

Special Economic Zones as a Governance Tool for Policy Coordination and Innovation

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INTRODUCTION

It is widely recognized that Special Economic Zones (SEZs) consist of a specially designated geographical area that is exempt from nationwide regulation or taxation in order to achieve economic development within the zone. Consequently, they have often been used in developing Asian countries to help stimulate the whole national economy. On the other hand, such zones may have another, altogether different, function. For example, Japan has such a type of zone, introduced by the Special Zone for Structural Reconstruction Act of 2002.¹ Regulative reforms and deregulation are “tested” within the zone, followed by the introduction of the same regulative policy all over Japan if the test goes well. The Act also has a procedure in which local governments (including prefectural governments) propose the deregulation or regulative reform to the national government, which creates a policy coordination system between the national and local levels. This highlights the functional similarities between SEZs and the local decentralization of legislative competence.

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1 *Kôzô kaikaku tokubetsu ku’iki-hô*, Law No. 189/2002, as amended by Law No. 33/2009.

The purpose of this paper is to clarify this relatively unknown function of SEZs: namely, that they can also be used for policy innovation and coordination between multilevel governments. As such, it can be a form of multilevel governance between a federal system and local autonomy. This paper will therefore consist of two parts: In the first section, I will explain that SEZs can be used as a policy coordination tool through the Japanese examples. Then I will focus on the coordinative function of SEZs between multilevel norm-settings via a comparison between local autonomy and the federal system in Germany. This will imply the difference between the local autonomy and the federal system, because SEZs are used if the exemption from the nationwide legal scheme cannot be realized by an ordinance.

I. TWO FUNCTIONS OF SPECIAL ECONOMIC ZONES

In Japanese administrative practice, the expression “SEZ” is used only for zones that grant a deduction of corporate tax. This limitation, however, does not fit the general image of SEZs, and it is not compatible with the aim of this paper, either. I would, therefore, like to define SEZs more broadly as any zone that is exempted from uniform national taxation or regulation.

Compared with other Asian countries, there have not been many examples of SEZs in Japan. As an exception, we have the zones in Okinawa Prefecture that were introduced to develop the regional economy. In addition, the Special Zone for Structural Reconstruction Act of 2002 introduced this kind of zone all over Japan. It is certain that these zones are exempt from national regulations and are expected to result in the development of the regional economy, but the original intention behind such zones was to promote policy innovation from the viewpoint of regulative reform or deregulation. In other words, the purpose of this legislation was not the reproduction of the type of SEZ found in Okinawa. This section, therefore, shows how SEZs have been used in Japan by comparing two examples: the SEZ in Okinawa and the new-style special zone for structural reconstruction.

1. *Special Economic Zones in Japan*

a) *The Special Economic Zone in Okinawa*

Until 2003, Japan had an SEZ only in Okinawa. This limitation was closely related to the historical and economic background of Okinawa. Okinawa was a major battlefield in World War II and was then occupied by the US until 1972. It was not until 1959 that a free-trade zone was established, during the continued US occupation. Transistor radios were assembled in Okinawa using machine parts imported from the mainland of Japan and then exported to the US.² Since the return of Okinawa in 1972, this zone has con-

2 S. WAKUGAWA, *Okinawa-ken ni okeru tokku no torikumi* [Special Economic Zone in Okinawa Prefecture], in: Sangyô Ritchi 41 (9) (2002) 32.

tinued as a result of Article 23 of the Act on Special Measures for Economic Stimulation and Development of Okinawa of 1971.³ In 1998, the Act was partially amended and a special free-trade zone was added in which a certified company can enjoy not only customs exemptions but also corporate tax deductions (Art. 23-2, 26-2). This is said to be the first SEZ in Japan in administrative practice. The Act expired in 2002 and the Act on Special Measures for Economic Stimulation of Okinawa⁴ was enacted.

The new Act has three types of SEZ: the special free-trade zone, the information-technology special zone, and the financial-industry special zone. A certified company can deduct 35% of revenues in the zone when corporate tax is calculated (Art. 33 para. 2, Art. 48 para. 2, Art. 57 para. 2). Furthermore, the special free-trade zone is regarded as a bonded area (Art. 45), which means that imported materials are exempted from customs before they are manufactured and exported.

