Asian Journal of Law and Society, 6 (2019), pp. 395–412
doi:10.1017/als.2020.7

New Challenge of Legal Studies in Twenty-First-Century Asia: Towards a Sustainable Society

Yoshiki KURUMISAWA*
Waseda University

Abstract
Since the 1990s, the Japanese social structure has been changing mainly due to economic globalization. The gap between rich and poor has been widened. The economic policy of the government that tries to introduce the market-competition principle into all sectors in order to revive economic growth is promoting such social change. It seems illusionary that either activating market competition or the reconstruction of the welfare state could revive economic growth. Instead, we should consider a transformation from an industrial to a sustainable society as an inevitable course of social development in the twenty-first century. In 2015, the Japanese Association of the Sociology of Law (JASL) held a symposium entitled "Law and Legal Science in the Transformation to Sustainable Society" during its annual meeting. The main issue was which role legal studies can/must play in such a transformation. I think there are two different approaches. One is to establish the "sustainable principle" as a legal principle like the "precautionary principle" in environmental law. The other approach is to reconsider and reconstruct fundamental legal categories of modern law, which have supported industrial society as its legal infrastructure. This approach will be the subject of the paper. I will deal with the case of property rights to agricultural land.

Keywords: sustainability, property rights, agricultural-land law, legal assistance, universality of law and context, commercialization of land, cultivators-based principle

1. PERSPECTIVE

One of the most important issues that the Japanese Association of the Sociology of Law (JASL) has long discussed is how to explain a Japanese reluctance to sue. As is well known, Takeyoshi Kawashima considered the lack of modern legal consciousness to be an important source of this reluctance. According to him, as Japanese capitalism grew, people would go to court more frequently in order to settle the conflict.[1] However, neither civil nor administrative litigation has shown an increase today.

* Professor at Faculty of Law, Waseda University in Tokyo, Japan. Correspondence to Yoshiki Kurumisawa, Faculty of Law, Waseda University 1-6-1, Nishiwaseda, Shinjuku-Ku, Tokyo, 169-8050, Japan. E-mail address: kurumi@waseda.jp.

1. Kawashima (1967).

So-called cost-and-benefit calculation theory gave the other explanation. Its analysis found that, if the cost of suing was high and the benefit small, people would avoid litigation not only in Japan, but also in the US. According to this theory, only the legal infrastructure, not a cultural peculiarity or consciousness, determines people's behaviour.

On the basis of this theory, many JASL researchers have been engaged in analyzing the judicial system in Japan and proposed concrete judicial reforms.

Another theory has paid attention to the special character of Japanese enterprise management (lifetime employment, seniority system, and house union) through which employees had been well integrated into the company in spite of hard conditions of employment. The company appears for them as an employee community in which they have an equal chance to be on a future board of directors. They identify themselves as members of their company. For them, the normative order is only the order in their company, not a universal national law. It is difficult for them to sue their company even if it violates their rights. The company exercises a great influence as well on the private and civil life of the employees. They exercise self-restraint in their political activity considering the position of their company. Citizens independent of the company do not exist. Society consists not of citizens, but of companies, which must not be called civil society, but company society. It is true that, as Kawashima thought, if a society were capitalized, it would be generally legalized. However, Japan has not been legalized as deeply as European countries in spite of being highly capitalized, because capitalization here has been accompanied by the company society, which inhibits the legalization of our society.[2]

Since the 1990s, this social structure has been changing mainly due to economic globalization. It would be difficult for companies to maintain the Japanese management system, like lifetime employment, the seniority system, etc. Many companies have moved their plants to countries where they can save production costs. A lot of work in Japan is now temporary or part-time. The middle class was divided into a small number of upper-class and a large number of lower-class persons. The gap between rich and poor has been widened. The economic policy of the government, which tries to introduce the market-competition principle into all sectors in order to revive economic growth, is promoting such social change. The thoroughgoing policy of commercialization in sectors like education, health care, or agriculture would destroy social solidarity.

It seems illusionary that either activating market competition or the reconstruction of the welfare state could revive economic growth. Instead, we should consider a transformation from an industrial to a sustainable society as an inevitable course of social development in the twenty-first century.

It is an illusion as well to think that this transformation can be realized only within the nation-state. It is, of course, a global issue; however, it would be realistic to approach it step by step, namely to start the trial in Asia.

In 2015, the JASL held a symposium entitled "Law and Legal Science in the Transformation to Sustainable Society" in its annual meeting.[3]

2. Hirowatari (1997), pp. 143–76.

3. See *Journal of Japanese Sociology of Law* (2015), Volume 81.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

The great transformation from industrial to sustainable society is one of the most important challenges today. "Sustainability" is a key concept to constitute the society of the twenty-first century. This concept, which should combine and adjust different fields, like the economy, society, and environment, is, however, so ambiguous and comprehensive that it is often criticized as a meaningless word. In the symposium, we learned its precise content as defined by an economist and examined whether/how we can use it as a legal category. We consider the new content of property rights that can promote sustainable development, not only in the nation-state, but also in Asia. We will try to get some hints about the concrete legal policies for transformation from some examples of reconstruction in stricken areas. The modern legal system, which has operated as an infrastructure of industrial society, must adapt itself to the transformation.

2. PROPERTY RIGHTS RECONSIDERED

2.1 The Concept of Sustainability

According to the Flagship Report 2011 of the German Advisory Council on Global Change,[4] human beings experienced three great transformations; the first was the wide-scale transition from a lifestyle of hunting and gathering to that of agriculture and settlement; the second was the transition from agricultural to industrial society; and we are now confronted with the third great transformation: from industrial to sustainable society.

