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Reclamation, Licensing, and the Law: Japan's Courts Take Up the Henoko Base Issue

Sandi Aritza, Igarashi Takayoshi

Edited and translated by Sandi Aritza, Igarashi Takayoshi

Translation and introduction by Sandi Aritza

On December 27, 2013, then-governor of Okinawa Nakaima Hirokazu approved a permit to reclaim land off the coast of Henoko in Nago City, Okinawa in order to build a U.S. Marine Corps airfield. Current Okinawa governor Onaga Takeshi won a landslide victory against Nakaima in November 2014 on a platform opposing the construction of a U.S. military facility on land reclaimed off the coast of Henoko. Shortly after his inauguration, Governor Onaga established a "Third Party (Experts) Commission," consisting of six legal and scientific experts, for the purpose of reviewing the procedural grounds for former governor Nakaima's approval of the land reclamation. On July 16, 2015, the Commission published a more than 100-page report, concluding that Nakaima's approval of the land reclamation was legally flawed. (A summary of the report can be read here.) On October 13, 2015, Governor Onaga nullified the land reclamation permit based on the Commission's findings. Just a day later, the Okinawa Defense Bureau (the local branch of the Japanese Ministry of Defense) filed a complaint asking the Minister of Land, Infrastructure, Transport and Tourism (MLITT) to overrule Onaga's nullification. The MLITT swiftly complied. Shortly after, the Japanese government sued Governor Onaga, seeking a verdict that would allow them to override his authority as governor and approve the land reclamation. As the central government is essentially appealing to itself, observers predict it will win an easy victory. Igarashi Takayoshi notes that legal precedents are also on the government's side, and that to prevent such an outcome, the platform for debate must be broadened beyond the confines of Japan's government offices and courtrooms to the stage of national and global public opinion. SA

Introduction

In September 2015, intensive talks between the Japanese government and the Okinawa prefectural government regarding the construction of a US military base in Henoko broke down. On October 13, 2015, the governor of Okinawa announced that he would nullify his predecessor's approval of the reclamation of a public water body necessary to construct the base in Henoko. On October 14, in response, the Japanese government, determined to proceed with the construction, insisted that the land reclamation was legal, and filed an official objection with the Minister of Land, Infrastructure, Transport and Tourism (MLITT) asking that execution of the governor's order be suspended and that his nullification ultimately be overridden.

Media reports predict that the lawsuit between the Okinawa prefectural government and the Japanese national government will end in a victory for the national government. Indeed, that was precisely what happened earlier this year when the governor ordered a halt to construction due to the issue of fractured coral reefs. Then, the national government responded to the prefectural government's

order by appealing for a suspension of execution to the Minister of Agriculture, Forestry and Fisheries, which is responsible for overseeing the Fishery Resources Conservation Law. The government won that battle in short order and continued with the construction. In the current case, the government filed its objection with the MLITT, which is responsible for overseeing issues related to the Public Waters Reclamation Law. It goes without saying that constructing a US military base in Henoko is a major part of Japan's political and military strategy of unity with the United States government. It is also one of the most significant political issues for the Abe administration, second only to the debate over the constitutionality and legitimacy of its recent security legislation. As protesters on the ground attempt to block the construction, tensions will increase drastically in the legal battle between the national and prefectural governments over the nullification of the land reclamation approval.

It is important to note that in addition to the traditional debate over the US bases in Okinawa, this argument has become centered on "filling in the ocean to create new land," in other words, the legality of reclaiming a "public body of water," in much the same way that the debate over the security legislation converged on the issue of whether the Constitution allows the exercise of collective self-defense.[1] The Okinawa governor's nullification of the land reclamation permit drives a knife into the heart of the base construction plans, and if it succeeds, the base cannot be built. But can the Okinawa prefectural government really win? The battle over the land reclamation should not be buried in the opaque world of administrative procedure, but be open and exposed to the judgment of the people of Japan and the world.[2]

Coral-filled waters off the coast of Cape Henoko

The Third Party (Experts) Commission's Report

The Okinawa governor's decision to nullify the land reclamation permit was, of course, a political decision. However, what is more important is that Governor Onaga determined that the approval of the permit given by his predecessor, Nakaima Hirokazu, was illegal to begin with. (Former governor Nakaima initially took a negative stance toward the land reclamation project, but made a sudden turnaround at the very end of his term as governor and approved the permit under heavy pressure from the Abe administration.) Supporting this determination is a report (published July 16, 2015) on the findings of a third-party commission, the "experts' commission to examine the process of approval to reclaim a public water body for the construction of a Futenma replacement facility," established by Governor Onaga soon after his election. The commission consisted of six members; three lawyers from the Okinawa Bar Association and three experts in the natural sciences. Setting aside all political considerations in their examination of the Henoko issue, these experts concluded that from a purely legal perspective, the land reclamation approval was illegal based on the

understanding of the Public Waters Reclamation Law.

