Private Use of Public-Use Objects : A Recent Decision Concerning the Publicly Owned Water Surface Reclamation Act

Summary of, and Comment on, the Decision of the Osaka High Court, 28th February 2001

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I. SUMMARY OF THE DECISION

1. Facts

The claimant, the Land Development Public Corporation X, obtained a reclamation license based on Art. 2 of the Publicly Owned Water Surface Reclamation Act[1] (hereinafter "the Act"[2]) for a part of the Aioi Harbor Area by the Governor of Hyôgo Prefecture as the pertinent Harbor Administrator.[3] The defendant, Y, is the owner of pleasure boats moored at a breakwater pier in the licensed zone.

X claimed that the boats prevented the work from starting and, on the grounds of its reclamation right, demanded that Y permanently remove the boats from the licensed area. Y refuted X's authority for exclusive domination or occupation of that zone, claiming that Y's previous free usage was not restricted by the license, since the license itself could not be regarded as an official notice of recission of usage rights (*Entwidmung*).

2. Holdings

The authority to dominate and administer publicly owned water surface originally belongs to the state. However, the right to turn a certain part of water surface into land can be conferred to a third person by a reclamation license.

Since such a person's authority is derived from the state's right to administer publicly owned water surface, the reclamation right grants him an ownership-like authority to

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1 *Kôyû suimen umetate-hô,* Law No. 517/1921 as amended by Law No. 91/2000. The Law allows the granting of licenses to private persons to reclaim a certain part of the publicly owned water surface – almost all marine surface – and to obtain private ownership over the new land on the condition that the authority approves the completion of the work.

2 Articles cited hereinafter without specific mention of a law are those of the Act.

3 Art. 58 II of the Harbor Act.

administer a certain part of surface for the purpose of his reclamation work. Consequently, a licensed reclaimer, by virtue of his reclamation right, can eliminate occupants who are thwarting the planned work from the beginning or during the proceeding. The Act gives the reclaimer the authority to carry out the work by clearing off those whose degree of interest for that surface is ranked lower than that of the Special Stakeholders enumerated in Art. 5 of the Act. Because the license does not imply an immediate disuse of surface, other (free) uses are allowed as long as they do not disturb the reclamation work.

II. COMMENT

1. When a private citizen wants to conduct engineering work somewhere, he usually purchases the planned site through some contracts and then has the right to expel third persons from his land by virtue of his ownership. This case is peculiar in that the land, the object of ownership, does not exist before the completion of the work; instead, it is created by it. Now the statutory system of reclamation rights overlaps with various other laws. So we must discuss one after another the distinguishing aspects adopted by the High Court in its concise and polysemic *ratio decidendi*.

First, reclamation can be understood as a variation of disuse and disposition procedures of administratively used properties. In fact, only when the approbation of completion is bulletined does the state let the reclaimer acquire private ownership over the newly reclaimed land (Art. 22 II). However, before this, can the reclaimer be recognized as an owner-like titleholder, or at least be regarded as a fictitious one?

Second, if reclamation work qualifies by nature – at least to some degree – as a kind of public enterprise, certain prerogatives would accompany this. This raises the question of whether it is possible to demand the elimination of obstacles based on this reasoning.

Third, if reclamation is one form of utilizing a publicly owned surface or harbor as a public-use object, the question arises as to whether the reclaimer can demand anything by virtue of the right to utilize it.

2. First we shall examine the holdings from the viewpoint of property law. Art. 1 can be interpreted to premise that the territorial waters "belong to the state's ownership." This ownership, however, does not mean "ownership" in the sense of Art. 206 of the Civil Code. A private citizen's *dominium minorum* may never settle on any part of the sea, but the state's *dominium eminens* has not been purified to a form of *imperium* addressed to a specific person; elements of *dominium* are still attached to it. It is obvious that the state does not have private ownership over the sea; this can be derived from the fact that Art. 42 II stipulates that as for the national reclamation work, the state acquires the private ownership of the new land at the time of completion.

Therefore, the problem is how to interpret the holdings that say the reclamation right is a "derivation" from the state's right of domination. The holdings do not seem to imply that public-legal rights of domination, such as administrative command, are directly transferred to a private citizen, for a reclamation license cannot be regarded as a commission of exercising public-legal authority. Consequently, according to the holdings, the license has to represent the act which derives the private-legal right of domination similar to the public-legal right of ownership:

Is such an understanding a rational interpretation? In other words, does the Act regard the real right of domination as a part of the reclamation right?