While both former transformations had progressed for a long period as natural processes, the third one could be realized only by intentional human activities, not through a natural process automatically. It would be a trial-and-error process that should be carried out consciously on a precautionary and provisional basis, not as an immediate reaction to actual issues that can be experienced directly.

The concept of sustainability is an ambiguous, equivocal one to which any interpretation can be given. So we need a precise concept. However, that is not an aim of this paper, except to note that we understand the concept of sustainability to be a principle with which a whole society should be re-constituted through adjusting three structural elements of society, namely welfare, ecology, and economy, under low economic growth. The sustainable society is an alternative to the welfare state (big government) and neoliberal market society (small government), both of which have aimed their policy towards illusionary economic growth.[5]

2.2 Two Different Approaches

Now we must consider which role legal studies can/must play in the transformation. I think there are two different approaches.

One is to establish the "sustainable principle" as a legal principle like the "precautionary principle" or "polluter pays principle" in environmental law.

4. German Advisory Council on Global Change (2011).
5. Hiroi (2015).

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

Some European treaties such as the Treaty of the European Union[6] or Charter of Fundamental Rights of the European Union[7] have introduced the principle of sustainability, which has a direct binding force on the EU organizations and an indirect one on the Member States.

The other approach is to reconsider and reconstruct fundamental legal categories of modern law, for example, legal personhood, contract, property rights, etc., which have supported industrial society as its legal infrastructure. This approach will be the subject of the paper. I will deal with the case of property rights to (agricultural) land.

2.3 Abstract Character of Property Rights

The concept of private-property rights in modern law is constructed as an idealistic, abstract, absolute, and exclusive right of a subject to a commodity. According to capitalism, most objects of private property are commodity and capital. A right to a commodity means in the strict sense the right to an abstract exchange value inherent in a commodity, which we can recognize not with the five senses, but only conceptually. Therefore, the abstract concept of a property right to a commodity reflects the abstract character of exchange value. The property right to land as well, since it has been exchanged as a commodity, has acquired an abstract character. An owner of land can use it not necessarily directly by himself, but lease, dispose of, or mortgage it. In order to get high interest, a person may buy land on speculation. The economic and financial crisis in economic globalization is caused by financial trading (high-frequency trading (HFT)), originating in the abstract property right to capital, which is isolated from the real economy.

A private-property right to land has functioned to cut off the concrete relationship between human beings and land (disposal right), which was the inevitable condition of abolishing the landlord system in feudal society and establishing a market system in which land can be freely exchanged. Property rights express an abstract relationship between subject (person) and object (land). They do not control the concrete relationship between them according to a certain context and space in which a person is situated and land is located. The abstract concept of property rights to land should be re-examined and reconstructed in the transformation towards a sustainable society.

2.4 How Could the Property Rights Be Reconstructed?

The question here is how the property rights could be reconstructed. Constitutions of liberal states protect property rights as fundamental human rights.[8] Therefore, an expropriation can

6. Treaty of the European Union, Art. 3, Clause 3: "The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of environmental quality" (emphasis added).

7. Charter of Fundamental Rights of the European Union, Art. 37: "A high level of environmental protection and the improvement of environmental quality must be integrated into the policies of the Union and ensured in accordance with the *principle of sustainable development*" (emphasis added).

8. For example, the German Constitution (Basic Law for the Federal Republic of Germany) Art. 14 [Property—Inheritance—Expropriation] states: "(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws." The Constitution of Japan regulates property rights in the same way in Art. 29: "The right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon just compensation therefor."

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

be carried out only for the purpose of public welfare against fair compensation. On the other hand, the *concrete* content of property rights is to be decided by the *legislator*, who can change their content according to the changed economic order. Through legislation, we can create new property rights on each object adapting itself to the sustainable society. I would like to give two examples in the following section. The first example is the change of property rights to energy in Germany. The second one is the change of the content of property rights to agricultural land in Japan.

2.5 Change of Property Rights to Energy in Germany

The German government has been implementing an energy shift from nuclear to renewable energy with a transition period of about 20 years since 2000. After this period, energy companies must shut down production according to the revised Nuclear Power Act, although they had been permitted to operate nuclear-power plants without a term. Is the ban on nuclear-power generation a compulsory expropriation? If yes, the government should compensate operators for it according to the constitutional law. It would be an enormous amount of money. Some constitutional scholars insist that it must be a compulsory expropriation because the state deprives plant owners of a specific individual legal status to operate nuclear-power plants.[9] For other scholars,[10] it is, on the contrary, not a deprivation of an individual private right, but a new prescription of the content of property rights by the revised act and a renewal of the content of property rights to nuclear production in general. The old content of property was abolished with a certain period of grace in which the investment in the nuclear plant and equipment can be depreciated, so as not to be compensated.

The legislator has established the new property right to producing energy from renewable materials. I think we can see here a new concrete concept of property rights on energy products conforming itself to the sustainable society.

2.6 Change of the Content of Property Rights on Agricultural Land in Japan

At the end of the nineteenth century, Japan introduced modern laws from European countries and codified private and public laws, in order to revise unequal treaties with the great powers and avoid being colonized by these. It was hard work for the Japanese to understand the content of the received law and translate it into Japanese, because there were no social and economic conditions in Japan at that time to generate the modern legal system in European countries, and there had been no precisely equivalent words in Japanese for European legal terms. It was the beginning of Japanese comparative law. Because scholars who were engaged in the codification paid little attention to indigenous customary law, friction between law in books and law in action was present from the beginning. This friction was one of the factors behind the birth of the sociology of law in Japan. Japanese lawyers have developed received law in their own particular context for more than 100 years.