Turning now to the procedure for establishing such a zone, the first action is an application to the ministers in charge for the designation by the Okinawa prefectural governor. Before that the governor has to hear the opinions of mayors who govern the affected municipalities. The Ministers are supposed to hear the opinions of the Council for Economic Stimulation of Okinawa and designate the area as an SEZ (Art. 42). In addition, a corporation has to apply to the relevant ministers in charge for the certification (Art. 43-44).

SEZs in Okinawa have three interesting points. First, its main and exclusive content consists in the deduction of corporate tax.⁵ SEZs certainly have other measures for stimulating economic development: special measures for the depreciation, reduction of prefectural and municipal taxes and low-interest loans among others. These measures, however, can be provided by a zoning system in the act other than a SEZ. Second, there are some procedures in which various interests are coordinated when a certain area is designated as an SEZ. The Council for Economic Stimulation of Okinawa on the national level plays an important role in the process. Third, the SEZs in Okinawa are aimed mainly at developing the regional economy of Okinawa, where the unemployment rate is higher and the average income is lower than in other parts of Japan due to the weakness in the industrial structure.⁶ In addition, since US military bases in Japan are concentrated in Okinawa, it can be interpreted as compensation for the disproportionate burden associated with the US military presence.

Three problems with the zone can be identified. First, the zone cannot grant deregulation or regulative reform programs. Okinawa Prefecture demanded during the legis-

3 *Okinawa shinkô kaihatsu tokubetsu sochi-hô*, Law No. 131/1971.

4 *Okinawa shinkô tokubetsu sochi-hô*, Law No. 14/2002, as amended by Law No. 20/2010.

5 H. IZUKA, *Okinawa shinkô tokubetsu sochi-hô no chi'iki chiku seido ni tsuite* [On the SEZ system in the Act on Special Measures for Economic Stimulation of Okinawa], in: *Kôwan* 80 (3) (2003) 24.

6 K. HIWATASHI, "*Okinawa no jiritsu teki hatten, yutaka na jûmin seikatsu no jitsugen*" *o mezashite* [Toward the Self-Sustained Development and Rich Lives in Okinawa], in: *Toki no Hôrei* 1668 (2002) 6.

lative process that deregulation should be made part of the plans of the zone, but it was not permitted.⁷ Second, the procedures of designation are highly centralized. It may be true that before the application by the governor, he or she has to hear the opinions of the mayors who govern the related municipalities, but neither the governor nor the mayors can modify the program of the zone. Third, the program of the zone is not necessarily in conformity with the requests of the industrial world. There have been very few newcomers to these zones from the mainland. The standards for the certification set by the national government are said to be too strict for companies which consider (re-)locating to these zones.⁸

b) *Special Zone for Structural Reconstruction*

The Special Zone for Structural Reconstruction Act, including provisions for a different type of SEZ, was enacted in 2002 to test deregulation or regulative reform in a certain zone. The *Koizumi* Administration wanted to deregulate outmoded national regulations but met with strong resistance from the industrial world, which has benefited from such regulations. Therefore a “test” approach, in which deregulation or other regulative reform was actually implemented in a limited zone, was adopted. The same regulative regime was then expected to be applied on the national level if the test went well. Thus far, 1149 proposals have been authorized as zones and 815 zones among them have resulted in national regulatory reform.⁹

The Special Zone for Structural Reconstruction Act is the first act in Japan that has adopted a comprehensive system in terms of SEZs.¹⁰ In other words, this system is not a generalization of the zones in Okinawa. The Act has a list of exemptions from national regulations, which were based on the demands by local governments or corporations from the hearing on the preparation of the legislation.¹¹ It includes special measures on

7 WAKUGAWA, *supra* note 2, 35.

8 A. FUJIWARA, *Mei'an wakareru Okinawa no kigyô yûchi* [The Bright and Dark Sides of the Inviting Policy in Okinawa], in: *Sankei Shinbun*, 3. December 2008.

