

Law and Community in Disaster Recovery: Lessons from the 2011 Great East Japan Earthquake on the Outcomes of Civil Rights

KANEKO Yuka *

1. Background: Community in Peril

This article examines the outcomes of a series of special legislations introduced in the process of recovery planning after the Great East Japan Earthquake and Tsunami in March 11, 2011 (hereinafter the “GEJE”), with a particular focus on the endangered status of affected people and communities in the decision-making process of recovery plans, leading to serious restrictions on individual and communal property rights without proper compensation.

Although the role of community in disasters has been discussed in every phase of disaster management, neither the definition, nor the legal status of the community has ever been sufficiently identified (IRP 2011). In theoretical arguments such as “commons” (Ostrom, 1990, etc.) and “social capitals” (Putnam 2000, etc.), community has been deemed as a base of human bonds to enable meaningful social activities. Particularly in the Japanese practice of vigorously promoting the disaster-preventive community groups or *bou-komi*, featuring emergency responses by the communal fire-fighting groups, and the local ordinances to encourage community-led recovery-planning, it is still not clear what kind of civic groups can represent what type of community on what legal ground. This ambiguity pertaining to the definition and legal status of community disasters seems to have created rooms for the governmental intervention, causing tragic losses to the social bond throughout the GEJE affected areas in the East Japan, as revealed in the drastic population drain occurring as of early 2013¹. In order to protect the social capitals indispensable for the “human recovery” from the mega-disaster, a critical examination of the legal and institutional framework for the post-GEJE recovery is urgently needed.

It seems that the administrative procedure of “special zones (or *Tokku*)”

* LL.D., Professor, Graduate School of International Cooperation Studies, Kobe University.

introduced by a series of post-GEJE special legislations have constituted one cause of the tragic population drain occurring during the very procedural phase of “project decision” which concretizes, after the 2-year-long delay since the GEJE, the substance of land-use for town-recovery. The post-GEJE recovery process could have utilized civic initiatives for a safer and more prosperous future design of the citizens’ own hometown, by way of advanced participatory provisions on town-planning, developed through a series of amendments in the past couples of decades to the Law on Urban Planning, or the basic law providing for general principles binding all categories of town-planning projects. However, instead of activating such participatory principles provided in the law for normal times, the Law on Great East Japan Earthquake Recovery Special Zones was enacted in December 2011 to introduce government-centered procedures to minimize the chance of civic participation in the decision-making process for 40 categories of disaster-recovery projects to be covered by the national budgetary support. The Law particularly featured the procedural framework of “special zones (or *Tokku*)” which has been promoted in the new-liberalist sect in the Japanese politics since the Koizumi structural reform in the early 2000s. Trapped in the *Tokku* procedure, the GEJE victims are now facing unreasonable restrictions on their property rights which have been maintained for generations as their basis of livelihood, such as land ownership, long-term leasehold, fishery rights, and commercial goodwill, without sufficient disclosure and participation in the process of decision-making. Moreover, in parallel to this *Tokku* procedure as a particularly applicable law to the GEJE, the Law on Tsunami-Preventive Town-Planning was enacted as a permanent law to extend a similarly government-led procedure to the disaster-preventive town-planning in normal times, by a strong initiative of the Ministry of Land, Infrastructure, Transportation and Tourism (hereinafter “MLIT”). Within a few months from these twin *Tokku* laws, the idea of “Fishery *Tokku*” was introduced by the Miyagi prefectural governor, as well as various deregulation policies while as part of the process of “recovery promotion plans” provided in the Law on GEJE Recovery Special Zones, backed by industrial subsidies and other support measures under the Ministry of Economy and International Trade². These series of *Tokku* procedures seem to be nothing but a utilization of “emergency” justification for evading civic participatory procedures which should have been compulsorily applied in

a normal situation. With no opportunity being provided to defend it, the pre-GEJE status quo of civil rights is quickly being lost, in terms of not only such formal marketable rights as ownership but also such intangible values beyond monetary compensation as communal collective land use rights, fishery rights, and traditional commercial relations. Such substantive changes to the civil order seem to be weakening the centripetal force of communities, thus facilitating the current intensified population drain, further weakening the civic participation in the recovery process.

A further problem is the trend to extend this post-GEJE government-oriented and community-restrictive legal framework nationwide, implying a large scale Keynesian economic encouragement by way of disaster-preventive investments throughout the nation, as particularly evidenced in the introduction of Law on Tsunami-Preventive Town-Planning as a permanent law. A highly probable consequence in the near future is the nationwide loss of natural beauty along Japanese seacoasts as well as human bonds in the communities as a result of the tremendous scale of construction of seawalls and all other hard infrastructures. A prompt review of the procedural and substantive fairness of the institutional framework of post-GEJE recovery may offer some possible alternative direction.

In the following sections, a legal sociological approach is applied for the purpose of combining the text analysis on the characteristics of post-GEJE special legislations and interviews with leaders of local communities in the GEJE affected areas in the municipalities of Miyako, Yamada, Otsuchi, Kamaishi in Iwate Prefecture to identify the impacts of such special legislations. Chapter 2 will focus on the procedural aspects of post-GEJE special legislations. Chapter 3 will analyze the substantive issues on the changes to the civil rights resulting from these special legislations. Chapter 4 will refer to some actual cases from the author's interviews conducted during fourteen field trips from May 2011 through March 2013.

2. Recovery Procedures against Community Participation

(1) *Tokku* Procedure to Avert Civic Criticism

Throughout the history of Japanese disaster recovery since the 1923 Great Kanto Earthquake, the procedural frameworks laid out in the Law on Urban-Planning have been utilized. The Law was first enacted in 1919, superseded by the present one in

1968. The very contemporary trend in urban planning in Japan is a shift from government-led planning to civic initiative and autonomy, as envisaged at the enactment of the present 1968 Law and repeatedly strengthened by the series of amendments to it since the 1980s. Namely, in addition to the original set of provisions meant for civic participation included in the original 1968 Law (art.16 and 17) requiring public disclosure of draft-urban plans for two weeks and a chance for public comments, the 1980 amendment introduced a famous clause allowing the local ordinances to add more occasions for civic participation in terms of district-level planning (art.16 sec.2). Then, by repeated amendments throughout the 2000s, legal bases for civic initiatives have been constantly increased, including the civic proposal of district-level plans (art.16 sec.3), the civic right to give consent to any governmental decision affecting specific areas (art.17 sec.3), the discretion of local ordinances to further identify procedures for civic participation (art.17 bis.), the binding effect of the local assembly's decisions on land-use principles over the vertical line of administrative controls (art.18 bis.), and the proposal by civic group on the urban plans in general (art.21 bis.).

On the other hand, however, every occasion of disaster recovery has been used for a counter-revolutionary revival of government-led procedures in the name of emergency response. In the aftermath of the Hanshin-Awaji Earthquake in 1995, for example, a well-known episode was that the Kobe City government, backed by strong support from the Ministry of Construction at that time, rushed to a decision on the urban plans for land-readjustment within two months of the emergency land-use restriction from the Earthquake (Law on Construction Standard, art.84), which was later supported by the enactment of the 1995 Law on Special Measures for Recovery of Disaster Stricken Urban Areas, in disregard of the harsh criticism in the civil society. This tension between the government-led special procedure and the civic criticism was finally conciliated through a compromise proposed by the Kobe Mayor who introduced the idea of "two-step urban recovery planning." In this compromise proposal, slight changes by civic initiative were admitted to the already valid governmental decision on urban plans through utilizing of "town-planning councils" (*machizukuri-kyogikai*) based on the municipal ordinance on "district-level plan" under the Law on Urban Planning art.16 sec.2.