9. See di Fabio (1999); Ossenbühl (1999), p. 1.
10. See Koch (2000), p. 1529; Roller (1998); Denninger (2000).

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

2.6.1 The Landlord System before World War II in Japan[11]

In Japan, free transactions in agricultural land were fully allowed from the early years of the Meiji era onwards. The Meiji government lifted the ban on sales of land ownership and recognized the freedom of all classes of people to buy and sell agricultural land. Meanwhile, it also carried out reforms on land taxation; issued land certification (of land ownership) to the farmers, considering land taxpayers as land owners; and established the land-pricing system. Therefore, even though this obliged farmers to pay land tax, it was possible to make it more desirable for farmers to produce on the piece of land that became theirs. At about that time, the government had to issue a large number of banknotes to procure war supplies in order to suppress anti-governmental movements organized by some former middle-class warriors who became unhappy with government policies. For that reason, inflation occurred, and the price of rice skyrocketed. Many farmers made great profits. In the earlier part of the second decade of the Meiji rule, farming villages contributed to a dynamic economic situation. Ownership in the hands of farmers became a means to advance productivity as a form of *productive land ownership by farmers*. Productive ownership offers a foundation for farmers to become independent not only economically, but also spiritually. Modern European political-economic thought became a popular subject. The Movement for Civic Rights and Freedom was developed as a form of "Movement for Citizens' Learning *en masse*." The "Movement for Learning," based on the understanding that farmers might have the right to voice their concerns about the way tax monies were used in their capacity as taxpayers, was able to connect itself to political movements that demanded establishment of the Diet.

This positive situation lasted only for a short while. After suppressing the riots, the new government introduced radical deflationary measures in order to maintain its monetary policies. Prices for agricultural goods dropped accordingly. Moreover, national finances at that time were strongly based on land taxes. Heavy land taxes were imposed on landowners. Small and medium-scale farmers could not support themselves under heavy taxes and devaluation of agricultural produce. They had no choice but to mortgage their farms to merchants or large farm operators for loans. Many farmers could not repay their loans and had to transfer their ownership in the mortgaged farms to the lenders. They became tenant farmers who cultivated a piece of land that had been theirs and had to pay rent to the landlord. In this way, a class structure began to develop in the rural areas, consisting of landlords who accumulated ownership in farmland that they acquired through mortgages from tenant farmers who lost their land. A parasitic landlord system was established. It continued until the agricultural-land reforms at the end of World War II, therefore, took place as the system of modern land ownership was being established.

The landlord system was substantively different from the modern system of farm lease. The tenants had to pay an enormous amount of rent on more than half of the crops to the landlord. They were not rents comprehensible under a capitalist system, but more similar to those under the feudal regime. This landlord system that included personal domination over the tenants ought to be evaluated from the perspective of a pre-modern social relationship.

11. On the history of legal institution of agricultural land in Japan, see Kurumisawa (2016); Kurumisawa (2011a), pp. 239–49.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

Now the ownership by the landlord had become the title to exploit what tenant farmers produced.

The high rent destabilized the operation of tenant farmers. In order to reduce the number of consumers in a family and assist family finances, female family members in particular had to earn wages in the garment factories. Japanese capital, which centred on light industries, was then able to procure cheap labour from rural areas. In addition, instead of expanding agricultural production, landlords who managed to collect high rents from the tenants were eager to invest in securities issued by garment industries with the money they had remaining after paying land taxes. The state also spent extensively on capital growth with taxes it collected from the landlords. Japanese capitalism, therefore, began by relying on accumulated capital and cheap labour from the rural areas. The feudalist landlord system in rural areas was indispensable for the establishment phase of Japanese capitalism.

Japanese capitalism, which brought in excessive profits after World War I, shifted its focus from light industries to heavy chemical industries and moved into the phase of monopolistic capitalism. Capital at this stage no longer had to rely on the agricultural areas. The relative portion of land taxes within national finances decreased. Instead, the portion of income taxes increased. The social structure in the 1930s also enabled increased reproduction by the families of workers in the heavy chemical industries. They constituted a new workforce for recruitment. There was no longer the need to rely on migrant workers from the rural villages. The constitutive function of the landlord system in Japanese capitalism, therefore, decreased in significance. However, this landlord system persisted until the end of World War II.

2.6.2 New Property Rights on Agricultural Land: Agricultural Land Act 1952

Under the postwar American-occupation policies, agricultural-land reform was carried out to dismantle the landlord system that had been the hotbed of fascism. The government then bought the land back from the landlords at a price that was nothing more than forced seizure and redistributed it to the tenants at a price as good as a free gift. As a result, small-scale self-reliant farmers who owned less than one hectare of agricultural land emerged on a wide scale.

Farmers' products no longer belonged to the landlord, but to farmers themselves.

According to this change, the content of ownership of agricultural land had been converted from the landlords' right to exploit the products of farmers to the productive right of farmers.

In 1953, the Agricultural Land Act was adopted in order to stabilize the achievements of agricultural-land reforms and to prevent revival of the landlord system.

It was considered most appropriate for agricultural land to be owned by the cultivators themselves. Agricultural-land transactions were to be subject to administrative permission, and acquisition of rights (by ownership or lease) with regard to agricultural land was to be confined to farmers.

In light of Article 29 of the Constitution of Japan, we understand that the legislator abolished the old property right of the landlord and provided the new content of property right on agricultural land.

This law has then been revised several times and remains applicable today not only to retain its important role in securing the availability of agricultural land, but also to support sustainable agriculture.

3. COMPARATIVE SOCIOLOGY OF LAW FOR ASIAN REGIONAL LAW

As referred to above, the transformation from industrial to sustainable society cannot be realized in a nation-state. At least, we should approach it step by step, namely start the trial at a regional level, for us, in Asia.