Until recently, the Henoko issue has been debated as a uniquely Okinawan political, social, and cultural phenomenon. The report looks at the issue from a different angle, which further differs from arguments of the unconstitutional nature of Japan's military arrangements (including the unconstitutional nature of the US-Japan security treaty). Rather, the report directly denies the legality of the land reclamation itself. Its conclusion that the land reclamation approval process was "legally flawed" is highly significant, as it poses fundamental questions relevant not only to the Henoko issue, but to all cases of land reclamation that have been carried out all over Japan, as well as to the concept of "administrative discretion" applied in the ruling made by the Naha District Court in a case regarding the Okinawa Awase tidal wetlands land reclamation. (See Etsuko Urashima, Opting for the "Irrational": Tokyo Brushes Aside Okinawan Court Order to End Awase Wetlands Reclamation Project)

The report examines the grounds on which then-governor Nakaima approved, on December 27, 2013, the land reclamation permit application submitted on March 27 of the same year by the Okinawa Defense Bureau (in other words, the Japanese government) (hereafter "the approval").

Leading up to the approval, a review of the application was carried out by the Seashore Disaster Prevention Division of the Department of Civil Engineering and Construction in the Okinawa prefectural government. More specifically, the review was conducted by the department's director general, deputy director general, deputy councilor, and four to six senior-level prefectural employees. These prefectural officials conducted the entire review in a mere two months, starting in October 2013 when then-governor Nakaima began to signal his approval of the reclamation, reneging on his campaign promise to push for relocation of the Futenma base outside of Okinawa.

At the beginning of the report, the experts' commission explains that in examining whether or not there are legal flaws in the land reclamation approval, they referenced the following texts:

> Ministry of Construction Reclamation Administration Research Association, "Practical Handbook for Public Waters Reclamation"
>
> Ports and Harbors Association of Japan, "Practical Guide to Public Waters Reclamation"
>
> Okinawa Prefecture Review Criteria (October 30, 1994)

These are the standard textbooks generally used by the national and prefectural governments when carrying out reclamation work. In its examination, the experts' commission took every precaution to avoid any criticism that the members' personal opinions had affected its conclusion. It must be noted that the commission came to its conclusion in following the Japanese government's own interpretation of the law. The importance of this point can be appreciated when one recalls how in the debate over Japan's recent security legislation, the legislation was declared unconstitutional not only by scholars of constitutional law, but also by individuals generally seen as being on the side of the status quo, such as the former director general of the Cabinet Legislation Bureau and former Supreme Court justices. This provided the grounds for many Japanese people to realize that their own opposition to the legislation was not merely a matter of personal opinion, but

indeed something that could be shared broadly by the entire Japanese population. This allowed people to hold deep and firm conviction in their opposition to the legislation.

Two Arguments

The experts' report examines two main issues. One is the necessity, or lack thereof, of reclaiming land in the first place; the other is whether the present reclamation plan meets the necessary review criteria for reclaiming land. Of course, if the reclamation is deemed unnecessary, the issue of approval would disappear.

Regarding the necessity of reclamation, the report examined whether there is a logical connection between the purported aim of the reclamation-the relocation of Marine Corps Air Station (MCAS) Futenma-and the resulting construction of a new military base in Henoko. Can we really accept the claim by the U.S. and Japanese governments that the base construction is essential from a military perspective? The U.S. and Japanese governments have consistently claimed that there is no viable alternative to the current plan consisting of construction of two runways in a V-shaped configuration in Henoko. This was called into question when Democratic Party of Japan (DPJ) took the reins of government under Hatoyama Yukio, calling for Futenma to be relocated at least outside of Okinawa, if not outside of Japan altogether. However, the DPJ's position eventually collapsed, and it presently appears that public opinion supports the view that there is no alternative to Henoko for relocation.

The report, however, closely examines the history and present situation of U.S. military bases in Okinawa and concludes that such claims are highly dubious. Even if one accepts the necessity of relocating MCAS Futenma to eliminate the dangers it poses, there has been no logical explanation as to why that relocation must be to Henoko. Equally dubious are claims about military deterrence (that the U.S. Marine Corps stationed in Okinawa constitutes an important element of deterrence); claims about Okinawa's strategically superior location (being close, but not too close, to potential conflict areas); and claims about the necessity of integrated multi-unit operations (namely, that if the Marine Corps helicopter squadrons are relocated outside of Okinawa, the Marines will lose their mobility and rapid responsiveness). While I will not discuss these issues in detail in this paper, the view laid out in the report seems to be common knowledge among defense experts. The report is harshly critical of the land reclamation approval on the grounds that no prior review of the above points was carried out.