In cases of municipal-level town-recovery planning in the GEJE as well, varieties of seemingly participatory procedures resembling *machizukuri-kyogikai* have been applied, in the forms of town-planning councils, civic questionnaires, and civic forums. However, according to the author's observation, they were all nominal procedural steps lacking sufficient information disclosure, only adopted to avert critical discussions. Decision had already been made behind the curtain for all participatory attempts, following the municipal government-led "recovery planning" process for the year 2011, and replaced in the year 2012 by the *Tokku* procedures according to the 2011 Law on GEJE Recovery Special Zone. The following two sections will analyze the structure of such government-led procedures.

(2) Recovery Plan in the Municipal Procedure

A "recovery plan" is a blue print of whole-scale post-disaster recovery to cover all of housing, livelihood, and regional industrial reconstructions. In the post-Hanshin-Awaji Earthquake recovery after 1995, a Basic Recovery Plan was introduced in a cautiously designed civic participatory process as if to soothe the civic criticism raised at that time against the aforementioned overly hasty decision on the urban plans within two-months after the Earthquake. This idea of "recovery plan" was then added to the list of municipal disaster responses as envisaged in the "National Basic Disaster-Preventive Plan" (chapter 3), and incorporated into the "Disaster Recovery Manual" of the national government (National Cabinet Office, 2010).

In the post-GEJE recovery practice, according to the author's occasional interviews with officials in the affected municipal governments in Iwate Prefecture, as early as April, 2011 or one month after the GEJE, several types of recovery planning procedures were started to be proposed to each municipality by major private urban-planning consultants dispatched from their Tokyo and Osaka headquarters. Then, under a direct survey of seven-billion-yen-scale sponsored by the MLIT, these same consultants were hired as formal contractors, either through bidding for contracts or through bilateral negotiations. Many of such private consultants more or less emphasized the experience from the 1995 Hanshin-Awaji Earthquake where dealing with the vociferous civic criticism was a headache for the local governments. As a result, an almost similar lineup of seemingly democratic procedures was utilized in the

recovery planning of affected municipalities, in a combination of such advocacy methods as (i) decision-making via administrative councils directly nominated by the Mayor; (ii) approval by the municipal assembly; (iii) district-level recovery councils to be temporarily formed by locally renowned persons nominated by the Mayor; and (iv) direct-democracy such as public questionnaires and public forums.

For example, in the city of Miyako, a proposal made by a private consultant company in the bidding was selected by the city due to its well-deliberated two-step procedure to separate the processes of basic recovery planning and the district-level recovery town-planning, as if imitating the “two-step urban recovery planning” once featured in Kobe for the purpose of soothing civic criticisms. However, a fundamental difference between the procedures in Kobe and Miyako remained in that whereas the civic decision in Kobe’s “town-planning council (or *machizukuri kyogikai*)” had a certain legally binding effect on the Mayor’s decision-making according to the municipal ordinance in effect since 1981, the Miyako process gave no such explicit guarantee.

Namely, the first stage for the Basic Recovery Plan of the Miyako City centered on the (i) type procedure cited above of the administrative council, representing conservative interest groups basically obedient to the Mayor, while skipping the aforementioned (ii) type of municipal assembly’s approval which should have been formally required since the Basic Recovery Plan had the effect of being an amendment to the General Master-Plan of the City³.

On the other hand, the second stage for the “district-level recovery town-planning” featured seemingly more advocacy approaches such as the establishment of “district-level recovery council” or the type (iii) approach for each of 10 major tsunami-affected areas, while holding a general civic forum or the said (iv) type approach for each of 23 small inundated areas having less than 40 households. In reality, however, the nature of “district-level recovery council” was nothing but a district-level administrative council, controlled by the City, far from being a body that would take any active role to bridge the City and the local community. The general public forum in each smaller community was held only twice in each area, once for the introduction of outlines of governmental planning, and another for briefly reporting its finalized version. The details of governmental plans were hardly disclosed to and understood by ordinary members of the affected communities, but their mere

attendance at these councils and forums was later treated as their having given consents to the City-led plans. The City prepared a paper titled “Proposal to the Mayor” as of late February 2012, although its contents were unknown to most of the members of the target communities and sometimes was entirely in contradiction with the already achieved consensus in each community. It is ironic that the recovery-planning section of the Miyako City has claimed the successful achievement of participatory decision-making for the district-level recovery plans (Nakamura et al., 2012).

This manipulation of participatory procedures seems unlawful, according to the spirit of advocacy principles given in the Basic Ordinance on Autonomy as well as the Ordinance on Promotion of Participation of the Miyako City introduced in 2008, which stipulates that “a citizen has the right to participate in the town-planning” (art. 6, BOA), and that “the City recognizes the role of community in town-planning, and supports the community activities” (art.9 ditto), and also provide for procedural bases of direct democracy such as disclosure (art.15), accountability (art.17), referendum (art. 20 ditto) and the policy proposal to the mayor by a civic group of more than 20 persons (art.9, OPP). However, in practice, community members found it difficult to incorporate these legal provisions in their negotiations with the City, as the provisions do not include any substantive terms to make it an explicit legal obligation of the City to be bound by the result of a community consensus, while providing only that the City should give citizens the chance for participation (art.7-8, OPP), pay respect to the advocacy (art.3 sec.3, BOA), and give the reason for the rejection of a civic proposal (art.10, OPP). Even if these ambiguous terms, such as “respect,” could potentially been utilized by civic activists as the initial basis of negotiation with the City, no such activism was actually possible from the circle of disaster-affected people who were already mentally weak, suffering from prolonged livelihood suspension.

According to the author’s survey (Kaneko 2011b), other municipalities in the coastal Iwate prefecture, such as Yamada, Otsuchi, and Kamaishi utilized similarly democratic-sounding procedures for each Recovery Plan, although the one-step approach was usually chosen instead of the Kobe-style two-step approach, centering on the administrative council, as well as the district-level recovery councils selected by the Mayor, and generally featuring seemingly advocacy but not binding gestures of

Table- 1 : Procedural Flow on the Recovery Planning Compared

1995 Kobe Earthquake: Two-Step Urban Recovery Planning	Decision on Urban Plan (government-led) → Basic Recovery Plan ↓ Recovery Project ↑ Civic Participation via Town-Planning Council
Tokyo: 2000 Ordinance on Disaster Response	Draft Basic Recovery Plan ↓ Urban Recovery Plan (civic participation) ↑ Basic Recovery Plan → Decision on Urban Plan → Recovery Project
Miyako City: 2008 Basic Ordinance on Autonomy	Basic Recovery Plan (government-led) ↓ District-level Councils and Civic Forums ↑ District-level Plans → Recovery Adjustment Plan (government-led) → Recovery Project
Otsuchi Town: 2012 Basic Ordinance on Disaster Recovery	Councils Assembly (Civic) ↔ Basic Recovery Plan (government-led) ↑ District-level Councils/ Forums → Recovery Adjustment Plan ↑ Akahama Area's Initiative → Recovery Project
Yamada Town:	Basic Recovery Plan (government-led) ↓ District-level Forums → → → Recovery Adjustment Plan → Recovery Project

(by Author.)

civic participation such as civic questionnaires and forums (Table-1).