Without a common Asian legal perspective like EU law, we could not have a view of the sustainable Asian society. At this stage, we should consider a new comparative legal methodology. Traditionally, we have used comparative law as a tool of reference when we codify our code or interpret codes. Now, in the transformation from industrial to sustainable society, we have had to develop a new method of comparative law to codify sustainable regional law through harmonizing and integrating laws in each Asian nation-state. The point at issue is the *universality and context of law*. This point has been discussed in the context of legal assistance for so-called transformation countries after the dissolution of the Soviet Union.

After the dissolution of the Soviet Union following the revolutions of Eastern Europe, many former Soviet satellite states decided to shift to a capitalist society, rather than maintain the socialist system. The path these states chose was to reconstruct society by introducing market relationships, thus becoming connected to the rest of the world. As a market system could not have been introduced without building a legal infrastructure, many former satellite states asked developing capitalist countries for assistance in building a legal system.

This description fits most Asian developing countries pressured by market economies to globalize. Japan as well has given legal advice to these countries based on its experience of transplanting a European legal system more than 100 years ago.

The possibility of transplanting law has been asked in the form of legal advice. The issue can be formulated as "universality and context of law," which is a great challenge for comparative law in the era of global market economies.

3.1 War of Advice to Transformation Countries and the Study of Legal Assistance as an Academic Subject[12]

Countries providing legal assistance are constantly exposed to the temptation of using such assistance as a tool to control the economy of the recipient country. That is the reason why, when taking part in assistance, scholars are compelled to concurrently pursue research on issues related to the fundamentals and theories of jurisprudence, which include such questions as the following: Can law be transplanted in the first place? Why is that justified? What is the best method of legal technical assistance?

12. Kurumisawa (2013); Kurumisawa (2010), pp. 313–6.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

A notable example is Professor Rolf Knieper, who led Germany's legal-assistance effort. He explored methodologies of legal technical assistance through dialogue with scholars of recipient countries, amid tense relationships with work around legal-system implementation.[13] Scholars' involvement in legal-assistance projects has led such assistance itself to be studied as an academic subject, furthering analyses of the universal validity of law across societal and national boundaries, and encouraging the study of the context unique to the society of each recipient country. One can say that today's comparative-law scholars confront theoretical issues posed by legal assistance that is a hands-on effort.

3.2 Rationale Justifying the Transplant and Universal Validity of Law

Knieper stands on the recognition that legal universalism, which advocates that law demands its universal validity, is neither an axiom nor a principle with timeless applicability, but a theory that is valid only in a particular phase of world history—that is, present-day society in which capital and labour are invested to produce goods that are traded at markets in exchange for money. A society like this has a structure in which private domains are created through the legitimate pursuit of personal interests and supplemented by the public and national domains. In such a society, various principles demand universal validity—including private ownership, the protection of freedom of contract, free business activities, and obligation to pay taxes, as well as the principles corresponding to them, such as the nation's obligation to build infrastructure, the government authority's obligation to comply with the rule of law, and the protection of the socially vulnerable—and such universal validity justifies the provision of legal assistance across national boundaries. Accordingly, the purpose of providing legal assistance to a post-regime-change country is not to develop the underdeveloped society, but to help the country fulfil the general duty of developing a legal system in a real-world environment where a society cannot be sustained unless integrated into the global economy through goods and capital transactions. This is predicated on two conditions, one being the existence of a market-economy system and the other being the need for a legal system in order to maintain markets. In other words, law represents a social relationship that mediates economic relationships of producing and trading goods (i.e. markets) and, as such, is valid for social relationships in general in a market economy. It can be confirmed that herein lies the rationale justifying the universal validity of law, that from here derives the transplantability of law, and that herein exists the rationale justifying legal assistance.

3.3 Need for and Methods of Understanding Context

On the other hand, a recipient country's society does not exist as a *tabula rasa* or a blank slate on which anything can be drawn; it exists as a society with its own history and unique context. In order for legal assistance to be successful, it is essential to clarify such context and examine over a long period of time the applicability of law to that context. The key is

13. Knieper (2004); Knieper (2006).

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

how to reconcile law's demand for universal validity with the context of each country. However, how should we understand such context?

A precondition of transplanting law is to link a society to which law is transplanted with the global economy that is based on market mechanisms. Therefore, what is crucial for understanding the society's context is to know what resistance the recipient society may show and what change it may undergo when introducing market relationships and becoming connected to the global market. It is important to pay attention to these points when working to grasp the context of the society.

When examining the best way to build market mechanisms into a society, I think, there are at least two points to consider. The first is how to combine the allocation of social wealth through market relationships with distribution through non-market relationships, such as the state or communities. The second is how to arrange the individual components of a market—that is, a place in which transactions are conducted to satisfy demand (buying for use or consumption) and a place in which transactions are conducted to increase value (buying for selling). These two points are likely to be dictated by the society's context, and providing legal assistance without regard to them will probably cause frictions. Even in a society in which the majority of social wealth is allocated in the form of articles of commerce, it is not the case that all the social wealth is commercialized. Each society more or less has its own mechanism by which some categories of wealth are allocated through non-market social relationships. A factor instrumental in considering the context of a particular society is what categories of wealth have been allocated through non-market relationships or have been subject to restrictions on commercialization. When it is based on the premise that law represents the very social relationship mediating markets, one can also say that forcibly applying law to non-market social relationships will cause frictions.

In the following, I will take the case of land law, especially agricultural-land law, to consider this issue.