The Okinawa prefectural Department of Civil Engineering and Construction, which was in charge of the review, as well as Governor Nakaima himself, clearly viewed the Henoko decision as an order handed down from above regarding which no argument was permissible. When faced with such an order, it would have been impossible to try to make an independent determination as to why Henoko was chosen, or whether the project was really necessary. The issue of local government blindly following orders from above clearly relates not only to the topic at hand, but to the very interpretation of the Public Waters Reclamation Law itself. In other words, it was from the start considered self-evident that a military base must be built regardless of the interpretation of the law, and the subsequent review process was merely an exercise in how best to provide a pretense for a decision that had already been made. The report, however, goes no further into discussion of the motives for land reclamation, instead examining whether reclamation meets the necessary review criteria even in the case that the purported motives are accepted as fact.

There is a clear division between camps when it comes to the understanding of the most

important principle involved in the interpretation of the necessary review criteria stipulated by law. In post-war Japan, land reclamation has been carried out nationwide with relative ease. The reason given is that Japan's land mass is insufficient for constructing needed farmland, factories, event halls, airfields, and other such facilities; or that there is a need to reinforce the relationship between such facilities and the ocean. Okinawa is a perfect example of this line of argument. So much land has been reclaimed along the coastline of Okinawa that there are hardly any pristine beaches left on the island. The ocean, however, as a "public body of water," is the shared property of all of Japan (in other words, the people of Japan). The ocean has incalculable value for its ecosystems and natural environment, as well as for recreation, scenic enjoyment, and the fishing industry. Therefore, land reclamation should not be carried out unless it will lead to a genuine improvement of public welfare. That remains the case whether the party conducting land reclamation is a private company or the Japanese government. When contrasted with other public works projects executed using taxpayer money and the laws on which they are founded, the above is clear.

Laws such as the Road Law, the River Law, the Land Readjustment Law, and the Urban Renewal Law are all based on the premise that roads, dams, rezoning, and urban development inherently contribute to the public good. The corresponding laws were written in order to legalize and justify relevant projects. More specifically, while there is some difference between the laws, administrative agencies (bureaucrats) are the ones to draw up construction plans for roads, dams, and so on. These plans then become the "word of God." The responsible parties then jump through a number of procedural hoops including consultation by a council of experts, environmental assessment, disclosure of information, and public hearings. However, the "word of God" is at the heart of these projects, and barring the unthinkable, there is slim chance of the original plan being cancelled or altered in any fundamental way based on these procedures. The procedures are nothing but a formality to provide legality and justification to the "word of God." Unfortunately, this fundamental tendency extends to Japan's judicial system, which under the Constitution is in theory supposed to act as a check on administrative power. In court, various excuses and pretenses-in particular the concept of administrative discretion, which I will discuss in detail below- are used to reject any opposition toward or alteration of planned public works projects. This structure of administrative dominance leads to the myth that public works projects are absolute-once started, they will inevitably be carried through to completion.

The Public Waters Reclamation Law, however, is different. Reclamation is not assumed to be inherently beneficial. Rather, it is only permitted in special cases when the public benefit accrued through the project outweighs the damage it will cause. This principle is the opposite of that applied to all other public works projects. It is important to note that the aforementioned texts referenced by the experts' commission in their report are all written primarily from this point of view.

Required criteria for review and decision-making

Article 4.1.1 of the Public Waters Reclamation Law requires review of whether reclamation constitutes appropriate and rational use of national land. The commission determined that this requirement must be interpreted comprehensively, rather than based on specific details. A comprehensive interpretation would call for weighing the benefits accrued by using Henoko for military purposes against the benefits of preserving the natural environment. As explained in the above section regarding

motive, the commission was not convinced that building a base in Henoko would have significant military value. In fact, the commission determined that building another base in Okinawa would violate the principle of equality throughout Japan, and could even be understood as a form of discrimination against Okinawa. On the other side of the scale, the natural environment of Oura Bay is extremely valuable. Its value is not merely sentimental or aesthetic, but is recognized and protected by the following international treaties and domestic Japanese laws:

> The "Okinawa Strategy" based on the Convention on Biological Diversity
>
> The "Ryukyu Archipelago Coastal Preservation Basic Plan" and "Off-limits Area" based on the Coastal Preservation Law
>
> The "Nago City Land Use Plan" based on the City Planning Law
>
> The "Nago City Landscape Plan" based on the Landscape Law

The Oura Bay area is also included on the Ministry of the Environment's list of Japan's top 500 important wetlands, and much of its wildlife is listed on the IUCN Red List of Threatened Species, recognized as requiring conservation measures.

Upon weighing the military and environmental benefits against each other, the commission concluded that reclaiming land to build a military base despite the risk of destroying such great environmental value is neither appropriate nor rational. This conclusion not only applies to an interpretation of the Henoko issue, but in fact demands that we take a hard look at land-use plans that have been carried out all over Japan.