9 *Kôzô kaikaku tokubetsu ku'iki keikaku chi'iki saisei keikaku oyobi chûshin shigai-chi kassei-ka kihon keikaku no nintei ni tsuite* [On the Accreditation of Plans for Special Zones for Structural Reconstruction, Plans for Regional Renovation and Basic Plans for Revitalization of Central and Suburban Areas], available at <http://www.kantei.go.jp/jp/singi/kouzou2/kouhyou/110325/keikakunintei.html> (last retrieved 1 June 2011).

10 There was a precedent for this act, the Pilot Municipality Plan in 1992. About 40 municipalities were designated as pilot municipalities, and special financial measures or special treatments within the national administrative practice (mainly on the circular notice level) were applied. This plan, however, failed to realize the desired results because the scope of special measures was limited within the positive law, which this plan was not expected to amend. Notwithstanding the ideas of the municipalities, authorities were impeded by the non-assistance of prefectures, which had no enthusiasm for this plan.

11 Y. TAKAHASHI, *Kôzô kaikaku tokubetsu ku'iki-hô* [The Special Zone for Structural Reconstruction Act], in: *Jurisuto* 1242 (2003) 13.

the School Education Law,¹² the Welfare Law for the Aged,¹³ the Customs Law,¹⁴ the Alcohol Industry Law,¹⁵ and so on (Art. 11-36). After asking for a proposal from local governments or private firms, the Prime Minister is empowered to lay down the fundamental policy of the special zone for structural reconstruction (Art. 3). Local governments that wished to adopt these exemptions were allowed to make an application to the Prime Minister for authorization of the zone planning (Art. 4 para.1). Corporations that wanted to make use of the exemptions could submit a draft of the zone planning to the local government (Art. 4 para.4). The Prime Minister is supposed to authorize the zone planning in three months as a rule if the application (I) fits the fundamental policy, (II) is expected to have a positive economic or social effect within the zone, and (III) can smoothly and surely be realized (Art. 4 para.8, Art. 5).

Concrete examples of the zone can be classified into two groups.¹⁶ One group is involved in daily life and welfare matters. Take the welfare transportation zone, for example. The Road Transportation Act¹⁷ requires permission when a person wants to start a business related to passenger transit (Art. 5, 78). This regulation prevented non-profit organizations (NPOs) from operating welfare transportation schemes, even on a small scale. A special zone, therefore, was established for NPOs that permitted them to operate a passenger transit service upon prior registration. Now this deregulation has expanded to cover the whole of Japan (Art. 79-81).¹⁸

The other group is aimed at the development of the regional economy. The most famous example of a zone, the *doburoku* special zone, belongs to this group. *Doburoku* means unrefined *sake*, which is produced in a small scale mainly in rural areas. For reasons of taxation, a license is needed if a person wants to produce *sake* (Art. 7 para.2 Alcohol Industry Law). The minimum brewing quantity of six kiloliters per year has been a significant obstacle to the production of *doburoku*. Thus the special zone exempts *sake* producers from this quantity limitation. As a result of the success of the zone, a fruit wine and liqueur special zone was also introduced in 2008.¹⁹

Three aspects of the system of special zones for structural reconstruction deserve careful attention. First of all, an exemption from regulation is included in the planning of the zone, which makes a striking contrast to the SEZ in Okinawa. The form of the Act is

12 *Gakkô kyôiku-hô*, Law No. 26/1947, as amended by Law No. 98/2007.

13 *Rôjin fukushi-hô*, Law No. 133/1963, as amended by Law No. 37/2010.

14 *Kanzei-hô*, Law No. 61/1954, as amended by Law No. 13/2010.

15 *Arukôru jigyô-hô*, Law No. 36/2000, as amended by Law No. 32/2005.

16 A. FURUKAWA, *Ugokidashita kôzô kaikaku tokku* [The Special Zone for Structural Reconstruction in the Initial Phase], in: Sangyô Ritschi 42 (8) (2003) 9.

17 *Dôro unsô-hô*, Law No. 183/1951, as amended by Law No. 64/2009.