3.4 Commercialization of Land as a Case Study

3.4.1 Nations' Responses to the Commercialization of Land

Originally, articles of commerce were produced by human labour. Land, to which this definition does not apply, has been commercialized through processes unique to each society and nation. Professor Takeshi Mizubayashi, a Japanese legal-history scholar, defines a historical phase in which land itself becomes an article of commerce as a "society with a land market economy"—a society with a unique socioeconomic structure that is no longer feudalism but is yet to be capitalism.[14]

In China, during the Qin and Han Dynasties, communities were dissolved and the national system was changed from a feudal to provincial-county one, while land became traded as an article of commerce. These developments triggered the annexation of land and the dissolution of the peasantry. However, under the national system of a "society with a land market," China adopted the policy of banning the free trade of land to protect small farmers and prevent the peasantry from breaking up by prohibiting excessive ownership of land. This policy was clearly aimed at building an equitable society on a national scale.

14. Mizubayashi (2006).

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

In France, the trend of commercializing land caused each region to codify customary law (law on the recovery of real estate by relatives) in opposition to the trend. At the same time, going against that movement, the theory of contract law was formed within the citizen-law system, denying the law on the recovery of real estate by relatives, accepting the commercialization of land, but denying the uncontrolled accumulation of land inconsistent with the principle of justice.

Unlike China, which attempted to ban the commercialization of land, and France, where commercialization was accepted but purchasing land for selling was legally controlled, Japan's shift from communities to a "society with a land market" did not occur spontaneously from the bottom, but progressed in an extremely short period of time under pressure by Western powers. For a national system corresponding to this shift, a modern system and abstract concept of absolute property right was introduced from abroad, which led to the denial of the real-estate-redemption system, the denial of custom, and the approval of commercial land trading. As a result, the title to farmland was transferred from the hands of cultivators to the landlord. A parasitic landlord system was established, under which the exploitation of tenant farmers managing farmland became the norm.

3.4.2 Universal Validity and Context in the Agricultural-Land Law

In many recipient countries, the main source of social wealth is land (in particular, farmland). Land law is, therefore, among the legal fields of greatest interest to recipient countries. They have a strong tendency to develop the land-law system based on the recognition that the way to derive the greatest economic value from land is to immediately privatize state- or community-owned land and allow it to be freely traded in markets. Insofar as recipient countries regard land as an investment option, legal technical assistance will be provided to realize the deregulation and liberalization of land transactions. However, Japan's experience as a country to which law was transplanted serves as an eloquent reminder of the consequences that such assistance will bring.

3.4.3 Cultivators-Based Principle (Selbstbewirtschafterprinzip)

Our experience shows that, as for farmland, it is necessary to start by recognizing that holders of the right to farmland should be the people who have resided and engaged directly in farming there. Generally, listed corporations cannot be allowed to become right-holders of agricultural land. The Japanese Agricultural Land Act adopts the legal principle that only natural persons who are not only managers, but also directly engaged in agricultural cultivation or conceptually similar legal corporations working in agricultural production can become right-holders of agricultural land. This is called the "cultivators-based principle." The Farmers' Land Act (*Bäuerliches Bodenrecht*) in Switzerland and Agricultural Land Transaction Laws (*Grundstückverkehrsgesetze*) in Austria have a similar principle (*Selbstbewirtschafterprinzip*). These principles should have a universal validity, because they would provide an inevitable condition for sustainable agriculture.

Certainly, when the Japanese Agricultural Land Act was first drafted in 1952, the legislative intent behind this principle was to prevent the return of the landlords who used to live parasitically on tenant farmers or the real producers. The fruits of labour were to belong to those who actually cultivated the land. The criticism that economic groups make today is

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

that to apply such outdated provisions when the danger of revival of parasitic landlords has already passed is to create a barrier against engagement in agriculture and blocks effective uses of agricultural land. They argue for abolishment of the Agricultural Land Act.

However, it is undeniable that the existence of agricultural land has been secured thanks to these provisions of the Agricultural Land Act that exclude non-agricultural operators by requiring strict factual review of whether or not those who acquired agricultural land actually engage themselves in agricultural activities. Since Japan does not have an integrated and powerful territorial planning and construction law system as exists in European countries, the Agricultural Land Act is taking on the task of saving agricultural land from development pressures. This is by no means an outdated function.

Nowadays, the need for flood prevention; the development of water resources; and the preservation of the natural environment, traditional landscapes, and cultures, etc. is known in general as resulting from agricultural-production activities in rural areas (multiple functions of agriculture). The precondition for the agricultural sector to deliver its multiple functions sufficiently and appropriately in the future requires that conventional actors in agricultural production permanently reside in the local area, continue their production work, and unceasingly maintain the functions of the collectivity.

The Agricultural Land Act has contributed to the uninterrupted continuity of the relationship formed over the years between humans, on the one hand, who reside permanently in the local areas to carry out agricultural activities, and, on the other, the agricultural land as well as its surrounding natural resources (such as water and community properties, etc.). This contribution will continue into the future. We can, therefore, reconfirm the significance of the cultivator-based principle of the Agricultural Land Act in the current context.

Moreover, by making ownership and lease rights an intermediary in the relationship between the land as an object of labour and the farmers, the cultivator-based principle helps ensure a continuous relationship between the farmers and the land, and at the same time demands unity between the main operators and their actual engagement in agricultural activities. Farmers not only engage themselves in agricultural activities, but also take on responsibility for operative decision-making, by mobilizing different elements together, such as their own sensibility, feeling, and experiences in the changing climate, and the traditional techniques that they used in working the land. Under the cultivator-based principle, the three elements—land ownership, self-engagement in agricultural activities, and responsibility for management—are formed into one body, which gives birth to the inherent love for land and nurtures particularities in the agricultural products. This will lead to non-exploitative use of land as a means of production.