If reclamation rights were to be seen as real rights, the restriction in Art. 175 of the Civil Code would require an explicit statutory basis. However, in contrast to regulations such as, *e.g.,* Art. 23 of the Fishery Act, Art. 12 of the Mining Act, or Art. 20 of the Special Multipurpose Dam Act, no corresponding disposition for a reclamation real right can be found in the Act. There is also no registry system as a prerequisite for opposing other buyers, nor does the Expropriation Act apply. It is true that reclamation rights can be transferred under permit (Art. 16) and inherited (Art. 17), but this does not imply a legal nature as a real right.

In this respect, we must investigate the precedents' basis for admitting the reclaimer's use of uncompleted land. These do de facto exist, but they have not been officially approved. The precedent established that reclaimed land is not regarded as unregistered land by the Civil Code, but rather only as earth and sand heaped on the ocean floor (Exception of Adhesion, Art. 242 Civil Code).[4] The rationale of this interpretation is obvious from the text of Art. 35, which stipulates that when a license becomes invalid, not land but "earth, sand, and other objects on the publicly owned water surface" fall into national ownership. Uncompleted land, in other words, is merely a huge movable property.

Accordingly, in cases of the illegal occupation of uncompleted land, claims for return[5] or obstacle elimination by virtue of *movable* ownership do exist. More important, this conclusion does not change when the earth and sand are located beneath the surface. This means that if the exploitation of earth and sand located permanently below the high-tide level is disturbed,[6] the exercise of a real right is also possible. And needless to say, the ownership of earth and sand is not the result of a reclamation license.

On the other hand, in the original case above, the reclamation work has not yet begun. Earth and sand have not yet been transported. The holdings do not discuss the claim for elimination on the basis of ownership of those materials, but based on a reclamation right. As no object for domination exists before the start of work, one must

4 Decision of the Supreme Court, 17 June 1982; Minshû 36, 5, 824.
5 This is a *rei vindicatio*.
6 Further adhesion of earth and sand as movabilities to this, see Art. 243 of the Civil Code.

assume a logical leap in the holdings' argument that qualifies the reclamation right as a real right.

Only the license establishes a "public order" for unspecified individuals' de facto use of public space that was neither prohibited nor approved and that entitles a specific person to fill in earth that in turn results in an obstruction to other users. Thus, after all, it is not sufficient to consider only the aspect of property law; the problem must also be related to other legal aspects.

Therefore, an interpretation of the holdings that the reclamation license bestows a private-legal right of domination would be baseless.

3. However, even if the reclaimer cannot be recognized as a real right holder, the question of whether he can fictionally be regarded as such is still open.

In the context of the structural improving of farm land or urban areas, a licensed reclaimer is legally regarded as a land owner with respect to the new location.[7] Inversely, this reveals that a reclaimer cannot be regarded as a land owner without special disposition.

However, the position of an "associate participant" (developer) in an urban renewal work project seems similar to that of a reclaimer before completion in the respect that he cannot have part-ownership in the uncompleted building. Legally, an associate participant is supposed to obtain a share in the condominium on the day of the rights exchange.[8] On the other hand, it would be unbalanced if a private *dominium* – along the lines of an associate participant – were fictionally given to a reclaimer.

Moreover, according to Art. 32 I 5 of the Act, a reclamation license is revocable and restitution can be claimed when changes to the surface invoke its necessity. That is, the Act strictly oversees the whole working process. The acquisition of ownership itself depends upon a judgment undertaken in the public interest. This reveals that the reclamation license cannot be identified with conditional donation, nor does it even yield an expectation right for an acquisition before the approbation of the completed work. Besides, a precedent[9] denies a prescriptive acquisition of new land made by unlicensed work.

In short, if the holdings deduce this conclusion from the perspective of property law, we cannot accept it as a logical interpretation.

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7 See Art. 4 of the Farm Improving Act and Art. 131 of the Urban Reshuffling Act respectively. Both Acts aim to ameliorate quarters with small and entangled sites into a tidy section plan by dividing and combining the former pieces and switching one with another.

8 See Art. 88 I Urban Renewal Act. Unlike the Urban Reshuffling Act or the Farm Improving Act that cover reform activities on the ground, this Act aims at three-dimensional work. High-rise buildings are constructed in order to supply ample residential space for inhabitants that previously lived in small one- or two-story houses. The remarkable point is that other developers can also participate in this work association for urban-renewal promotion by giving economic incentives, which has often raised conflicts recently.