In Japan, there have until now been many plans drawn up regarding the use of national land, including several versions of a National Comprehensive Development Plan (*Zenso*). These plans thoroughly examine the current status of and future forecasts for population, industry, economy, and infrastructure, and many have actually been implemented. The plans, however, have steered clear of any mention of military bases-or nuclear energy facilities-despite the crucial implications these have for the use of land. The commission's report is a rare example of experts facing this taboo head-on, in this case from the perspective of land reclamation. In that sense, the report will likely have important implications for future land-use planning.

Article 4.1.2 stipulates that land reclamation must "take adequate consideration of environmental conservation and disaster prevention." The commission's position on this differs fundamentally from the position taken by Governor Nakaima when he approved the land reclamation. The aforementioned difference in principle becomes an issue here. Governor Nakaima gave the reclamation project the green light on the condition that the Ministry of Defense's policy took adequate consideration of the environment and would take appropriate measures based on an accurate understanding of current problems and anticipated environmental impact. In other words, he approved the permit on the premise that he could expect the Japanese government to take appropriate measures in response to any problems. In contrast, the commission's report interprets the concept of "adequate consideration" stipulated in the Law as demanding that appropriate measures actually be taken based on an accurate understanding of current problems and anticipated environmental impact. In other words, approval of land reclamation must be based on a clear judgment that realistic, concrete, effective, appropriate measures will be taken, not on the vague expectation that some sort of measures

may be taken at some point in the future. This point is one of the extraordinary highlights of the report.

The report explains that the Henoko/Oura Bay area is home to 3,097 marine species and 5,853 terrestrial species, including 1,995 plant species, and 3,858 animal species, 374 of which are designated important species. Issues considered particularly critical include:

> Sea turtles
>
> Coral
>
> Sea grasses and kelp
>
> Dugongs (designated for protection by the IUCN, listed as an endangered species in the Washington Convention, and designated a protected species by the Cultural Properties Protection Law)
>
> Introduction of alien species through dirt and sand used in land reclamation
>
> Concern over aircraft noise and low-frequency radio waves
>
> Changes in the tides
>
> Typhoons

Regarding each of the above issues, the commission conducted a rigorous investigation into whether effective and appropriate measures were in place, and whether the measures could realistically be implemented. It concluded that none of the measures in place were adequate. The reasons for inadequacy were described as follows:

> Even where qualitative measures have been postulated, they lack quantitative research and are unscientific
>
> No consideration is given to the relationships between various ecosystems
>
> No forecasts have been made as to the impact on diverse flora and fauna

All of these point to a fundamental and rudimentary misunderstanding of environmental conservation. Conspicuous in the former governor's approval is the written remark that, given the difficulty of conserving dugongs, sea turtles, and coral, the government should do "as much as possible, to the extent possible, while receiving advice from experts" when proceeding with the project. The governor essentially left everything up to the national government.

In addition to the inadequacy of environmental conservation measures, I would also like to make note of a serious procedural violation committed during the approval process. The commission's report casts serious doubt on the governor's wholesale delegation of responsibility to the national government. When former governor Nakaima was still pledging to insist that Futenma be relocated outside of Okinawa, he and the prefectural Department of Environmental and Community Affairs submitted a document containing more than 500 questions about dugong conservation measures in response to the Okinawa Defense Bureau's land reclamation application. In spite of this, the Okinawa Defense Bureau did not respond to nearly any of the questions. The questions were almost entirely ignored by the prefectural Department of Civil Engineering and Construction. The procedural violation of neglecting to respond to questions from involved parties is also a serious issue arising in the Awase tidal wetlands lawsuit.

As to why this should be so, it was not only because military matters are accorded unquestioning priority, but also that the prefectural government's review team was hopelessly understaffed, lacking the extensive time, funding, expertise, and experience needed to conduct research and draw up measures for the protection of dugongs, sea turtles, coral, and other species. The entire review was conducted in an extremely short period of time, between mid-October and December 2013. In a variety of ways, the prefectural government utterly lacked the "comprehensive, objective capability" to make decisions regarding the various review criteria. The issue of insufficient capability on the part of local governments will have to be studied widely as a fundamental issue when it comes to land reclamation and the environment.

Article 4.1.3 requires that land reclamation "not violate any law-based plans made by a local public entity regarding land use or environmental conservation." The response of the Department of Civil Engineering and Construction to this requirement was purely formal and bureaucratic. The department viewed the plethora of "plans," including international plans and national strategies regarding biological diversity, to be no more than ideals, not legally binding and therefore exempt from review. In Japan, there are no laws directly regulating damage to sea turtles, coral, seaweed, algae, or the dugong. Therefore, when considering the conservation of such species, so-called "plans" take on a great deal of importance. This fact was utterly overlooked in the prefecture's review.