18 T. TSUTSUMI, *Jidô-sha kôtsu ni okeru riben-sei anzen-sei no kôjô o tsûjita anshin anzen na "kuruma shakai" no jitsugen ni mukete* [For the Safe and Secure Automobile Society with Improvements of Convenience and Safety in the Motorcar Transportations], in: Toki no Hôrei 1779 (2007) 30.

19 Y. YAJIMA, *Kajitsu rikyûru tokku no sôsetsu* [The Establishment of the Fruit Wine and Liqueur Special Zone], in: Hôrei Kaisetsu Shiryô Sôran 1819 (2008) 41.

also interesting because it is not a “gathering act” – meaning a simple “accumulation” of exceptional-case laws within every concerned ministry’s purviews – but a comprehensive and general act coming under the jurisdiction of the Cabinet Secretariat.²⁰ Second, policy experimentation forms an essential element of the system. There have been a number of regulative initiatives which were first tested in such a zone and were followed by nationwide implementation. The areas requiring deregulation or regulative reform were collected through the applications of local governments and the draft proposals of corporations. This may be the first opportunity in which private corporations could oppose regulations that hinder their business operations.²¹ It is much easier to coordinate interests for realizing deregulation on the local level than on the national level because the organized interests of industry are too strong on a national level.²² Third, this system indicates a new type of policy coordination procedure between national and local governments. This procedure starts with the application of the zone planning by local government. The Cabinet Secretariat then negotiates with the ministry or agency in charge as if it were an agent for the local government.²³ The result of the negotiation is carried from the Cabinet Secretariat to the local government. If it is not sufficient for the needs of the local government, it can propose its opinion to the Cabinet Secretariat, followed by renegotiation with the ministries or the agencies. With a re-opinion process in addition to these two processes, there are, in total, three policy communications between the national and local governments.²⁴ Information on this process is openly available on a website. This openness and routinization of the process is one of the most outstanding characteristics of the system.²⁵

It is necessary, however, to pay attention to three negative points regarding these zones. First, there is no comprehensive SEZ including special measures on tax exemption, deregulation, and financial benefits.²⁶ A similar special zone with regard to finan-

20 N. YASHIRO, *Kisei kaikaku no genjō to kadai* [The Status Quo and Tasks of Regulatory Reform], in: *Jurisuto* 1236 (2002) 4.

21 F. HARUNA, *Kōzō kaikaku tokku no kongo no tenbō* [Future Prospects of the Special Zone for Structural Reconstruction], in: *Jurisuto* 1250 (2003) 21.

22 N. YASHIRO, *Kōzō kaikaku tokku no hyōka to kadai* [Evaluation and Problems of the Special Zone for Structural Reconstruction], in: *Jurisuto* 1250 (2003) 10.

23 N. FUKUSHIMA, *Kōzō kaikaku tokku no katsuyō-hō* [Practical Use of the Special Zone for Structural Reconstruction], in: *Sangyō Ritchi* 42 (8) (2003) 13. For example, the Cabinet Secretariat demanded the Ministry of Education and Science rethink the monopoly of school corporations in private schooling. The Cabinet Secretariat had an opinion that corporations other than school corporations could operate schools if appropriate legal restrictions were set to maintain the stable operations of schools.

24 KŌZŌ KAIKAKU TOKKU KENKYŪ-KAI, *Tei’an shutai to shōchō to no yaritori no jissai* [Communications between a Proposer and Ministries in Practice], in: *Shin-toshi* 60 (10) (2006) 153.

25 H. SHIROYAMA, “*Kisei kanwa*” to “*kisei kaikaku*” [“Deregulation” and “Regulatory Reform”], in: *Jurisuto* 1356 (2008) 25.

26 H. URABE, *Keizai tokku zeisei* [The Taxation System of Special Economic Zone], in: *Nichi Zeiken Ronshū* 58 (2008) 152.

cial measures including tax reduction was introduced after 2005 by the Regional Renovation Act.²⁷ However, a zone system with all these three measures does not exist. Second, applications for the zone tend to be sluggish these days. In addition to the limitation of regulation exemptions and the resistance of ministries, it has been a source of fewer benefits than anticipated because some regulatory reforms have been quickly expanded to the whole Japan after the proposer had brought the zone into profit.²⁸ Third, the legal characteristics of the zone are still unclear. It is not theoretically clarified whether the zone is compatible with the idea of local autonomy. While the legislation and practice are rapidly progressing in response to the changing political and economic circumstances, academic investigations have not kept pace with these changes.