9 Decision of the Supreme Court, 21 January 1983 (unpublished).

4. Thus, we have to try to comprehend the holdings from the perspective of a public enterprise's prerogative.

The duty to begin the work is imposed upon a licensed reclaimer (Art. 13), and the license automatically becomes invalid when its term is over (Art. 34). Considering that this system and the declaration of a public utility for the purpose of expropriating an enterprise[10] are the same, the degree of the state's interest in the performance of the work seems high at first sight. But actually, the aim of Art. 13 lies in preventing the license from monetization. So this disposition as such does not indicate the public enterprise character of reclamation works. However, in spite of this, it is possible to recognize at least a certain public nature of this work.

The original text of the law of 1921 aimed to promote land development by the use of private capital. Restrictions of purpose, transference, and diversion were insufficient. But by an amendment in 1973, a reclaimer with the intentions of subdivision became limited to public entities (Art. 4 I 5); for transference and diversion control a direct legal basis was added (Artt. 27 to 29). At present, therefore, reclamation works can be regarded as having at least as much of a public character as "new town development works" that can be the basis for an expropriating procedure.[11]

Consequently, we shall research the prerogatives for reclamation work by comparing them with various dispositions about obstacle elimination in other public enterprise statutes.

Generally, when obstacle elimination as a prerogative for a public enterprise is allowed before the title acquisition, there will be two types: the system which gives the authorities' powers for special protection to the private enterprise (authorities initiative type), and the one which confers special power on the private enterprise (enterprise initiative type).

First we will look at the authorities initiative type. When the site of the work is geographically definite in advance, the system which inflicts act restriction as an immediate statutory effect of the bulletin of the work plan is adopted. "Urban reshuffling works" would be an example of this type.[12] On the other hand, when a site is not defined from the beginning, the system applies that encloses the act restriction area by an administrative act. Examples for this type are "*Shinkansen* railway works."[13] "Destined public-use objects" in road and river works also belong to this category.[14] In these works, obstacle elimination is realized through removal order and proxy enforcement by the authorities. As for the enterprise-initiative type, except for cases in which the enterprise is ident-

10 See Art. 20 of the Expropriation Act.
11 See Art. 5 of the New Town Development Act.
12 See Art. 76 of the Urban Reshuffling Act.
13 See Artt. 10, 11 of the National Shinkansen Railways Construction Act.
14 See Art. 91 I of the Road Act or Art. 56 of the River Act.

ified with the state, examples are very rare. Only trivial acts less than obstacle elimination – such as passing through others' land – are exceptionally approved.[15]

On the other hand, some works such as railways, electricity, and gas do not enjoy any special prerogative.[16] Among designated public-use objects, the park work belongs to this.[17] In the context of these works, a contractual purchase is required in order to eliminate obstacles and, as a supplement, an appeal for an expropriating procedure is possible.

Now, to which type does the reclamation work belong? I am surprised that the holdings do not refer to the disposition (Art. 31) according to which the governor can require the owners to remove blocking objects from the working area after the reclaimer has compensated surface titleholders. That is, it's obviously a system of an authorities-initiative type. In fact, it is unique that a previous act restriction is not available. This may be founded on the conception that no private title exists on the surface before compensation. Consequently, from the viewpoint of the public enterprise law, the standard avenue for a reclaimer is to apply for a removal order and anticipate the proxy enforcement.[18]

In this point, the holdings seem to regard the reclamation system after a license has been granted as an almost enterprise-initiative one, although they do not approve self-help, but rather emphasize that the completion of interest-balancing with the interests of other surface titleholders is the prerequisite for a license. However, if we were to rely upon such a theory of a "*privatrechtsgestaltender Verwaltungsakt,*" we could extract an entirely reverse conclusion which rejects all private-legal means of the reclaimer after the license has been granted.[19] At any rate, the holdings that lack detailed considerations of Art. 31 are not sufficient for such a conclusion.

Consequently, the "exclusivity of reclamation right" from the viewpoint of the public enterprise law is only an interpersonal (*schuldrechtlich*) one. If, for instance, a conflicting license for the same area is distributed to a third party, all the licensee can do is to claim its invalidity.