The commission's report examines each point in detail and concludes that in Henoko, the value of the natural environment outweighs the potential value of a military base-in other words, the value of the dugong exceeds that of the Osprey. Therefore, the former governor was wrong to approve the land reclamation project, and his approval itself is mistaken and legally flawed. This argument accords with common sense. Moreover, it matches the sentiment of the majority of Okinawan people as expressed in numerous elections.

"Administrative discretion"-the obstacle faced by the commission's report

Governor Onaga nullified the land reclamation permit approved by his predecessor, former governor Nakaima, on the basis that the approval was legally flawed.[3]

However, two significant hurdles must be overcome for his decision to be established as legal. One is, of course, the stance of the Japanese government, which prioritizes military affairs to the extent of passing security legislation that is a complete denial of Article 9 of the Constitution (signifying prioritization of the U.S.-Japan security treaty and its associated values over all else). This hurdle has appeared time and time again, expressed in statements by Prime Minister Abe or Chief Cabinet Secretary Suga each time a meeting is held between prefectural and national representatives. The other hurdle is the question of what verdict will be handed down when this battle reaches the courts.

In considering what will happen in the court battle, it is instructive to refer to the verdict handed down by the Naha District Court in the first round of the Awase tidal wetlands trial (February 24, 2015; the plaintiffs, local residents, appealed to a higher court, and those proceedings are currently underway). The Awase case also involves land reclamation by filling in a bay, in this case to build a sports convention center. The Awase tidal wetlands are located near Henoko, and the same dugongs that visit Henoko also visit Awase. The environmental value of Awase is no greater and no less than that of Henoko. Furthermore, according to research done by the plaintiffs in the Awase case, nearly 80 percent of the more than 500 questions posed by the former governor and the Department of Environmental

and Community Affairs regarding the Henoko reclamation apply equally to the Awase reclamation, with discrepancies deriving only from the differences between a military base and a sports convention center. As I will discuss below, when the Henoko battle departs from the level of administrative procedure and makes its way to the judicial system, it will be fought in the same court in which the Awase trial was fought, and the verdict at the Awase trial could have strong implications for the results of the Henoko trial.

The Awase tidal wetlands are located in Okinawa City, on the east coast of central Okinawa. They consist of a reef lagoon containing 290 hectares of mud flats and 112 hectares of seaweed beds, and are one of the few pristine tidal wetlands remaining in Okinawa. Like Henoko, they are on the Ministry of the Environment's list of top 500 important wetlands, and are also a candidate for recognition by the Ramsar Convention. Dugongs and sea turtles also visit Awase to feed on the seaweed that grows there. The original plan for the Awase tidal wetlands was to build a marina resort called "Marine City Awase" by reclaiming land as a way to dispose of the massive quantities of dredged soil derived from the land reclamation that had been carried out to create a new harbor area as part of a special free trade zone. But the plan, which was put together hastily and haphazardly, was highly unrealistic, and calculations of its economic potential were illusory. In 2005, local residents filed a lawsuit calling for a ban on expenditure of public funds for the project. The plaintiffs were victorious in both the first trial at the Naha District Court in 2008 and the second trial at the Naha branch of the Fukuoka High Court in 2009, both of which determined the plan to be lacking rational financial grounds.

The reclamation plan, however, was not cancelled. The Okinawa City government came up with a variation of the plan in 2010, which was smaller in scale than the original and consisted of building a sports convention center rather than a resort. Just as in the Henoko case, the governor at the time approved this 2010 plan based on the Public Waters Reclamation Law. The local residents again filed suit against the Okinawa City government, demanding a ban on expenditure of public funds for the project. (This time, the Democratic Party of Japan was in power at the national level, and the residents demanded suspension of the first stage of construction and cancellation of the second stage of construction on the grounds that the project would cause major environmental damage.) This time, however, the court favored the defendants, and the residents lost the case in February 2015. The court "did not find the land reclamation plan to be lacking justification from the perspective of social or economic impact in terms of its aims, necessity, nature or scale." This is the famous (or for the residents, the infamous) concept of administrative discretion: "The court may revoke an original administrative disposition made by an administrative agency at its discretion only in cases where the disposition has been made beyond the bounds of the agency's discretionary power or through an abuse of such power" (Administrative Litigation Law, Article 30).

Furthermore, regarding the concept of discretion, the court has ruled that "A judiciary review of whether a case of execution of discretion constitutes an overreach or abuse of discretionary power will be conducted on the premise that the [agency's] decision was made as an execution of discretionary power. [The review] will investigate whether any factor of the decision, such as choices or steps in the decision process, lack rationality. Only in instances where [the judiciary] finds the decision lacking important foundational aspects, or finds the decision significantly lacking in appropriateness in light of social norms, will the [agency's] decision be determined as an illegal overreach or abuse of discretionary power" (*Hanrei Jijō* volume 936, 2006).