(3) Recovery Adjustment Plan

Following the municipal-level decision-making of the “recovery plan” during 2011, another series of procedural steps were taken throughout the fiscal year 2012 for the “recovery adjustment plan” according to the Law on GEJE Recovery Special Zones introduced in December, 2011. In contrast to the legally ambiguous nature of “recovery plan” as a general blue print for the recovery, a “recovery adjustment plan” was designed to give rise to a legally binding effect of the “urban plan,” or the administrative act to trigger and justify all compulsory administrative processes to follow in regard to each individual recovery project such as land-taking, relocation, land-readjustment, etc.

A uniqueness of this newly introduced process of “recovery adjustment plan” was the utilization of the special zone or *Tokku*. A *Tokku* was an idea initiated in the early 2000s by the Koizumi structural reforms for the new-liberal deregulation. In this provision, upon a decision made by the consultation group (*Kyogikai*) made up of representatives from local governments and relevant ministries, and the approval by

the prime minister thereon, local governments were exempted from following the normal steps provided in individual relevant laws including those meant for the protection of economically weak categories of people and for the promotion of civic participation. As the Japanese judicial court precedents have refrained from conducting a judicial review of *Tokku* on the ground that it does not reach the level of an “administrative disposition” directly affecting civic rights and obligations,⁴ a *Tokku* has been a quick and useful tool for the government to skip the most delicate part of negotiations with various interest groups. A further uniqueness of the “recovery adjustment plan” was found in its tactical strategy of concentrating all relevant projects of urban plans and other measures in a lump-sum procedure under its umbrella, while skipping all detailed individual procedures.

Another tactic of the Law on Disaster-Recovery Special Zones is the utilization of twin procedures in achieving the introduction of the *Tokku* method into the delicate area of urban planning at the interface with civic activism. Namely, the Law has provided for a twin process where the *Tokku* method is first applied to the “recovery promotion plan” which allows a fast track approval process for the economic and industrial recovery projects, or seemingly suitable areas for *Tokku* method,⁵ and then, behind the cloak of this “recovery promotion plan,” allows the “recovery adjustment plan” to apply a similar *Tokku* process for the purpose of urban-planning under the control of the MLIT.⁶

This procedural camouflage in the Law on Disaster-Recovery Special Zones cannot, however, avoid a validity question at the very idea of applying the *Tokku* method to urban-planning, particularly in regard to its explicit omission of the civic participatory procedures provided in the Law on Urban-Planning which constitutes the general principles applicable to all areas of town-planning. Namely, after bundling up all relevant areas of disaster-recovery projects including town-planning projects (such as land-readjustment projects and urban-redevelopment projects) as well as integrated disaster recovery projects, collective relocation projects, tsunami-preventive facilities, and fishery port and field adjustment projects (art.26 sec.2, item 4), the Law on Disaster-Recovery Special Zones goes on to narrow the application of participatory provisions under the Law on Urban-Planning only to such minimum ones as the public hearing (art.16 sec.1), disclosure (art.17 sec.1), presenting opinions (art.17 sec.2)

and the administrative council (art. 18 and 19 sec. 1-2), while excluding all other advanced moments of direct civic participation such as the civic proposal of district-level plans (art. 16 sec. 3), the civic right to give consent to a governmental decision affecting specific areas (art. 17 sec. 3), the discretion of local ordinances to further identify procedures for civic participation (art. 17 bis.), the binding effect of the local assembly's decisions on land-use principles over the administrative lines (art. 18 bis.), and the civic right to offer proposals on urban plans in general (art. 21 bis.). Because of this full-scale exclusion of participatory process, a "recovery adjustment plan" can automatically acquire full legality upon a simple public notice made at the completion of the procedure for a *Kyogikai*. (art. 50, Law on GEJE Recovery Special Zone).

It is also notable that a method similar to *Tokku* was copied by the Law on Tsunami-Preventive Town-Planning, a permanent law applicable in normal situations,⁷ which was introduced in parallel with the Law on GEJE Recovery Special Zone as if hidden in the cloak of a special law for an emergency. In fact, in preparation for the implementation of the Law on Tsunami-Preventive Town-Planning, local ordinances have started to be enacted by the prefectures in estimated tsunami-affected areas in the governmental simulation for the approaching Nankai Trough Earthquake, succeeding the same government-centered procedure for public-private partnership as given in the Law.⁸

Although the Ministry of National Land and Transportation has been appealing for democratic steps such as questionnaires and civic forums to be respected by the municipal decision-making process (Ministry of National Land and Transportation, 2012), all such steps make no sense since the "recovery adjustment plan" in each municipality has already been decided in a purely independent process separated from such seemingly democratic steps. The constitutionality of this lump-sum *Tokku* method has started to be questioned by scholars and practitioners (Saito 2012; Yasumoto 2012). The court can now test the constitutionality and lawfulness of these *Tokku*-style town-planning laws, since the "recovery adjustment plan" in each municipality is no more just a "plan" but has, by the end of Fiscal Year 2013, reached to the procedural stage of "project decision," thus meeting the court criteria of "administrative disposition."⁹

3. Substantive Restriction of Property Rights in the Recovery

While the procedural flow of legalizing already-determined governmental decisions continued during the fiscal years of 2011 through 2012, from the “recovery plan” to the “recovery promotion plan,” and to the “recovery adjustment plan,” and to the final stage of the “project decision,” the population drain has become an undeniable phenomenon. Even in the author’s limited interviews with the GEJE affected people in the Iwate coastal areas, it is evident that the major reason for leaving their dear hometowns is a deep disappointment at the substantive outcome of the recovery projects.¹⁰ It is a matter of a constitutional question on the protection of property rights against governmental intervention under Japanese Constitution art. 29, which involves not only the matters of individual property rights in a narrow sense but also the community bonds and historical culture descending for generations. The following sections will sketch the imperiled order of civil rights as the result of the recovery plans with particular focus on the outcomes of housing reconstruction, and the recovery of livelihood basis such as communal fishery rights.

(1) Prolonged Restriction on Housing Reconstruction

The first issue from among the substantive rights under threat is the prolonged land-use ban, banned both by explicit regulation and implicit administrative guidance, which has suspended individual reconstruction activities for two years already without compensation. The restriction was initially applied to the whole of tsunami-inundated areas, but later partially lifted for the areas not eligible for governmentally-supported recovery projects. The decision on eligible and non-eligible areas was made on the basis of so-called “2-2 rule” set by the Central Disaster-Preventive Conference in September, 2011, the detailed mechanism of which will be explained below.

The problem was, however, that the timing and area of such partial lifting of the land-use ban was not clearly explained to the affected people by the local governments, probably out of fear that any differential treatment between eligible and non-eligible areas for fiscal support might cause intense civic criticism. Because of this limited disclosure and accountability, many of the affected people could not recognize the lifting of the land-use ban, and have suspended their reconstruction activities for the long period.

