 Law on Special Zones for Recovery in Response to the Great East Japan Earthquake and the 2013 Large-Scale Disaster Recovery Law, as well as the Land Readjustment Law and other legislation that defines project procedures under the umbrella of these laws, the administrative-led procedural flow typified by the "special zone" method has been strengthened, and there is a trend where the opportunities for participation by residents in safety community planning that had been accumulated in earthquake disaster recovery ordinances since the Great Hanshin-Awaji Earthquake have been abandoned.

Yet, despite being bound by the national legal framework, there is still room for local, grass-roots initiative for safety measures to progress. The successful example of

Chamber of Commerce and Industry leadership in Yamada town was introduced as an example from the author's interview research in the coastal area of Iwate Prefecture. Local commercial leaders emphasized that what made their leadership possible was people, not a system, and that the decisive factor was in what way people can handle the system. However, it is not always possible to obtain talented people like "Team Yamada" who have the knowledge and motivation to master the system. It is necessary to elaborate on Art. 10 (5) of the Large-Scale Disaster Recovery Law that could be the basis of local ordinances for residents' participation.

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Notes

i Debates of legal scholars have been accumulated in Japan on the range of the public assistance in disaster prevention and recovery since the Hanshin-Awaji Earthquake. See Abe

(1998), Ikeda (2000), Ikuta (2010), Yamazaki (2013), Ii (2016), etc.

ii As for the details of the post-Hanshin-Awaji Earthquake recovery in Shin-Nagata Matsumoto Area and Rokkomichi-North Kaze-no-sato Park Area, the author refers to the interviews with the leaders of local post-disaster recovery councils as of June 2016 through December 2016 with a guidance by the post-disaster recovery consultants Mr. Hisashi Uchida at the Kobe Institute of Urban Research. See also Uchida (2000).

iii According to the author's interview as of March 2013 with the Disaster Management Division, Department of General Disaster Prevention, Bureau of General Affairs, Tokyo Metropolitan Government.

iv The recovery adjustment council is an internal consultation mechanism inside the government, and lacks the meaningful opportunities for civic participation by its nature. It is formed by the prefectural governor and the municipal mayor, and capable of inviting the national-level minister in charge as well as the "stakeholders who has strong relation" and "other parties" recognized by the local government (art. 47, para. 3). As for the urban planning, the council is not obliged to invite "stakeholders who has strong relation" and "other parties," while the participation of experts and the minister in charge is compulsory (art. 47, para. 4).

v Urban Planning Law of 1968 provides for certain moments of civic participation such as the public hearings, public release and perusal, and public opinions (art. 16 and 17), which has been increased by a series of law amendments, such as the municipal ordinance on district plans added by 1980 amendment (art. 16, para. 2), civic proposal of district plans based on ordinance (art. 16, para. 3), stakeholders' approval procedure on specified areas (art. 17, para. 3), additional procedures for civic participation by the local ordinances (art. 17-2), legal binding land use plan by the decision of the local assembly (art. 18-2), and the proposal procedure of urban plans by local town-planning institutions (art. 21-2), which are added by a series of law amendments during 2000s.

vi For the details, see Kaneko (2013) (2014) (2016), (2017a) (2017b).

vii In case of Taro area in Myako city, local residents established the NGO "Standing-Up Taro!" in June 2011, which repeatedly sent recovery proposals to the city government. Similarly, in the Kuwagasaki area of Miyako city, a voluntary association "Kuwagasai Recovery Committee" was established in June 2011, in cooperation with the association of local autonomous bodies, and sent a recovery proposal to the city government in December 2011. None of these proposals, however, were reflected in the recovery proposal in February 2012, nor in the final Recovery Plan decided by the mayor in March 2012.

viii Taro area used be an independent municipality before the merger to Miyako City in 2005, known as a fishery town, with the most of the households belonged to the Taro Fishermen's Association. The population was maintained around 3,500. Toro has been known as an advanced tsunami-preventive town, with the world's largest seawalls of 10 meter height constructed after the Showa Sanriku Tsunami that occurred in 1933. Residents' opinion on the safety measures after the 2011 Great East Japan Earthquake was divided on whether or not to reconstruct the seawalls which were totally destructed by the tsunami in 2011. Miyako city's "Taro Area Recovery Plan" (March 2012) and the Miyako Recovery Adjustment Projects that followed the Plan entered on the reconstruction of the seawalls with an increased height, while partially incorporating a relocation project and land readjustment project.

ix Kuwagasaki area of Miyako city is a historical fishery port city going back to the Edo period. The 2011 tsunami affected 800 households which have lived in the area for several generations. "Kuwagasaki Area Recovery Plan" (March 2012) centered on the land readjustment project involving the construction of the 17 meter-width industrial road and the marine industrial complex, which was only possible after the public purchase of large areas from the historical land-owners.

x The author's interview with the Urban Planning Division, Department of Urban Adjustment of Miyako City as of March 2017.

xi The author's interview with local residents in Taro area as of July 2015 and Kuwagasaki as of August 2015 during the workshops held by the Kobe University Disaster Recovery Platform. For the details, see Kaneko (2017b).

xii In the questionnaire survey conducted by the Kobe University Disaster Recovery Platform in January 2015 in collaboration with Tohoku and Iwate Universities, which obtained 120 answers from total 340 households in Kuwagasaki Area, 20.8% of the total answers turned out to be leaseholders. For the details, see Kaneko (2017b).

xiii According to the author's interview as of August 2016 with the on-site office of the Urban Renaissance Agency which was in charge of the implementation of the land readjustment project, only one declaration of leasehold was made according to the Land Readjustment Law (art. 19, art. 85) to the city. Although the Law provides that a leasehold can be automatically succeeded on the substituted land after the completion of the land readjustment project (art. 99, para. 1), the on-site office only noticed one such case of leasehold.

xiv The author's interview with local residents as of August 2017 and March 2018.

xv The author's interview as of August 2017 with the Division of Recovery Promotion, Department of Recovery of Otuchi Town Government.

xvi Unoshimai area of Kamaishi city used be an independent municipality consisting of four fishery villages (Unosumai, Katagishi, Hakozaki and Ryoishi) before the merger with Kamaishi city in 1955. It has turned to a bed town for the employees having works in Kamaishi city center, while the ratio of fishery households has decreased to less than 10%. The recovery adjustment plan of Unosumai was started in August 2013 and onwards, whose completion was postponed to the fiscal year 2018 as the result of revision of the plan in 2014.

xvii The author's interview as of March 2016 with the Main Office of Recovery Promotion of the Kamaishi City Government.

xviii The author's interview as of March 2018 with the Chairman of Yamada Chamber of Commerce and Industry.

xix The author's interview as of March 2017 with Division of Recovery Promotion of Yamada Town Government.