In contrast, listed corporations are typical forms of entities characterized by a clear separation among the shareholders, the managers, and the workers, or, in other words, the separation of ownership, management, and labour. Corporations having offices in Tokyo try their best to acquire farmland in rural areas and employ local farmers as workers in order to develop agricultural operations. In this case, farmers are no longer managers. They are only expected to work in conformity with operative instructions sent from the headquarters in Tokyo to local offices through e-mails or phone calls. They are no longer concerned with, or responsible for, the kind of products or the resulting impact on the soil caused by operations done in conformity with these instructions. The overall unity that

existed between them and the land in the former livelihood is lost. The relationship becomes incomplete, in a way similar to that between a wage earner and his/her workplace.

3.4.4 Case Study—Vietnam: Land Law in a Socialist Market Economy[15]

Aiming to build market socialism, Vietnam allocated land to farm households by introducing a contract production system, under the framework of advanced co-operatives that were collective farms. This policy was designed to promote a shift from a cooperative-based agricultural-production system to a family-based agricultural-management system, backed by farmers' dynamism and willingness to engage in production at farms managed personally, not collectively. In other words, the breakup of collective farms was triggered directly by farmers' earnest desire to engage in physical labour and management at the same time. On the other hand, when collective farms were broken up, the land was divided extremely equally, thanks to the communal principle that is traditional to small villages that had not been completely wiped out even after the formation of socialist collectives. This shows that two trends actually coexisted in the nation's agricultural society, one being the personalization of management, the other being equal allocation of land in accordance with the communal principle. Against this backdrop, the nation's first land law was enacted, recognizing land as a means of production. The 1987 Land Law permitted exclusive use of farmland as a means of production and disallowed the trading of farmland. Then, the 1993 Land Law permitted land-use rights to be traded within the limited possession of three hectares. The land law up to that stage can be said to have been predicated on a farmland market in which farmers participated on the basis of a small-farmer system. In contrast, developments leading to the 2003 Land Law are seen as having crossed the line of the universal-validity principle regarding farmland transactions, not only by enabling farmland to be accumulated via rental transactions over the limit of possession of land-use rights and thereby accelerating the dissolution of the peasantry, but also by allowing non-farmer business groups to acquire land-use rights. One can say that these measures have been instituted in view of the land market leading to the breakup of the small-farmer system.

3.4.5 Case Study—Mongolia: Land Law in Transformation from Socialism to Capitalism[16]

In Mongolia, whose territory was once used almost entirely for nomadic herding, land was not anybody's property, but a common asset of which anyone could use any part. However, the nation's shift to a market economy called for non-pastureland to be used for economic purposes in order to help the nation's economic development. This was because it was thought there were no resources other than land that were able to produce economic benefits. Then, to enable land to be freely traded in markets, the government started enacting laws promoting private ownership of land. The first was the Law on Land promulgated in 1994. This law stipulated, first of all, that all the land be owned by the nation, and then that the nation grant it to citizens. The 1994 law, however, did not go so far as to immediately grant land ownership to citizens; instead, it established a scheme under which the nation concluded contracts with private citizens that allowed them to use land for a certain period

15. Kurumisawa (2007), pp. 97–141.
16. Kurumisawa (2011b), p. 36.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

of time (maximum of 60 years) depending on their purposes. The right granted there was provided for as a possessory right (*ezemshikh*), which was different from ownership. That way, the nation aimed to create an environment where citizens were able to make profits from land, before granting land ownership to citizens by enacting a law permitting private ownership of land (which was realized in 2002).

During the socialist period, farmland belonged to large state-run farms that were managed on a district (*soum*) basis. Privatization of those state-run farms, which covered grain and vegetable production and livestock-raising, began in 1991 by way of dividing the production means other than land in the following manner: state-owned property, including state-run farms, was distributed to citizens in the form of vouchers; then citizens joined hands to establish a private company by combining their vouchers. This method was taken because, whereas vegetable production could have been managed by family farms, wheat production needed a larger farming scale, requiring the production facilities and machinery corresponding to that scale, and it was not feasible to divide such property on a family basis. It was to those private companies that land-possessory rights under the Law on Land of 1994 were granted according to their size. As these rights were not granted to individual farmers, they staged protests with tractors, demanding that the government reallocate farmland-possessory rights. In 2003, the government set a 3,000-hectare upper limit on the possessory rights obtainable for land to be used for grain and feedstuff production. As a result, companies possessing land in excess of 3,000 hectares were obligated to return to the government their possessions exceeding the limit and the returned land-possessory rights were granted *gratis*, preferentially to citizens engaging in farming for five years or longer. The area to be granted was determined to be less than 100 hectares for grain production and less than five hectares for potatoes and other vegetables. In 2008, however, the government reversed its 2003 decision and raised the upper limit on possessory rights obtainable. For land to be used for grain and feedstuff production, the upper limit was raised from 3,000 hectares to 20,000 hectares and, for land to be used for producing potatoes, vegetables, and other plants, the upper limit was raised from 50 hectares to 200 hectares. This decision was made against the backdrop of the emerging situation in which mining and other non-agricultural companies invested in the agriculture business and started operating large-scale farms with tens of thousands of hectares of land.

The Law on Mongolian Citizens Ownership of Land of 2002 introduced private ownership of farmland, which was granted for a consideration, preferentially to those having farmland-possessory rights. In reality, however, private ownership of farmland has not been realized due to extremely high prices. Although granting private ownership of farmland *gratis* has also been proposed, turning it into reality will require introducing regulations on farmland transactions at the same time. Such regulations will be needed to ensure that farmland will be owned by local farmers who actually engage in farming full-time and bear responsibility for farm management. On the other hand, as possessory rights are non-transferable, they can be regarded as constituting a legal framework that helps stabilize relationships between farmers and farmland.