Implementation of land-use restrictions in Miyagi Prefecture was a cautiously gradual and relatively transparent one, as the prefectural government explicitly applied the initial two months' land-use restriction under Art. 84 of the Law on Construction Standards, which was then extended to 8 months by the Law on Special Measures for Restriction of Construction in the GEJE. Upon the introduction of "2-2 rule" in September 2011 to narrow the "Disaster Risk Areas," many of the municipalities in Miyagi Prefecture chose to lift up the restrictions for some inundated areas, though a two-year restriction under the 1995 Law on Special Measures for Recovery of Disaster Stricken Urban Areas was introduced for other areas expected to come under the "Disaster Risk Areas" where either the land rearrangement project or the relocation to higher lands was to be applied. It was only after the procedural phase of "project decision" that the municipality governments introduced the ordinance to initiate a permanent and strict habitation ban under art. 39 of the Law on Construction Standards for the purpose of realizing the relocation projects to higher-lands.

In Iwate Prefecture, the implementation of ban was much more confused. Although the Iwate prefectural government first envisaged a permanent habitation ban under art. 39 of the Law on Construction Standards from the very beginning of the post-GEJE recovery process, in an attempt to lead large-scale relocations to higher lands, each affected municipality did not obey the prefectural guidance to enact the ordinance necessary for such land-use restriction. Instead, the municipalities chose to informally request land-users' cooperation via administrative guidance. It was only at the procedural phase of "project decision" by the end of fiscal year 2012 that a legally binding mode of land-use restriction was introduced in many municipalities in Iwate. This type of ambiguous implementation caused tremendous confusion among the affected people in many ways. The first lesson is that, even if applied in an informal mode, such a most strict type of land-use restriction as the permanent habitation ban under art. 39 of the Law on Construction Standards can result in the same effect as a formal ban. Many people obeyed the ban in the fear of possible informal penalties driving from the informal ban. Second, an informal mode of restriction is easy to apply, but difficult to stop. Without explicit designation of the timing and the areas of lifting, many people still feel bounded by a certain type of ambiguous ban and continue to

observe the suspension of land-use. Third, a shift from an “informal ban generally applied to whole inundated areas” to a “formal ban specifically applied to selected areas” is difficult to be understood, especially when the same regulation (Art. 39) is concerned.

One would suspect that ambiguous attitudes of the affected municipalities in implementing a highly restrictive ban on an informal basis have resulted in gross economic loss or opportunity costs to the freedom of private properties. A precedent of the Supreme Court of Japan (Judgment on 2002. 2. 3, *Minshu* Vol. 56, No.2, p.331) once found that the constitutionality of the governmental restriction on private properties, under Art. 29 Sec.2 of the Japanese Constitution, should be scrutinized based on a balancing analysis among the purpose and needs of restriction, the type and nature of the property, and the degree of restriction. The initial adoption of the informal ban on the whole of inundated area can be found constitutional when the emergency protection of civic lives and properties is considered as a sufficiently reasonable “purpose and need” to justify the ban. However, now that the “recovery adjustment project” has explicitly designated a narrowed “Disaster Risk Areas” based on the “2-2 rule” as the safety standard, there is no more justifiable “purpose and need” to continue either formal or informal ban on all the excluded areas by the “2-2 rule.” The socio-legal fact that the same informal ban is still informally maintained in many parts of the tsunami-affected areas might constitute a basis for a constitutional question.

Table-2: Modes of Land-Use Ban in Inundated Areas

Municipalities In Miyagi Prefecture	LCS-84(1month)→LSMCR-GEJE (6-8month)→Recovery Plan →Areas for self-reconstruction on original land: Lift →Areas for Land-filling project: LSMRDSUA (2 month) →Areas for Relocation to High Lands: LCS-39 (Permanent)
Municipalities in Iwate Prefecture	LCS-39(Permanent) by Administrative Guidance (AG) →Recovery Plan →Areas for self-reconstruction on original land: Lift of AG →Areas for Land-filling project: AG continued →Areas for Relocation to High Lands: LCS-39 (Permanent)

(By Author)

Abbreviations: LCS: Law on Construction Standard

LSMCR-GEJE: Law on Special Measures for Restriction of Construction in the GEJE

LSMRDSUA: Law on Special Measures for Recovery of Disaster Stricken Urban Areas

(2) 2-2 Rule to Divide the Fate of Private Properties

The decision made in September, 2011 by the Central Disaster Preventive Conference was strange. It decided on the construction of tremendously large seawalls, of the height of several-teen meters and with a sectional bottom of several-ten meters, to cover the entire coastal line of the GEJET affected areas, while emphasizing that such seawalls could only respond to the 1929 Meiji Sanriku Tsunami-class or Level-1 type tsunami, and were incapable of responding to the GEJE class or Level-2 type tsunami. This introduction of tremendously large but useless seawalls had, however, another reason-d'être, that is, the basis of tsunami simulations to limit the extent of recovery projects under national fiscal support. Namely, the size of the seawalls was a key factor to manipulate the results of tsunami simulations which were repeatedly done by the MLIT together with the relevant prefectural governments, based on the so-called "2-2 rule" or the idea to limit the target of national fiscal support to the areas where the GEJE class tsunami is estimated to reach the depth of more than 2 meters and a water flow velocity of more than 2 m/s. By adjusting the size and shape of the seawalls, the tsunami simulation can easily manipulate the "2-2 rule" line or the eligible areas for national fiscal support. Such eligible areas were finally decided as the "Disaster Risk Areas," in which the relocation projects to higher lands were made available, under either the mode of the disaster-preventive collective relocation project or the fishery community infrastructure adjustment project.

This idea of seawalls to narrow the "Disaster Risk Areas" has changed the fate of many of the GEJE affected communities. Some communities are now in peril of being broken into pieces, since some parts in the community are designated as the "Disaster Risk Area" but other parts are not, causing serious conflict of interests among the community members in terms of the eligibility for fiscal support. Other communities suffer from a rapid population drain because the entire area of their community failed to be designated as the "Disaster Risk Area," in disregard of the strong desire of the majority of the community members for the relocation to higher grounds, as evidenced in numbers of questionnaire surveys. If these tragic fates of separations, conflicts, and population loss were found to be the consequences of governmental intervention in the name of disaster recovery, or a human-made disaster instead of a purely natural disaster, a legal accusation would be fully justified.

(i) Discretionary Restriction

First, the constitutionality is questionable in regard of the discretionary designation of “Disaster Risk Areas” and “Relocation Promoted Areas” by the “recovery adjustment plan.” If one’s original residential area is designated as a “Disaster Risk Area,” he/she is compulsorily required either to relocate to higher ground, or to carry out reconstruction using a particularly strengthened structure, or to wait until the completion of land-filling projects, while other households outside the “Disaster Risk Area” do not assume any such obligation. Referring again to the aforementioned Supreme Court precedent on art. 29 of the Japanese Constitution on the freedom of private property, a balance between the needs and the degree of restriction is not easily demonstrated for the “recovery adjustment plan,” given the ambiguous simulation on “safety” as needs (seawalls responsive only to Meiji-Sanriku-Tsunami-level, tsunami simulations endlessly recalculated, groundless 2-2 rule, etc.), on one hand, and the arbitrary and highly restrictive mode of designation of and restriction in “Disaster Risk Areas” (habitation ban, structural restriction of construction, land deduction, land exchange, etc.), on the other.