As in the Henoko case, conservation of the dugong, seaweed, and other sea life was the major point of contention in the Awase tidal wetlands trial. Also as in the Henoko case, the Okinawa prefectural Department of Civil Engineering and Construction approved the Awase reclamation based not on certainty that concrete conservation measures were in place, but under the assumption that such measures would be drawn up at some point in the future. The local residents, in the role of plaintiff, made a detailed and extensive critique of this stance, but the court failed to take a hard look at the issue of conservation measures, and essentially relinquished responsibility by simply stating that they did not find the plan particularly lacking in appropriateness. The court's relinquishing of responsibility was rendered legal through the concept of administrative discretion. This manner of thinking ensures that the notion that, once started, public works projects will inevitably be carried through to completion, is also supported by the judiciary. The concept of administrative discretion is prevalent not only in cases of land reclamation, but for the construction of roads, dams, and every other imaginable instance of city planning.

In Japan, citizens were first enabled to make a formal objection against an administrative disposition through the Administrative Appeal Law, enacted in 1890 during the Meiji era. At the time, Japan was ruled by the emperor, who was considered a living god, and administrative officials were bureaucrats carrying out their work in the name of the emperor. Therefore, conventional wisdom at the time prohibited the Japanese people, who were considered subjects and children of the emperor, from filing objections. After the end of World War II, the emperor was designated a symbol of the country, rather than a deity or ruler. Even so, conventional wisdom did not change immediately. It wasn't until 1962 that the Administrative Litigation Law was enacted, allowing for a more democratic system in which sovereignty lay with the people. Even the Administrative Litigation Law, however, imposed numerous limitations on citizens wishing to file an objection against an administrative agency. Such limitations included a restricted definition of "standing to sue," or a party's eligibility to file suit; as well as a limited definition of what constituted an administrative "disposal" subject to a lawsuit. In 2004, the criteria for eligibility to file suit was expanded, and the system under which plaintiffs were able to file a lawsuit demanding that the court order the execution of an administrative disposition underwent significant reform, lowering the hurdle for filing objections a great deal. But the new law and its revised version maintained recognition of administrative agencies' discretionary power.

In the Meiji era, administrative officials were granted discretionary power because they were seen as servants of the emperor. After World War II, more modern justifications were adopted for the same purpose. Administrative

agencies were considered incapable of wrong, and were recognized as the sole possessors of sophisticated expert information, knowledge, and technologies. Policy-making was considered a process involving a degree of discretion, which is by nature complex and involves various interests. Most importantly, acts of administrative discretion were seen, not as dictatorial acts, but rather were thought to be based on expert opinions gleaned through public hearings and councils of experts, and ultimately validated by legislative approval through the enactment of budgets. Because dispositions by administrative agencies were always viewed in this way, it was considered imprudent for court justices to interfere. Court justices were viewed as lacking knowledge regarding technical matters, and as unable to take responsibility for the resulting impact of nullifying an administrative action.

As a result, even in academic circles, a formal and passive interpretation of court authority has prevailed, with scholars believing that court justices may only interfere in instances in which an administrative disposal is motivated by corruption or violates the aim of the law, the principles of equality or proportionality, or procedure. This passive interpretation of court authority culminated in the aforementioned Supreme Court judgment. In summary, the court may not nullify an administrative decision unless it either lacks any grounding in reality or significantly lacks appropriateness in light of social norms. The verdict handed down in the first round of the Awase tidal wetlands trial took full advantage of this interpretation of administrative discretion. The court declared that the fate of the dugongs and sea turtles upon execution of the land reclamation was a matter to be decided by the administrative branch of government, not the judiciary. If the same logic is used in the Henoko reclamation trial, the court will likely make the same determination regardless of the content of the experts' commission's report.

The creation of new decision-making criteria

The primary value judgment involved in the question of administrative discretion is that of "social norms," or what the average person thinks about an issue.

As mentioned above, public works projects were formerly considered inherently good. Construction of roads, dams, airports, and harbors, as well as reclamation of land by filling in or draining the sea, can contribute to modernization, disaster response measures, and the overall convenience of society. Such projects also provide employment and other economic benefits to local economies and societies. Particularly salient in the case of bullet trains, advanced infrastructure can signal the advent of a new era of technology, culture, and lifestyle. This mentality began to change in the early 1990s, however, as vested interests took hold, public works projects began to exceed a reasonable level, and the environmental hazards they wrought became more overt. People started to question whether such projects were necessary or just wasteful. It also became clear that there was a limit to the benefits of job creation and local economic development. The taxpayer burden ballooned, and Japan came to be one of the most indebted countries in the world. Given Japan's aging population and low birthrate, more and more "white elephant" infrastructure will be left to become dilapidated and break down. Thus, people will have no choice but to rethink the idea that public works projects are inherently good. The following examples of this process of rethinking reflect changes in social norms and ought to be used as criteria for judicial consideration:

1. In 1997, Hokkaido implemented a system referred to as "assessment of the times" in which public works projects were consolidated based on contemporary considerations.