5. Moreover, we can try to save the holdings' consistency from the viewpoint of the public-use object law.

Reclamation is also a way of exploiting a public-use object; actually it is the most extreme form of a privileged use of the publicly owned water surface. This concept is ascertained by the disposition that substitutes a reclamation license for a surface-

15 See Art. 60 of the Electric Enterprise Act.

16 See Art. 8 of the Railways Enterprise Act, Art. 47 of the Electric Enterprise Act, and Art. 36-2 of the Gass Enterprise Act.

17 See Art. 23 of the City Park Act.

18 There is no disposition for application, but according to M. YAMAGUCHI / S. SUMIDA, *Kôyû suimen umetate-hô* [Publicly Owned Water Surface Reclamation Act] 211 the command should be exercised by way of it.

19 See *infra* at 6.

occupying license.[20] On the one hand, the surface legally remains a public-use object until the formal disuse by an administrative act, *i.e.,* the bulletin about the approbation of completion. On the other hand, for the harbor as a public-use object, the reclamation might even be said to be the exercise of its natural utility.[21]

As Y claims, the granting of a license does *not* imply a disuse as such, and it does not invalidate a utilization established by either administering or police jurisdiction about a publicly used object at the time of the beginning of the reclamation work. According to Art. 39 III, when a licensed reclaimer disturbs the "public use of the surface" by violating the appended conditions, a penalty can be inflicted. When a spacious area is gradually reclaimed, the sphere available for free usage is diminished, but the simultaneous cessation of use is never expected.[22] The decision of the Supreme Court of 10 April 1982 should be remembered here,[23] which limits the privileged use of waters "to the necessary extent for fulfilling the given purpose."

Accordingly, we ought to rethink this case as a problem of adjustment between the reclaimer's privileged use (private utilization) and boat owners' free usage (collective utilization) and to understand the holdings from that viewpoint. That is, if a third party's free use interferes with the privileged use, who should take the initiative to end the interference, the privileged user or the authorities?

If one takes the precedents into consideration that approve the right of a free user of a road to eliminate obstacles,[24] at first sight there might be no doubt in granting the same right to a privileged user. However, these decisions are not really helpful as they restrict this right to only those residents whose vital interests were infringed upon by the disuse of the road. Thus, the precedents are almost meaningless for discussing our case. So we have to shift our attention to the legal nature of a privileged use.

The privileged user's position is determined by two different relations, that is, toward the authorities and toward the third party. Of these, the former is the more important one.[25] In this respect, an early decision of the Supreme Court proclaimed the civil court's jurisdiction[26] regarding the right to occupy a river site as "a kind of property right in private law" and admitted a right to obstacle elimination by virtue of that right.

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20 See Art. 37 I of the Harbor Act.

21 See Art. 3-3 of the Harbor Plan, Harbor Act.

22 YAMAGUCHI / SUMIDA (*supra* note 19) 204.

23 Minshû 16, 4, 699.

24 The leading case is the decision of the Supreme Court, 16 January 1964, Minshû 18, 1, 1.

25 About the latter, cf. the decision of the Kumamoto District Court, 27 July 1967, Shogetsu 13, 10, 1198, where the Court held that the right to occupy a road was an "interpersonal right (*Forderung*) in public law" against the road administrator and not opposable to its disuse.

26 Decision of 4 May 1922, Minshû 1, 5, 235. Before World War II, Japan had a separate Administrative Court such as under the French or German judiciary system.

Regarding these holdings, a commentator criticized that the right actually was a "property right in public law" because of the disposition excluding private rights at river sites,[27] but agreed to the conclusion itself.[28] Another commentator, after enumerating three theories such as the public-legal, the private-legal theory, and a theory combining various elements of the right for public-use objects, emphasized their relativity in relation to the third party.[29]

In practice, privileged use of river and road sites is interpreted similarly.[30] By any means, claims for obstacle elimination are supposed to be available without the need to wait for an administrator's surveiling order.

However, it would be all the more inappropriate to discuss the use of public-use objects from the viewpoint of property law for its original status as "*res nullius.*" This is much truer for publicly owned water surface on which *dominium minorum* cannot be established.

So we should state that this action is not based upon real right but upon possession (*Besitzklage*). In France, privileged use on administratively used property (*domaine publique*) is merely a precarious position against the authorities, but against a third party this use is protected by the Civil Court through possessory action. To regard this use as a property right is denied by the theory of non-transferability of administratively used property.[31]

In this case, the object of possession is a publicly owned surface which cannot be an object of a real right. What should be referred to, above all, is a decision of the Osaka High Court that admitted an electricity enterprise's possessory action for prohibiting the third party's construction within the space prescribed in the Electric Construction Regulation.[32] In this case, too, "factual domination" and "volition for possession" as prerequisites for possession are fulfilled by a survey expected in the Act itself.