2. *Two Functions of the Special Economic Zone*

The example of Japan has therefore highlighted another function of SEZs. It can be a tool not only for economic development but also for policy innovation and coordination.

a) *Special Economic Zone for Economic Development*

The SEZ in Okinawa and Special Zone for Structural Reconstruction are useful policy tools for regional economic development. As a traditional measure, local governments have adopted an “invitation policy” – that is to say, they invite a large factory or commercial facility to their region, providing them with a building site, subsidies, or infrastructure. However, local governments cannot exempt regulatory measures that are provided by national laws in principle, even if they have competence for executing the national law and the law gives them discretion, because they are not supposed to adjust regulatory measures in accordance with local economic circumstances. Besides, it has become more difficult now for local governments to maintain traditional practices because the effect of the measure is now decreasing due to the so-called “slash-and-burn farming commerce.”²⁹ This means that an owner of a new facility will not continue the activity for the long term but rather “retreat” from the region when the profits start to decrease. The increasing risk of a so-called residence suit, which targets a financial action of the local government, is another reason why local governments are hesitating to adopt such an invitation policy. Therefore, it is very helpful for local governments to

27 *Chi'iki saisei-hô*, Law No. 14/2005, as amended by Law No. 6/2010. See M. HONDA, *Chie to kufû no kyôsô de kassei-ka e* [Revitalization through Competitions in Knowledge and Schemes], in: Sekai to Nippon 1066 (2006) 62; Y. UMENO ET AL., *Chi'iki saisei-hô to chi'iki saisei zeisei* [Regional Renovation Act and Tax Reduction for Regional Renovation], in: S. MISONO ET AL. (eds.), *Chi'iki saisei shisutemu-ron* [On Regional Renovation Systems] (Tokyo 2007) 125.

28 T. HONDA, *Nippon no furusato saisei o mezashite* [Toward the Renovation of Japanese Rural Areas], in: *Shisei* 55 (10) (2006) 29.

29 H. YAHAGI, *Ôgata-ten to machizukuri* [Big Shopping Mall and City Planning] (Tokyo 2005) 6.

use these new-style zones, which enable the local municipality to be exempt from national regulations or taxation, in order to stimulate the regional economy.

b) Special Economic Zone for Policy Innovation and Coordination

Both types of SEZs in Japan also have a function of policy innovation and coordination. An SEZ is a zone in which national regulation or taxation is exempted in response to the demands of the region. This system therefore involves coordination mechanisms for the following two reasons. First, in most cases the national law delegates the enforcement to local governments. The local governments have no competence to change the regulation or taxation by themselves, even if they are the ones that feel the inconveniences associated with the enforcement. Second, regulation and taxation are the typical policy areas where legislative action must precede the administrative activities (*the principle of the law-governed state*).³⁰ Therefore, it is essential to coordinate national and local policies not only in the administrative but also in the legislative process.

From the viewpoint of policy coordination, there are two models of SEZ in Japan – the national-government-oriented SEZ (SEZ in Okinawa) and the local-government-oriented SEZ (Special Zone for Structural Reconstruction). The latter is obviously preferable to the former in the context of policy innovation because new policy ideas are more acceptable in the decentralized structure. A proposal right of companies and private organizations and a close liaison with the legislative process deserve special mention regarding the Special Zone for Structural Reconstruction.

II. SPECIAL ECONOMIC ZONE AS A TOOL FOR MULTILEVEL GOVERNANCE

The reason why SEZs are needed as a tool for multilevel governance is closely related to the status quo of local decentralization in Japan. If a municipality had competence to deregulate national regulations or exempt taxes, or if Japan had a federal system, there would be no need for SEZs. In this section I will identify the characteristics of SEZs compared with local autonomy and a federal system. I will also take up the differences between SEZs and deviatory competence of ordinance with which a municipality can overwrite national legal restrictions, including national regulation and taxation.