While managing grain production in Mongolia does not suit family farms, management through co-operation among residents can be said to accord pursuant to the cultivator principle that has universal validity. Therefore, priority should be given to increasing and supporting medium-sized farms managed by local residents, as opposed to non-agricultural entities' mega-farms where management and labour are separated and people working there live

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

somewhere else. In the land-law field, it is important to provide technical assistance from that perspective.

Under the Constitution, pastureland can be neither possessed nor owned. It is a space open and available to any herder. Nevertheless, the national Parliament has recently been discussing the draft Pastureland Law, which is designed to introduce possessory rights to pastureland (especially in suburban areas) and promote settled herding. This movement has been triggered by multiple developments. The first is changing natural conditions under which decreased rainfall has led to deterioration in grass growth. This, in turn, has caused the trend of herders moving to and concentrating in areas with better conditions. Furthermore, with the introduction of a market economy, social-infrastructure-development projects have focused on capital and other large cities, causing herders to move to the central area that offers better access to markets. These trends have resulted in an imbalance between the area of meadows and the number of farm animals raised there, creating a vicious cycle by which grass growth has been further hampered. To address the situation, pilot projects have been undertaken by the Millennium Challenge Corporation and other foreign-aid bodies, aimed at ensuring the efficient, rational, and sustainable use of grass, and encouraging a shift from inefficient nomadic herding to settled herding with higher productivity, by setting aside areas in pastureland that are exclusively used and managed by particular groups of herders. The draft Pastureland Law is to promote such strategies by establishing a legal framework. Some members of Parliament representing provinces (*aimags*) with unfavourable conditions, however, are opposing the draft law. We need to carefully watch how this matter will progress.

For herding in an arid or semi-arid region like Mongolia, the scope of movement is not limited to a certain area, but affected by rainfall as well as natural disasters including snow damage and drought. A pattern of movement is neither fixed nor clear, which inevitably makes boundaries of resource use unclear too. Groups formed by herders are equally varying, multilayered, fluid, and changing. On the basis of such conditions, over a long period of time, herders have developed ethics for resource use, including the flexible use of resources and reciprocity (helping each other at times of difficulty), along with social norms dictating pastureland use and its co-ordination. In light of such traditional norms gradually losing their effectiveness these days, it has been proposed to change the form of nomadic herding itself. The issue here, in other words, whether nomadic herding should be extinct or not, is nothing less than a fundamental question about civilization.[17] Even the cultivator principle that has universal validity cannot apply to pastureland, as it does not have the historical context of land ownership.

3.4.6 Case Study—Japan: Inclination Towards Abolishing the Agricultural Land Act

In Japan, arguments for the development of efficient and competitive entrepreneurial agricultural operations to cope with economic globalization are gaining in importance day by day. Amendments to the Agricultural Land Act, which originally prohibited agricultural-land acquisition by enterprises, have been submitted to the Diet for debate.

17. Tanaka (2009), p. 54.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

In June 2009, the Japanese government launched a legal-amendment project to liberalize land lease in response to pressures from economic groups and demands by the neoliberal political forces and proposed amendments. The Bill was passed in the Diet. The revision stipulates that everybody can lease agricultural land. This gives rise to concern that entities in charge of agricultural production will shift from local farmers to enterprises with overwhelming capital resources. Alternatively, there is a risk that the system of agricultural-land management by farmers' groups will collapse as a result.

The Japanese government is now forced to renounce its food sovereignty and go in the opposite direction from realizing self-sufficiency in foods and sustainable agriculture by participating in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which provides for full trade liberalization with no exceptions as a condition of participation. If the Japanese government would decide to abolish a tariff on rice, homestead farmers would become extinct and the rate of self-sufficiency in food would fall below 14%, which is a result of a test calculation announced by the Ministry of Agriculture, Forestry and Fisheries.

The government explained that this decline in food self-sufficiency might be avoided by improvement of agricultural structure, in other words, enlargement of a scale of management. For example, if a large company with competitive cost and large-scale agricultural management could enjoy an economy of scale, the rate of self-sufficiency would rise.

The Agricultural Land Act prohibits a juridical person in general from purchasing agricultural land in order to keep it in the hands of homestead family farmers. This Act would be abolished, because the provision would be a serious obstacle to the intention of the government. Homestead family farmers will vanish from the Japanese countryside together with the traditional idyllic landscape. What will remain there?

4. CONCLUSION

Legal technical assistance that is a hands-on effort calls for scholars of legal theories to take on the challenge of searching for the legal principles that should be universally valid across national boundaries and of analyzing each country's society and its historical context. This theoretical consideration is certainly useful not only for legal assistance, but also for harmonizing the legal systems in Asian countries and integrating them into the Asian regional-law system. What is required of comparative-law scholars is to go beyond studying and comparing each country's substantive law and to employ a method for the sociology of comparative law, whereby relationships between law and society as a whole are compared on a country-by-country basis.