(ii) Differential Treatment

Second, the constitutionality is questionable on the differential treatments under the “recovery adjustment plan” between “Disaster Risk Areas” and the other areas, and also on a further differential treatment between “Relocation Promoted Areas” and the other areas within the same “Disaster Risk Area.” Since art. 29 of Japanese Constitution is construed to protect not only individual private properties but also the whole capitalist system of the freedom of private ownership against governmental control, excessively differential treatments by the government can be found to be an unconstitutional intervention. According to the “recovery adjustment plans,” only households whose lands are designated as “Relocation Promoted Areas” are eligible for the relocation project to higher lands under full-cover national fiscal support, while those households whose lands are designated as a “Disaster Risk Area” but do not fulfill the conditions for a “Relocation Promoted Area” are basically only eligible for the land readjustment projects for land-filling, and are excluded from the fiscally supported relocation project to higher lands. Those households whose lands are not designated for either category of “Relocation Promoted Area” or “Disaster Risk

Area” are entirely excluded from any nationally supported recovery projects. Although the municipal governments have made efforts to reduce the disparity between those who are under the relocation projects and those who are not, by promising additional subsidies for housing reconstruction to be funded by the “Recovery Fund,” the fundamental difference (such as land-taking price and interest-rate subsidies) is difficult to overcome.

Differentiation by way of fiscal support cannot be easily justified even by the constitutional arguments put forth in favor of the governmental support for disaster-recovery projects following the 1995 Hanshin-Awaji Earthquake. Although an opinion of influential persons emphasizes the need for governmental fiscal intervention on the ground of social aspects of property rights and/or public policy considerations especially for the protection of rural socio-economy against further population drain,¹¹ the post-GEJE context seems too complex to apply such arguments, particularly when the social consequence of population drain is evident as a result of the governmental intervention.

(3) Loss to the Communal Value as the Basis of Livelihood

(i) Right of Community in General

Many of the GEJET affected communities are now facing the risk of division under the government-led safety settings such as “2-2 rule,” “Relocation Promoted Areas,” “Disaster Risk Areas,” seawalls, the second line levees, etc. However, the possible basis for constitutional claim is scant, since the legal interests of a community, or the integrated communal value as the basis of individual livelihood, has never been clearly identified. Perhaps, an assertion may be possible based on the “public purpose” requirement on the governmental confiscation over private properties, provided in art. 29 sec. 3 of the Japanese Constitution, which is further detailed in the arguments on the Law on Land-Taking (art. 20), in the context of the balancing test between “gained interests” and “lost interests,” in which such communal values as culture, history, environment, and livelihood basis can be asserted to be potential “lost interest.” However, the legal interests of the community, or the community as a legal entity is still a new topic in both academism and practice in capitalist Japan, only recently starting to appear in court cases such as Kunitachi mansion case (Tokyo

District Court Judgment on 2002.12.8) and dealt with in some advanced municipal ordinances. Further accumulation of constitutional interpretation is awaited in regard to such potential bases as the right to happiness (art. 12) and the local autonomy (art. 92).

(ii) Fishery Rights

On the other hand, there are communal rights and interests already historically integrated into the formal legal system, and hence capable of being asserted as individual rights. Fishery rights is a typical such example, which often stems from the pre-modern feudal Edo era, and preserved under the modern registration system since as early as the 1890s.

Though the present registration system for fishery rights under the 1949 Law on Fishery takes the form of special permission given to the fishermen by the prefectural governor (art. 10, 12), which is controlled by a review system for renewal every five to ten years (art. 21), and easily cancelled if not exercised for two years (art. 37), in actual place, the “fishery cooperatives” fairly independently exercise the actual management of fishery rights. In fact, the fishery cooperatives have been the key institution in the democratic reform of Japanese fishery, since an ideal of socialist cooperatives became influential among fishermen in prior to WWII. A bottom-up proposal was even made by the fishermen in the drafting process of the present 1949 Law to incorporate the democratic reformist idea of concentrating all fishery rights held in each community to a fishery cooperative. However, the 1949 Law settled on a compromise with the capitalist interests supported by the General Headquarter of Allied Army which occupied the Japanese territory at that time, resulting in the present form of fishery right registration in which both the fishery cooperatives and individual fishermen can register in parallel. Among the three categories of admissible fishery rights, namely, the fixed-net-style, the sectional-style, and the cooperative-style fishery rights, priority is given to the fishery cooperatives to register for the fixed-net-style fishery rights (art. 16), and also to exercise the “cooperative-controlled fishery rights” for the sectional-style and the cooperative-style fishery rights (art. 14 sec. 6).

Accordingly, the Law seems to allow the each community to choose, either to promote democratic cooperation by way of concentrating the control of fishery rights

to the fishery cooperative as far as permitted by the Law, or to promote individualism, even allowing rooms for concentration by absentee right-holders and penetration by large commercial capitals.

On the other hand, neo-liberalism has gained strength at the level of national government, bringing in the notion of “efficiency,” causing confused arguments. A neo-liberal sect has been keen on the capitalization of the fishery industry, by promoting the idea of admitting the registration for fishery rights by commercial investors, while minimizing the role of community-based fishery cooperatives by way of bankruptcy procedures, mergers and acquisitions, and vertical integration of local cooperatives into a single umbrella association under the prefectural government. The reasoning given for such neo-liberal reform is that the most of the fishery cooperatives are nothing but inefficient, conservative successors to outdated traditions existing since pre-modern days,¹² far from the image of modern cooperative reformers. Although it seems to be a battle on the choice of contemporary fishery policy between the neo-liberalism and the fishery cooperatism, the actual battle is being fought between the government and the people in fishery communities whose livelihood deeply depends on the fishery cooperatives. Policy to invite bankruptcies and mergers of fishery cooperatives mean nothing but the implicit taking of collective civic rights of fishery-based livelihood, in the constitutional context.

In the GEJE recovery process, the national Fishery Agency has been more for new liberal reforms such as the promotion of fishery rights permission to capitalist investors, mergers and acquisitions of fishery cooperatives, and their vertical integration under the prefectural-based umbrella association (Fishery Agency, 2012). Miyagi prefectural government has explicitly declared neo-liberal policy direction in its “Recovery Plan.” Even in Iwate Prefecture traditionally known for the activism led by community-based fishery cooperatives, reform pressure has been evident, such as the reduction of small ports and the retirement of the older generation being taken for granted in the “recovery promotion plans,” as well as in the fishery community relocation projects under “recovery adjustment plan.”

A difference in the fates of fishery communities is, however, observed according to the degree of initiatives taken by each fishery cooperative in the post-GEJE recovery process. In the author’s interviews with the leaders and members of the

fishery cooperatives in Miyako, Taro, Omoe, Yamada, and Otsuchi in Iwate Prefecture, most of the fishery cooperatives are suffering to certain extent from the post-GEJE governmental pressure. Already heavily in debt since before the disaster, largely due to the government-led policy for large investments and/or assuming loans from the fishery credit associations, these cooperatives had limited financial capacity to absorb all the tremendous necessary expenditures for disaster recovery such as the reconstruction of the fishery ports, ships, fishing nets, process facilities and office buildings. Accordingly, in order to acquire the governmental assistance, the leaders had to compromise with the governmental guidance, such as putting the original cooperative on a bankruptcy process in order to receive governmental capital injection (Otsuchi), and reducing the number of ports and facilities for reconstruction (Miyako and Yamada). Closure and integration of port facilities often implicitly means the suggestion for fishermen who would lose access to the nearby fishery facilities to retire. Although their retirement would lead to the cancellation of their registered right to fish, no compensation is expected to be made available.