In order to clarify these points, a comparative study with German law is appropriate and useful. There are two grounds for such a comparison. First, the system of local autonomy in Germany is similar to that in Japan in that a municipality in both countries has so-called almighty competence (*Allzuständigkeit*), which means that a municipality can handle all public local affairs even if a statute is not clearly given the competence to handle it.³¹ This makes a striking difference to the local autonomy system in the UK, for

30 H. SHIONO, *Gyōsei-hō I* [Administrative Law I] (Tokyo 5th ed. 2009) 68.

31 T. CLEMENS, *Kommunale Selbstverwaltung und institutionelle Garantie* [Local Government and Institutional Guarantee], in: NVwZ 9 (1990) 837.

example. Second, Germany has a cooperative federal system that differs from the US. It is very common in the German federal system that the federal government makes a law and then the state government enforces the law.³² This close relationship causes a similarity to the relationship between the Japanese central and local government, which has a relatively wide range of public affairs and competence even though Japan is a unitary state. In addition to that, Germany experienced the Federation Reform, which contained the deviatory competence of state laws.

1. *Special Economic Zone and Local Autonomy in Japan*

a) *Conditions of an Ordinance from the Viewpoint of the Constitution*

The Japanese Constitution³³ guarantees the local autonomy, which includes competence to enact an ordinance within the limits of the national law (Art. 92, 94). The old standard theory insisted that an ordinance could regulate an area where national laws had not yet been adopted. After the decision of the *Tokushima Police Ordinance Case* by the Supreme Court,³⁴ the scope of an ordinance should be divided according to the purposes of the national law and the ordinance. In some cases, an ordinance can have more strict regulations unless they conflict with the national law. Generally speaking, however, an ordinance cannot relax any national standard established by national law because it is considered to set the lower limit of any regulation.

Japanese taxes are divided between national and local taxes. New taxation or changing taxation must be preceded by “a national law” (Art. 84 Japanese Constitution). The standard theory says, however, that an ordinance can be the basis of taxation.³⁵ The Supreme Court confirmed this position in the *Asahikawa National Health Insurance Ordinance Case*.³⁶ In practice, on the other hand, a national law, the Local Tax Act,³⁷ decides almost all important contents and conditions of local taxes. An ordinance can regulate only what the national act allows. It is impossible, therefore, for an ordinance to exempt national taxation in order to stimulate the regional economy.

b) *Deviatory Competence of an Ordinance?*

Is it theoretically difficult to relax the national regulation or taxation by an ordinance? Since the local decentralization reform in 1999, some scholars have argued that the

32 K. HESSE, *Der unitarische Bundesstaat* [The Central-Oriented Federation] (Karlsruhe 1962) 15-16.

33 *Nihon-koku kenpô* of 3 December 1946, Engl. transl. http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last retrieved on 28 April 2011).

34 Supreme Court, 10 September 1975, Keishû 29 (1975) 489.

35 N. ASHIBE, *Kenpô* [Constitution] (Tokyo 5th ed. 2011) 360.

36 Supreme Court, 1 March 2006, Minshû 60 (2006) 587, Engl. transl. <http://www.courts.go.jp/english/judgments/text/2006.03.01-2000.-Gyo-Tsu-.No..62.html>.

37 *Chihô-zei hô*, Law No. 226/1950, as amended by Law No. 65/2010.

provisions of national laws on the autonomous duty of local government³⁸ should be interpreted as an example.³⁹ That means that the local government can deviate from the national law and make a new ordinance without clear delegation given by the national parliament. A recent argument concerning the local decentralization has also presented the deviatory competence of an ordinance.

From the viewpoint of legislative policy, it is possible to give the deviatory competence to an ordinance if a national law clearly delegates that competence. In fact, some acts in environmental law (*e.g.*, the Air Pollution Control Act⁴⁰) have such clauses. This approach, however, has a major problem as to local autonomy. A local government can use this competence only when a national legislator allows. In this system, the ordinance that a local government can enact is regarded as a delegated ordinance, which means a policy tool for executing national policy and not for creating original local policy.