Now, although a privileged user can raise a possessory action, the matter of its priority over a surveiling order in the perspective of public-use object law has not yet been settled. In this case, there are many options, including administrative commands and their proxy enforcements, such as a removal order by a governor,[33] a harbor administering jurisdiction and transposing order by the harbor chief,[34] a harbor police jurisdiction, or an immediate enforcement such as a removal by Coast Guard staff as part of the territorial waters police jurisdiction.[35] The removal order in Art. 31 is a specialized

27 See Art. 3 of the former River Act.
28 T. MINOBE, *Hyôshaku kôhô hanrei taikei* [Comment Series on Public Law Decisions] Vol. I, 32.
29 R. HARA, *Kôbutsu eizôbutsu-hô* [Public-Use Object and Establishment Law] 296.
30 See Art. 24 of the River Act and Art. 32 of the Road Act.
31 Tribunal Administratif de Paris, 21 April 1971, RIBETTE / MANOURY, AJ 1972, 164.
32 Decision of 4 July 1963, Kôminshû 16, 6, 423.
33 See Art. 56-4 of the Harbor Act.
34 See Art. 10 of the Harbor Traffic Act.
35 See Art. 18 of the Coast Guard Act.

disposition of Art. 56-4 of the Harbor Act and has both the elements of a public-use object and the public enterprise law.

In spite of this, considering that possessory actions and surveiling orders are different in their legal perspectives, both can coexist. With a possessory action, neither party can assert that its position assumes the character of public interest, and thus the question to decide is solely the "validity" and not the "legality" of the license.[36] We may not require the procedural exclusivity of Art. 31, because the Act lacks the disposition for application like Art. 98 II of the Urban Renewal Act that gives room for the opposite interpretation that private-legal possessory action should be precluded.

In short, in our case, a possessory action on the grounds of the license for a privileged use should be based on the assumption of its independence from any surveiling order. Nevertheless, no matter how we try to reinterpret the holdings from this viewpoint, a consistent understanding is difficult. We cannot deny the fact that the Court has recognized a real claim in a realm where no real right can stand.

6. By the way, there remains the German theory of the "*privatrechtsgestaltender Verwaltungsakt*" concerning both aspects of public enterprise and public-use object law. As mentioned above, with respect to the reclamation license, the holdings emphasize its character as a resolution about adjustment of interests. In Germany, the text of the pertinent law clearly precludes the third party's claim for obstacle elimination against a user holding a surface-occupying license.[37] In Japan, some precedents which declare the illegality of preliminary injunction reveal similar thoughts.[38]

If we accept this opinion, can the reclaimer's claim for obstacle elimination against a third party then be prohibited without a contradiction? In any case, since Art. 8 I of the Act mainly leaves the procedural management of interests arrangement to private enterprises, the license cannot be regarded as an act that invalidates a number of private-legal relationships.

ZUSAMMENFASSUNG

In dem Beitrag geht es um eine Entscheidung des Obergerichtes Osaka vom 28. Februar 2001, in der das Gericht sich mit der Frage auseinandersetzt, unter welchen Voraussetzungen im öffentlichen Eigentum stehende Flächen von Privaten genutzt werden dürfen. In concreto ging es um die Gewinnung von Land, bei der die Interessen des mit der Aufschüttung beauftragten Unternehmens mit denen eines vorherigen Nutzers der

36 Although the author is not discussing exactly the same problem, see also T. HIROOKA, *Kôbutsu-hô no riron* [Theory of Public-Use Object Law] 68, 69.

37 See § 11 I 1 *Wasserhaushaltsgesetz*.

38 See the decision of the Ôtsu District Court, 11 September 1965, Gyôshû 16, 9, 1557.

betreffenden Bucht kollidieren, der dort Ausflugsboote zwecks Vermietung an einer Mole vertäute. Der Verfasser faßt zunächst das Urteil knapp zusammen und kommentiert sodann die dadurch aufgeworfenen dogmatischen Fragen ausführlich. Besondere Schwierigkeiten bereitet die Ableitung einer tragfähigen Rechtsgrundlage, auf die das Unternehmen seinen Anspruch auf Beseitigung der Boote stützen kann.

(Die Redaktion)