As one exception to this, Omoe Fishery Cooperative, located in an isolated peninsular area within the administrative jurisdiction of Miyako City, is a rare example of having successfully maintained its independent fishery policy against the governmental pressure. Its success seems largely due to its advantageous bargaining power since before the GEJE, because of its healthy fiscal condition, its business success with its highly qualified brand products, and the confidence it had in its own well-balanced management policy combining both individual competition between fishermen for innovation and the integrated access to the market.

Taro Fishery Cooperative, also on the outskirts of Miyako, is also famous for its unique management policy emphasizing the unity of community fishermen, stemming from the ideal of the pre-WWII cooperatism. It has been an ambitious experiment, concentrating the management of fishery rights with the Cooperative while employing ordinary members of the community as workers in its aquaculture and marine processing sections, which has been so far successful to the point of establishing a nationwide brand name. However, in the post-GEJE context, in contrast to Omoe's success, Taro Fishery Cooperative is facing an eminent decrease of members who have decided to abandon their fishery rights.

Thus, amid the governmental new-liberalist intervention to fishery rights in the name of disaster recovery, each unique experiment of the fishery communities is now going through an ordeal in seeking for the optimal relation between the cooperative, individual fishermen, and other members of the community.

(iii) Livelihood Basis Embodied in Long-Term Use Rights

A remarkable finding from the author's fieldwork is the issues of the livelihood bases which have been embodied in the form of long-term land lease rights.

First, not a few long-term dwellers and small-businesses making living in the center of tsunami inundated areas have been based on the long-term land lease, as the result of past buy-up by commercial capitals particularly in the previous days of fishery boom. It often happens that such lease right, although being capable of formally publicized and protected against the third party claims by the property registration system, are in practice, not registered because of the weak bargaining position against the land-owner.

Second, the coastal lands in fishery areas have often been under a traditional communal control for the purpose of fishery usage for generations, often not being secured under the formal law regime. It has sometimes been the case that the municipal and prefectural governments, by their unilateral actions, formally register such communally controlled land areas as the publicly-owned lands, while constituting the traditional fishery usage thereon as a mere "lease right" on contractual basis or right *in personam*, which is much weaker form than a right *in rem*. In one case of such fishery areas on which the author took a look at the contents of the formal land registration at the registry managed by a local branch of the Ministry of Justice, only the ownership registration had been completed by the municipal government, without any mention to the existence of the lease right thereon.

The problem under the Japanese law is that these unregistered land lease rights can be easily harmed in disasters. Although these unregistered rights can still be protected by way of the registration of the building constructed on such land (former art. 1 of the Law on the Protection of Buildings, succeeded by art.10 sec.1 of the Law for Lease on Land and Housing), such a constructive legal effect is to be lost in disasters, upon the destruction of such building on the land, unless the reconstruction

occurs within two years (art.10, sec.2). The GEJE was the very such situation where the majority of houses on the leased lands were simply lost by the tsunami. As the result, the author has encountered numbers of tragic cases in which the land owners almost unilaterally cancelled the long-term lease contracts without making due payment for compensating the lawful interests of long-term land leaseholders who have made living thereon for decades, in order to start new land developments in the name of disaster recovery, while the land leaseholders staying in the temporary shelter losing every property as well as the hope for future.

Even more serious is the situation of fishermen whose rights to fish are at the risk of cancellation, because of the cancellation by the municipal government, as land-owner, of the lease of coastal land areas for traditional fishery purpose, without compensation.

Such unjust loss of basis for dwelling and livelihood could have been mitigated if the government issued a decree to incorporate the 1946 Law on Emergent Arrangement for the Lease of Land and Housing in Disaster Stricken Towns to the GEJE. The Law has provided for special treatments for land leaseholders, such as the automatic claim of their leases against the third parties for the period of five years without any explicit means of publicizing their rights after the housing loss in a disaster, as well as the automatic extension of lease period. This Law was, however, rejected to be applied to the GEJE as the result of a rigorous campaign made by the lawyers' associations, as well as the governmental initiative for the amendment of the Law, claiming, based on the experience of the Hanshin-Awaji Earthquake in 1995, that the Law could be excessively preferable to leaseholders to the impediment to the freedom of private ownership and hence detrimental to the "security of transactions," and that the land-leaseholders can be better protected by the laws for normal times.¹³ However, it is highly questionable that such a new liberal thought of promotion of commercial transaction which could be applicable to the earthquake in the cosmopolitan Kobe should be automatically applied to the GEJE where the protection of livelihood basis of individual disaster affected people is in question, instead of the macro-economic stimulation.

4. Case Study

According to the author's fieldwork since May 2011 in the coastal Iwate Prefecture heavily affected in the GEJE, members of the affected communities have actively extended mutual aid,¹⁴ sincerely sought local consensus for rebuilding their livings, and made consistent efforts to convey their ideas to the local government, since the very early stage of post-GEJET recovery process. However, most of communities have gradually lost their centripetal force, as the municipal governments responded with noncommittal attitudes, particularly since the "Basic Principle for Recovery" of the national government was made public in late July 2011 to the effect of narrowing the areas eligible for full-cover national fiscal support for town-recovery projects. Particularly, the municipal governments turned silent on the matter of the areas selected for relocation to higher lands, although the relocation was the most popular choice of town-recovery projects among the affected communities, as shown in various questionnaires conducted by both governmental and private surveys, reflecting the desire for securing the safety of future generations.

After the two-year long land-use restriction and the suspension of livelihood activities, as of March 2013, the affected communities are now facing either of two typical tragic situations. The first type is a community whose whole areas has been decided as non-eligible for any full-cover recovery projects by the relevant "recovery adjustment plan," and accordingly, all households in the community are destined to reconstruct their houses on each original site by themselves, after two years lost in vain in an expectation for the relocation to higher ground. The other type is a community whose areas are divided into the "Disaster Risk Areas" under a habitation ban (art. 39, Law on Construction Standard) which is eligible for recovery projects under full fiscal support, and the non-eligible areas for such supported projects. Such a separate treatment for households in the same community often results in mutual distrust, accelerating the loss of community bonds contributing to population drain. The following cases will illustrate typical examples of these dilemmas.