Is it theoretically possible that an ordinance can deviate from a national law without any individual delegations from national law? Technically speaking, the Local Autonomy Act⁴¹ could have a general deviatory clause that allows local governments to enact any type of ordinances including deviation. However, we have to consider the relationship between the local autonomy and the principle of the law-governed state.⁴² It may be preferable from the standpoint of the local decentralization to allow the general deviatory competence of an ordinance. That enables an autonomous ordinance to deviate from or overwrite the national regulation. At the same time, however, the regulatory substance of the national law declines considerably. If an ordinance can breach a national law, the traditional norm pyramid is overturned completely. We should also think cautiously regarding the negative side of such a proposal.

38 The Local Decentralization Act of 1999 (*Chihô bunken no suishin o hakaru tame no kankei hôritsu no seibi-tô ni kansuru hôritsu*) changed the system of tasks assigned to local government. Before that, the tasks were normally divided into four groups: public duty (original duty of a local government, *e.g.*, public transportation), administrative duty (tasks related to the police), delegated duty to the local government (national duty delegated to the whole local government, *e.g.*, welfare administration) and delegated duty to the local organ (national duty delegated to one organ [typically a governor or a mayor] of the local government, *e.g.*, environmental administration). The latter was often criticized because in this duty, a governor or a mayor was regarded as a lower-level official of the national government. The reform abolished this type of duty and reorganized the system: autonomous duty and delegated duty. Both of them are now regarded as a task of local government, but the national government can intervene more strongly in the enforcement process of the latter.

39 Y. KITAMURA, *Bunken kaikaku to jôrei* [The Reform of the Decentralization and the Ordinance] (Tokyo 2004) 65.

40 *Taiki osen bôshi-hô*, Law No. 97/1968, as amended by Law No. 31/2010.

41 *Chihô jichi-hô*, Law No. 67/1947, as amended by Law No. 71/2010.

42 H. SHIONO, *Gyôsei-hô III* [Administrative Law III] (Tokyo 3rd ed. 2006) 173; Y. OHASHI, *Gyôsei-hô I* [Administrative Law I] (Tokyo 2009) 61.

2. *Federal Structure and Local Autonomy in Germany*

Germany has no general legislation pertaining to SEZs. The only similar example is the exemption from procedure regulations of the public works in the former East Germany.⁴³ From the standpoint of multilevel governance, however, German law has two interesting points. First, an ordinance (*Satzung*) of a German municipality (*Gemeinde*) can regulate relatively fewer fields than that of a Japanese local government, while the German Constitution (*Grundgesetz*) secures local autonomy as well. Second, after the federation reform in 2006, a federal state has *deviatory legislative competence* that enables the state to enforce its original policies, even if these are inconsistent with the federal policy. An investigation of the German law will highlight the characteristics of SEZs as a tool of multilevel governance.

a) *Conditions of an Ordinance from the Viewpoint of the Constitution*

A German municipality can enact an ordinance within national law. The German Constitution certainly has a clause that secures the local autonomy of the municipalities (Art. 28 para. 2 German Constitution). However, the standard theory says that a municipality is an administrative organization including a municipal assembly (*Gemeinderat*), not a local “government” that consists of legislative and administrative organs. The ordinance is partly directly under the control of the federal and the state parliaments. A municipality can enact an ordinance within the autonomous duty. However, the delegation by the individual national law is needed when the content of the ordinance has to do with an infringement of basic rights. Therefore, the deviatory competence is mainly discussed in the context of the federal system.⁴⁴

43 The Transportation Planning Speeding-up Act (*Verkehrswegenplanungsbeschleunigungsgesetz*) included shortening of preceding procedures, fixing time limits for each stage of planning, and simplifying the legal procedure. This act was applied only to the procedures in the former East Germany area in order to accelerate the improvements to the infrastructure (H. YAMADA, *Keikaku tetsuzuki no sokushin* [Promoting the Planning Procedures], in: *Seinan Gaku'in Daigaku Hôgaku Ronshû* 25 (1) (1992) 122). This act expired in 2006, but the simplification of the legal procedure has been succeeded to the Administrative Court Act, which is applicable to the whole nation (§ 50 para. 1 VwGO) (PAETOW, *Erstinstanzliche Großverfahren vor dem BVerwG* [The Procedure for a Plurality of Interested Parties in the Federal Administrative Court as the First Trial], in: *NVwZ* 26 (2007) 37).