2. Also in 1997, the Hashimoto administration implemented a General Plan to Reassess Public Works Projects, applying the "assessment of the times" system nationwide.
3. In 2000, former minister of construction and chairman of the Liberal Democratic Party Policy Research Council Kamei Shizuka conducted a radical revision of how public works projects were implemented.
4. In 2003, under the banner of neoliberalism, the Koizumi administration privatized the Japan Highway Public Corporation and other public entities in a move to increase cost performance.
5. In 2003, the Democratic Party of Japan (DPJ) proposed a series of reforms, including a Public Works Project Control Law. In 2009, after winning control of the government, the DPJ implemented a series of reforms.[4]

The above represents only a broad historical overview, but these reforms have been reinforced through various legal revisions. The River Law was originally limited to ensuring the implementation of river engineering and irrigation, but due to changes in government policy, it was revised in 1997 to include reference to the environment and participation. Now, there is a high likelihood of dam plans that don't take the environment and participation into account being deemed illegal. Even where laws have not been revised, reforms have been reinforced through a proliferation of plans and prospectuses. In numerous instances, local governments have implemented their own ordinances and plans in order to reflect local particularities as part of a nationwide policy trend. Conventional wisdom no longer considers roads, dams, and airports to be inherently beneficial in and of themselves. New social norms valuing environmental conservation, sustainability, and the preservation of valuable heritage are shared throughout the world. (More precisely, Japan's laws and policies still lag far behind global social norms.) The United Nations World Heritage List, the Ramsar Convention, and efforts to maintain biological diversity illustrate the emergence these global social norms. Conservation of the dugong can be seen as their crystallization.

The Public Waters Reclamation Law anticipated this shift in social norms. The aforementioned three texts on which the experts' commission based their report (the "Practical Handbook for Public Waters Reclamation," the "Practical Guide to Public Waters Reclamation," and the "Okinawa Prefecture Review Criteria") are guides to understanding the Law, and, given that they reflect recent changes in social norms, provide a powerful example for people living in the present day. Public or private entities involved in construction projects should not be allowed sole responsibility for ensuring that appropriate measures are implemented based on an accurate understanding of current problems and anticipated environmental impact. The court must take on the responsibility of making a concrete determination on the issues of environmental conservation and procedural negligence.[5]

Unlimited acceptance of administrative discretion is no less than a renunciation of decision-making responsibility. Providing unlimited powers of discretion to administrative entities and allowing the courts to relinquish responsibility is a violation of the principle of an independent judiciary. According to global social norms, failing to protect the dugong is a violation of universal human values, and any action that would hinder protection of the dugong should cease immediately, even if it does not have any direct effect on the protection of human lives or property. Furthermore, as a buffer zone to protect those values, a broad zone in which violation is prohibited should be established.

Conclusion

There is a danger in allowing military considerations to overwhelm all other considerations and unilaterally shutting down serious public debate about the Henoko issue.

As described in my introduction, after the Okinawa governor nullified his predecessor's approval of the Henoko reclamation, the Japanese government filed a formal objection in an attempt to have his nullification voided and obtain the authority to execute approval of the reclamation by proxy. It must be noted that the assertions of both the prefectural and national governments have been made within a very limited time and space, and information regarding the issue has not been publicized sufficiently, leading to a very low level of public understanding of the issues at stake. As Governor Onaga has mentioned on numerous occasions, the entire struggle is taking place in an arena where the Japanese government is essentially appealing to itself, making the outcome of the trial a foregone conclusion. There is a good reason the majority of media reports, including reports by expert analysts, predict that the national government will be victorious in its battle against Okinawa.

In order to avoid merely fighting a legal battle in an arena where the rules overwhelmingly privilege the national government, and in order to represent Okinawa's case to the people of Japan and the world, the Okinawa prefectural government must look beyond the constraints of these rules and create a new forum for debate. One option would be to take the initiative of bringing a civil action against the government and seeking an injunction against the base construction.6 Another option would be to join in the struggle of a group of residents currently acting as plaintiffs in a case demanding that the Henoko land reclamation permit be voided. (This case was brought against then-governor Nakaima on January 15, 2014. Ironically, when Onaga became governor, he automatically became the defendant in this case.) Either of these methods would prevent the government from being able to come out on top by dealing with the issue solely within the realm of administrative procedure. Allowing the assertions by each party, be they competing assertions between the prefectural and national governments, or competing assertions among local residents, the prefecture, and the national government, to be heard far and wide will have the important effect of causing public interest in the issue to grow. A surge of public support will likely play a powerful role in overcoming the Japanese government's claim that a military base in Henoko is indispensable for both the U.S. and Japan, and that the necessity and legitimacy of a having a military base there overrides the importance of conserving the dugong's habitat.