The case-study on reform of agricultural-land laws has against the pressures of a globalized economy highlighted by the need to test some of those universally acclaimed principles. In this respect, the globalized economy, which demands free trade as a universally valid principle, compels the nation-state to abolish its locality, which regulates the commodification of agricultural land. My position is that we can realize sustainable agriculture only by protecting the existence of homestead farmers through maintaining the regulation of agricultural-land transportation and establishing the nation-state's food sovereignty.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

If agriculture is evaluated only on the basis of it being a means of producing cheap agricultural goods, the multiple functions of family-based agricultural operators would be left out of sight. This would cause serious trouble. The way of setting up an agricultural-land regime that meets the demand of contemporary society for economic sustainability should be to emphasize the retention of the existing Agricultural Land Act in Japan, which confers acquisition of rights over farm land only to those farmers who are directly engaged in agricultural cultivation. Formulating law at the transnational level, we should not ignore the legal developments occurring at the level of each of the respective recipient nation-states. A comparative-law-and-society approach can accommodate and promote such ownership over sustainability.

REFERENCES

Denninger, Erhard (2000) *Verfassungsrechtliche Fragen des Ausstiegs aus der Nutzung der Kernenergie zur Stromerzeugung [Constitutional Issues from Stopping the Use of Nuclear Energy towards Generating Electricity]*, Baden-Baden: Nomos.

di Fabio, Udo (1999) *Der Ausstieg aus der wirtschaftlichen Nutzung der Kernenergie, Europarechtliche und verfassungsrechtliche Vorgaben [Getting off Economic Utilization of Nuclear Energy, European Legal and Constitutional Guideline]*, Koln: Heymanns Publisher.

German Advisory Council on Global Change (2011) "World in Transition—a Social Contract for Sustainability," https://www.wbgu.de/fileadmin/user_upload/wbgu.de/templates/dateien/veroeffentlichungen/hauptgutachten/jg2011/wbgu_jg2011_en.pdf (accessed 13 November 2015).

Hiroi, Yoshinori (2015) *Post Shihonshugi [Post Capitalism]*, Tokyo: Iwanami Shoten.

Hirowatari, Seigo (1997) "Nihon Shakai no Houka [Legalisation of Japanese Society]," in J. Aomi, ed., *Gendai no Hou (Contemporary Law)*, Tokyo: Iwanami, pp. 143–76.

Kawashima, Takeyoshi (1967) *Nihonjin no Hou-Ishiki [Japanese Legal Consciousness]*, Tokyo: Iwanami Shoten.

Knieper, Rolf (2004) *Juristische Zusammenarbeit: Universalität und Kontext [Judicial Cooperation: Universality and Context]*, Bonn: Deutsche Gesellschaft für Internationale Zusammenarbeit [German Corporation for International Cooperation].

Knieper, Rolf (2006) *Rechtsreformen entlang der Seidenstraße [Legal Reform along the Silk Road]*, Berlin: BWV.

Koch, Hans-Joachim (2000) "Der Atomausstieg und der verfassungsrechtliche Schutz des Eigentums [The Nuclear Phase-Out and the Constitutional Protection of Property]." 53 *Neue Juristen Wochenschrift [New Legal Weekly]* 1529–35.

Kurumisawa, Yoshiki (2007) "Landownership in Vietnam," in K. Kaino, Y. Kurumisawa, & T. Matsumoto, eds., *Houseibi Shien to Shijoukeizaika [Law Assistance and Market Economy]*, Tokyo: Publishing House, 97–141 (in Japanese).

Kurumisawa, Yoshiki (2010) "Universality of Law and Context—Comparative Study of Regulation on Transaction of Agricultural Land 1." 85 *Waseda Law Review* 313–6 (in Japanese).

Kurumisawa, Yoshiki (2011a) "Geschichtliche Entwicklung und aktuelle Probleme der rechtlichen Regulierung des landwirtschaftlichen Grundstückverkehrs in Japan [Historical Development and Current Problems of the Legal Regulation of the Transfer of Agricultural Land in Japan]," in J. Martínez, F. Schorkopf, G. Spindler, P.-T. Stoll, & B. Veit, eds., *Jahrbuch des Agrarrechts [Yearbook of Agricultural Law]*, Gottingen: Nomos, 239–49.

Kurumisawa, Yoshiki (2011b) "Universality of Law and Context—Comparative Study of Regulation on Transaction of Agricultural Land 2." 86 *Waseda Law Review* 1–37 (in Japanese).

Kurumisawa, Yoshiki (2013) "Legal Advice and Comparative Law." The Second International Conference on Comparative Law and Global Common Law organised by the College of Comparative Law, China University of Political Science and Law (CUPL), 2013.

https://doi.org/10.1017/als.2020.7 Published online by Cambridge University Press

Kurumisawa, Yoshiki (2016) *Nouchi wo mamoru toha douiukotoka? [What Does It Mean to Maintain Agricultural Land?]*, Tokyo: Nousangyosonbunka-Kyoukai.

Mizubayashi, Takeshi (2006) *Tennosei shiron [An Analysis of the History of the Emperor System]*, Tokyo: Iwanami Shoten.

Ossenbühl, Fritz (1999) "Verfassungsrechtliche Fragen eines Ausstieges aus der friedlichen Nutzung der Kernenergie [Constitutional Issues of an Exit from the Peaceful Use of Nuclear Energy]." 124 *Archiv für öffentliches Recht [Archive for Public Law]* 1–54.

Roller, Gerhard (1998) "Eigentums- und entschädigungsrechtliche Fragen einer Beendigung der Kernenergieentzug [Questions of End of Using Nuclear from the Viewpoint of Property Rights and Compensation]," in A. Roßnagel & G. Roller, eds., *Die Beendigung der Kernenergienutzung durch Gesetz [The Termination of Nuclear Energy Use through Law]*, Baden-Baden: Nomos, 81.

Tanaka, Katsuhiko (2009) *Nomonhan senso: mongoru to manshukoku [Nomonhan War: Mongolia and Manchukuo]*, Tokyo: Iwanami Shoten.