(i) Kuwagasaki (Miyako City)

Among numerous cases of the first type of community, Kuwagasaki Area in Miyako City is a typical one. A total 86 lives were lost and about 800 households lost

their housing in this peaceful, historically well-known small bay town where the community bond has been maintained for many generations since pre-modern days. The municipal government of Miyako decided on a “recovery adjustment plan” centering on a large-scale land adjustment project covering total 25ha of tsunami-inundated areas, in which each household was expected to make a compulsory free contribution of a certain part of original land at the reduction rate of more than 15-20% in average. Both the idea of 25ha-large land adjustment and excessive rate of land reduction were nothing other than a surprise to the Kuwagasaki community, according to repeatedly reported statements in the author’s interviews with leading members of the community, when they were first disclosed at a public forum held in April, 2012, particularly because the leaders of the community had already proposed a well deliberated consensus of the whole Kuwagasaki community to the City by December 2011, in which the relocation to higher grounds was emphasized as a core concept together with the lowered height of seawalls in the governmental plan in order to preserve the beautiful scenery of Kuwagasaki Bay. It turned out, however, that the City intended to develop the Kuwagasaki area as an industrial complex under the *Tokku* method for a “recovery promotion plan,” and accordingly, the construction of a 17 meter width industrial trunk road to run across the community was considered necessary, which necessitated the free compulsory contribution of land at a high reduction rate. Although it seemed nonsensical to introduce a-17-meter-wide road, just the same size as what was attempted in the post-Hanshin-Awaji Earthquake urban-redevelopment projects in the center of metropolitan Kobe, in this small bay town of Kuwagasaki barely spreading along a narrow sandbar, the municipal government of Miyako made a desperate effort to technically justify the plan, by conducting land-taking prior to the land readjustment project. The effect of this action was the manipulating of the nominal reduction rate to as low as 15% by reducing the difference of public land areas between before and after the land adjustment. As a result of this preliminary land taking, an intensified population drain has been triggered. It is estimated in the municipal survey that merely 30-40% of the original population will remain in the community¹⁵.

(ii) Akahama (Otsuchi Town)

Akahama Area, a fishery village in a part of Otsuchi Town is a rare example of successful relocation to higher land by the initiative of local community leaders. If not for this leadership, the possible fate of Akahama might have been as the same as Kuwagasaki's population drain, due to the governmental original plan to construct 14.5 meter height seawalls which would have prevented the choice of relocations. The leaders of Akahama forestalled the governmental plan with an alternative plan for a seawall height of 6.4 meters instead of 14.5 meters, achieving the affirmative result for relocations in the tsunami simulation, thus protecting the integrity of the community.

What was the reason for this success in Akahama? According to the author's interviews with the leaders of the "Thinking Group on the Recovery of Akahama," a unique consensus-seeking approach deliberately maintained throughout the internal decision-making process within the Akahama community seemed to be the key to achieving the integrity of community will, and hence were sufficiently influential over the town-planning led by the Town Office. In fact, the Akahama leaders dared to have literally all members of the community sit together for discussion and participate in decision-making.

Another reason was the relatively strong bonds existing in this small fishery community since long before the occurrence of the GEJE. If not for it, there would not have been 27 leaders rising to form the Thinking Group, nor the successful negotiation with the Town Office for the lots for temporary houses to be concentrated within Akahama Area to facilitate the community deliberations, nor the early negotiation with local landowners to secure the lands for relocation.

Access to expert support was another advantage for the Akahama leaders. A research institute of Tokyo University was located on the Akahama coast, and occasionally sent expert teams to run tsunami simulations to help Akahama leaders complete a technically persuasive community proposal to the Town Office.

The final but not least advantage was access to governmental information. The fact that one of the leaders in Akahama happened to be a newly retired town official having access to relevant information on the behind the scene recovery planning and budgetary issues may have helped Akahama leaders to take the initiative prior to the formal decision-making process applied under the newly enacted Basic Ordinance on

the Disaster Recovery in late 2011. In contrast to Akahama's success due to effective leaders, the loss of the Mayor of Otsuchi in the tsunami retarded the recovery process in Otsuchi Town itself.

Akahama might be an exceptional success story, due to several advantageous conditions. Still, its experience teaches us how institutional arrangement can be made so as to create and guarantee certain necessary conditions for successful community-led town-planning. They may include, *inter alia*, fair rules for internal decision-making in order to achieve as close as possible a consensus by respecting minority opinions, clear rules for external representation, establishing the binding effect of community decisions both inside and outside of the community, access to governmental information, access to expert support, and to secure the binding effect over the decision-making process of the government.

5. Conclusion

(1) Constitutional Limit of Disaster Law

Disaster-recovery law is in itself a risk area, where problematic measures, having been abandoned in normal times, are easily restored in the name of emergency law. A lesson from the GEJE is a special need to extend a careful review on fairness and constitutionality of laws in disaster. Particularly in the Japanese context of bureaucratic sectionalism and the weak local autonomy due to lack of budgetary independence, a disaster recovery can easily create momentum toward governmental exploitation of civil rights, where the local government only to acts as the obedient enforcer of the ministerial laws. In order to protect the fundamental norms from this erosion for civil rights in the name of emergency response, a permanent "Basic Disaster Recovery Law" is needed. Meanwhile, at least, a careful review of fairness and constitutionality of the disaster-related special legislation is an urgent need.

Such urgent review should minimally refer to the following procedural and substantive aspects:

(i) Procedural Norm

In procedural aspects, a particular question is the limit of changes to be made by the disaster laws to the laws and ordinances for normal times. The 2011 Law on GEJE

Recovery Special Zone featured the *Tokku* method for prompt decision-making on recovery projects, while ignoring participatory frameworks under the regime of the Law on Urban Planning and the relevant local ordinances. This emergency application of *Tokku* is being extended to town-planning in normal times by the Law on Tsunami-Preventive Town-Making enacted as a permanent law. There is no constitutional provision to explicitly protect the procedural or substantive rights of community. But when an integrated choice of values which emerge from the relevant legal system as a whole is taken as a constitutional norm (Yamamoto 2004), instead of a mere literal wording of the constitutional text, the participatory provisions developed in the regime of Law on Urban Planning is typical of such an area that needs to be incorporated into the constitutional interpretation of such general principles as the protection of property rights (art. 29), due process (art. 31), and local autonomy (art. 92). The emergency justification should not be used as an easy bypass to evade the provisions which have already matured as an integral part of the constitutional value.

(ii) Evaluation of Social Capital

Private rights at risk in disaster recovery are not only the individual marketable rights, but also the united, unmarketable rights of community. Even if the recovery adjustment plans decided under the *Tokku* method have been sufficiently prepared to compensate for the restrictions on individual rights, they are almost indifferent on the restriction on the latter, the communal rights and interests in livelihood, welfare, culture, environment, and all other social capitals. Perhaps, only when the concrete evaluation of each such communal value has been accumulated for the purpose of compensation claims, to take people's rights beyond the line of cost-benefit balance, will the government be freed from its addiction to doubtful Keynesian economic stimulation in the name of disaster-recovery project.

(2) Community as Master of "Early Recovery"

"Early Recovery" is a new notion that has come to prominence in the field of disaster studies, an idea for linking the disaster-victim aid for humanitarian purposes in the early stage of emergency response to the succeeding stages of rehabilitation and recovery, in order to enable the early reconstruction of self-reliance (IRP/UNDP/ISDR

2008etc.). This notion corresponds to the concept of “human recovery” which has been discussed in the reflections on the economic recovery-centered process of the post-Hanshin Awaji Earthquake recovery in Japan. Put in legal terms, early recovery is the matter of choosing the fundamental goal of public aid to disaster victims, or in other words, an interpretation of “protection of lives, limbs and properties of national people” provided in the Basic Law on Disaster Response (art.1), as either protection of a minimum survival level, or means to achieve a higher level of protection to meet the needs of “right to live” as envisaged in the Japanese Constitution art.25. If the goal of aid for disaster-victim were the latter, it should address not only individual victims but also the community as the basis of individual livelihoods.