Postscript:

Upon approving the Henoko land reclamation, former Okinawa governor Nakaima called for the Japanese government (specifically, the Okinawa Defense Bureau) to implement effective measures in response to the concerns of environmental damage described in this article. The Japanese government responded by establishing an Environmental Oversight Committee and appointing to it thirteen academics from such universities as Kyoto University (marine biology), the University of Tokyo (coral reef sciences), and Yokohama National University (marine environment studies). The government then hired a consulting firm called "Idea" under a private contract to conduct the committee meetings, paying them 24.62 million yen for their services. "Idea" had previously received more than 3.3 billion yen from the Ministry of Defense to conduct research on dugongs and coral, and it is said that the company appoints retired defense ministry officials to responsible positions. On October 19 and 20, 2015, the Asahi Shimbun published a shocking exposé revealing that the academics on the

Environmental Oversight Committee had received as much as 8 million yen in funds from "Idea" and from general contractors involved in the planned construction. This huge scandal, terribly close to a case of bribery and corruption, revealed public servants receiving unjustified compensation to conduct their public duties. The vice-chairman of the Committee, a professor emeritus at the University of the Ryukyus, has commented that "The committee members from mainland Japan have never conducted a single survey on Okinawa. Their true intent is probably to make sure the base is built."

The last remaining element of validity to Governor Nakaima's approval of the Henoko land reclamation-the assurance of environmental oversight-collapsed. After this story came to light, the Ministry of Land, Infrastructure, Transport and Tourism lost its final justification for voiding or suspending execution of Governor Onaga's nullification of the land reclamation permit.

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Author: Igarashi Takayoshi is a lawyer and professor emeritus of law at Hosei University. He formerly worked as an advisor to the Japanese government. He is the author of numerous publications on environmental, ecological, and public works issues. This article was originally published in Japanese in the December 2015 issue of the Iwanami monthly journal, Sekai, and is translated and reproduced here by permission of the editors of Sekai.

Translator: Sandi Aritza is a graduate student at the Middlebury Institute of International Studies at Monterey and a freelance translator and interpreter. She has translated for Japan Focus and the Ryukyu Shimpo, and has interpreted for delegations from Okinawa visiting the United States to protest the Henoko base construction.

Sandi Aritza is a translator and interpreter living in Chiba, Japan.

Notes

[1] Turning a body of water into reclaimed land signifies nationalization of that land, but the Japanese government intends to relinquish that national property to an extraterritorial state (the U.S. military) which is beyond the reach of the Japanese state.
[2] There are numerous methods by which this battle could be brought into the legal arena. The Japanese government could claim that the Okinawa governor's approval of the land reclamation constitutes a legally prescribed transaction entrusted to a local government entity as defined by the Local Autonomy Law. The government could then issue an order to the Okinawa governor commanding him to allow the Henoko construction to continue; if he refused to comply, the government could then order the high court to execute the approval. On the other hand, the Okinawa prefectural government could bring a protest suit against the Japanese government arguing that the government lacks the necessary qualifications to make a formal objection or request a suspension of execution in the first place. As an alternative to

bringing the issue to the courts, a review of the issue could be conducted by the Central and Local Government Dispute Management Council. Translator's note: On November 2, 2015, the Okinawa prefectural government filed for a review of the government's action with the Committee for Settling National-Local Disputes. However, after meeting on December 24-25, the Committee determined that under the Local Autonomy Law, the matter was not subject to its review. On December 18, 2015, a majority in the Okinawa Prefectural Assembly voted to file a protest suit seeking withdrawal of the MLITT's decision to suspend execution of Governor Onaga's nullification of the land reclamation permit on the grounds that the MLITT's decision was illegal. The Prefectural Assembly simultaneously passed a budget of around 13 million yen for expenses related to the suit, which will be brought to the Naha District Court in late 2015. On December 24, 2015, a group of 21 residents living near Henoko filed suit in the Naha District Court, seeking for the MLITT's suspension of execution to be voided temporarily. As suggested by Igarashi, the residents argued that the Okinawa Defense Bureau is not a "private entity" and therefore lacks the qualifications needed to request a suspension of execution from the MLITT under the Administrative Appeal Law.

[3] The reasons provided by the Okinawa prefectural government when it announced its nullification of the land reclamation permit on October 13 differ slightly from the perspective contained in the experts' commission's report.

[4] After the Abe administration came to power, this move toward policy reforms affecting public works projects was overturned via a "National Resilience Policy" focused on disaster prevention.

[5] The standard view among scholars, supported by judicial precedents, is that the Okinawa prefectural Department of Civil Engineering and Construction's failure to respond properly to the concerns posed by the governor and the prefectural Department of Environmental and Community Affairs constitutes a violation of procedure required to reclaim a public body of water, and thus does not constitute an act of discretion and is subject to judiciary review.