Given the reality of the *laissez-faire* governmental attitudes for public aid due to the increasing influence of neo-liberalism emphasizing self-reliance, early recovery is not an easy goal which can be pursued without intentional endeavors by the community as the basis for civic initiatives to integrate mutual aid. A community restated in this context of early recovery has the potential to create a new definition and an explicit legal framework for its role, by way of civic activism toward either the enactment of the “Basic Law on Disaster Recovery” or a bottom-up revision of local ordinances, and thereby change the course of the tide of *de facto* standardization of economy-oriented, human-isolated law and policy models in the name of disaster recovery.

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Notes

- 1 According to the survey conducted by Miyako City in Iwate Prefecture, for example, the trend toward population drain is pressing. Numbers show such that 48% of community members in Taro Area, the most seriously inundated areas in Miyako, have decided to move out of the area as of the beginning of January, 2013, following the governmental decision on recovery projects at the end of December 2012, showing a drop from 16% in the previous survey conducted earlier in 2012. Also in Kuwagasaki Area, another seriously inundated area in Miyako, only 34% have decided to remain in the area while 40% of households have decided to move out, are 26% undecided.
- 2 For details of the post-GEJET industrial support measures, see Kaneko (2012a) and Kaneko (2012c).
- 3 See art.14 of the Basic Ordinance on Autonomy of the Miyako City enacted in 2008.
- 4 See e.g. Nagoya District Court Judgment on November 5th, 2009.
- 5 For the "recovery promotion plan," a typical *Tokku*-style decision-making featuring the role of *Kyogikai* (consultation meeting) is applied by the Law on Disaster Recovery Special Zones. Namely, the Law provides for consultations with the project implementer (art.4 sec.3, 4), request for special measures by such project implementer (art.11 sec.2), proposal by the entities having close relation with the project (art.11, sec.4), negotiations with the Recovery Promotion Consultation Meeting (art.4 sec.6, art.13). This Consultation Meeting is composed of the local government, the project implementer, those entities having a close relation with the project, and other indispensable entities admitted by the local government, while the consideration should be made to reflect various opinions (art.13 sec.4). When the local government does not propose holding the Consultation Meeting, the project implementer and those entities having close relation with the project can request the meeting (sec.5). Apart from this local-level Consultation Meeting, a different *Kyogikai* is established between the national and local governments (art.12) in which the representatives from the local-level Consultation Meeting, the project implementer, and those entities having close relation with the project can join if nominated by the Prime Minister (sec.4).
- 6 Also the decision-making process of a "recovery adjustment plan" under the Law on Disaster Recovery Special Zones features a typical *Tokku*-style process based on the role of *Kyogikai* (consultation meeting). Namely, the Recovery Adjustment Consultation Meeting is held by the Mayor and the Prefectural Governor, in which the Minister in charge, those entities having close relation with the plan, and other indispensable entities admitted by the

local government can join as additional members (art.47 sec.3), provided that as for the urban planning, only the academic experts and the Minister in charge are referred to as additional members to the Meeting, disregarding other entities (sec.4). However, such terms with a democratic impression as “those entities having close relation with the plan” and “other indispensable entities” are construed nothing but the other ministries than the Ministry of National Land and Transportation, reflecting the bureaucratic sectionalism.

- 7 The Law on Tsunami-Preventive Town-Planning (chapter 4-6) features the *Tokku*-style *Kyogikai*-based procedure (art.11 sec.3) for the “promotion plan” which incorporates all categories of recovery projects, including the land-readjustment projects, urban redevelopment project, tsunami-preventive town-center construction project, disaster-preventive collective relocation project (art.10 sec.3).
- 8 For example, Tokushima Prefecture enacted a new ordinance titled “Ordinance for Disaster-Resilient Society-Making” in December 2012, featuring the same *Kyogi* procedure as the Law on Disaster Preventive Town-Planning for land-use controls such as the relocation of hospitals and other social welfare facilities located in coastal areas to safer grounds. However, there is no mention to civic participatory procedures. In municipal levels as well, the implementation of the 2011 Law is prepared in isolation from the civic participatory procedures for urban-planning in the normal times, as shown in the case of Tokushima City which has featured participatory urban-planning under the 2009 Ordinance on the Civic Participation as well as the Master-plan for Urban-Planning established in 2012.
- 9 Apart from the requirement of “administrative disposition,” the Japanese court precedents have set particularly difficult hurdles for the “standing” in administrative lawsuits. In the area of urban-planning, the plaintiff has to demonstrate a substantive merit of the case to the extent that he/she has assumed or should assume a direct damage to live, limbs and properties. Therefore, the next section need to review the substantive rights and interests of affected people and communities.
- 10 In the author’s questionnaire to the temporary housing in Taro as of March 2013 conducted in collaboration with a local community supporting group, 10 in a total of 24 persons stated their intention to leave Taro Area, with 2 were undecided, due to the dissatisfaction to the outcomes of recovery project. Asked about the contents of recovery projects, 21 in a total of 24 persons stated strong dissatisfaction, in which 15 answers pinpointed the dissatisfaction to the relocation project, while 12 answers criticized the governmental attitude to concentrate on housing infrastructure rebuilding without paying any attention to the livelihood basis of the community. Asked about the procedure of recovery projects, 18 in a total of 24 persons criticized the government-led procedure without paying serious attention to the voices of citizens on the fate of their own community. Taro is the most seriously affected area in the Miyako City with the casualty of 200 people in the total 4,000 population.
- 11 For the constitutional grounds of governmental aid to disaster victims, see for example, Tsukui (2007).
- 12 It is often criticized that, regardless of the degree of concentration of fishery rights management in the fishery cooperatives, more than 90% of the actual fishery activities are done by the individual household, as evidence of the out-datedness of the Japanese fishery. However, such popularity of individual-based fishery practice seems to be the result of the shift from the deep-sea fishing once common before the 1970s to the contemporary aquaculture-based fishery, which is gaining support from the argument that it is the vanguard of an ecological form of new fishery for living within the environment of coastal sea-front areas as well as the forest areas ecologically linked to the sea.
- 13 See the “Opinion to call for the immediate amendment to the Law on Special Arrangement for the Lease on Land and Housing in Disaster Stricken Towns” issued by the Japan Association of Lawyers on May 26, 2011.

- 14 Although enormous efforts have been made by the members of disaster-affected communities for enhancing “mutual aid,” limited access to “public aid” such as subsidies and utilization of public properties has been the bottleneck. “Public aid” is usually directed to the market-oriented sectors such as housing reconstruction and small-medium enterprises, while seldom available for the free, volunteer sector. Even the “Recovery Fund” of a total of 240 billion yen established in 2011 by each local government under the auspice of the national budget has been utilized for subsidizing housing reconstruction, which is in clear contrast to the active utilization of yields from the “Hanshin-Awaji Recovery Fund” in the post-Hanshin-Awaji Earthquake recovery stages in the late 1990s.
- 15 See the material distributed at the “Kuwagasaki-Kougannji-chiku Town-Planning Forum” prepared by the Urban-Planning section of the Miyako City as of December 19, 2012.