44 In this regard, however, there is also an SEZ-like example in German law – an *experimental clause*. It means the delegation of exemption competence from parliament to executive branch in order to test a new policy in practice. The most famous examples include the clauses for the reformation of municipalities, especially in the field of finance. Experimental clauses are often written in the municipal act for the purpose of testing “*Neue Steuerungsmodelle*” (similar to “New Public Management”) in public finance for a certain period (e.g., § 146 *Gemeindeordnung B.W.*). The procedure begins with the planning of a municipality with a resolution by the local council regarding the public finance system. If the Ministry of the Interior accepts it, the municipality can break away from state regulations concerned with municipal organization or finance (P. GIEBLER / C. SCHMID, *Gemeindeord-*

b) *Deviatory Competence of a State Law – Experimental Federation*

The experimental federation means that both the federal and the state governments participate in the competition of policy innovation with the deviatory legislative competence for state governments from federal legislation.⁴⁵ In 2006, federation reform was carried out, and this type of competence was introduced into the German Constitution.

As a part of the federal system, Germany has unique legislative rules. The federal government and a state government share legislative competence. All the legislative competence belongs to a state government unless it is written in the Constitution as exclusive or competitive legislative competence of the federal government (Art. 70 German Constitution). The exclusive legislative competence enables the federal government to enact a law, while a state government can prescribe what the federal government delegates to it (Art. 71). As for the competitive legislative competence, a state government can enact a law unless the federal government prescribes the matter. This type of competence has three subcategories (Art. 72). First, the federal government can enact a law freely (*e.g.*, civil law). Second, the federal government can make a law if the federal legislation is needed for the unity of the legal or economic system (*e.g.*, public assistance law). Third, after the federal government enacts a law, a state government can stipulate what is different from the federal law (*e.g.*, environmental law). The last subcategory was introduced in the federalism reform. The rule of the application of the federal and the state law is “*lex posterior derogat legi priori.*”

Evaluations of this system are clearly divided into two groups. Some criticize the collapse of legal unity. This type of law raises the cost of interpretation and application. The mixed source of laws arguably causes citizens harm in claiming a right. In addition to the worries from the viewpoint of the freedom and rights of citizens, there is also a criticism from the perspective of democracy. This type of law was originally introduced in order to speed up legislative processes on the federal level. Most of these legislative matters belonged to the framework legislation before the reform. In this procedure, a state government must make a detailed enforcement law after the federal government enacts the framework law. This often took too much time to meet the deadline of the enforcement of the EU directives.⁴⁶ The federalism reform therefore abolished this type of law and categorized these matters as competitive legislative competence. At the same time, as the product of a compromise, it introduced this type of law or increased the

nung für Baden-Württemberg Kommentar [Commentary on the Municipal Act of the State Baden-Württemberg] (Stuttgart 4th ed. 2006) § 146 marginal 1). In this procedure there are frequent policy dialogues between the state government and municipalities.

45 L. MICHAEL, *Der experimentelle Bundesstaat* [The Experimental Federation], in: JZ 61 (2006) 886; L. BECK, *Die Abweichungsgesetzgebung der Länder* [Deviatory Law-making by a State] (Baden-Baden 2009) 181.

46 C. DEGENHART, *Die Neuordnung der Gesetzgebungskompetenzen durch die Föderalismusreform* [The New Order of the Legislative Competence through the Federalism Reform], in: NVwZ 25 (2006) 1209; Y. NAKANISHI, *Doitsu renpô-sei kaikaku to EU-hô* [The Federalism Reform in Germany and the EU Law], in: Senshû Hôgaku Ronshû 100 (2007) 174.

exclusive legislative competence of a state government that previously belonged to the legislative competence of the federal government.⁴⁷ Unclear reconciliation processes between the Federal Parliament (*Bundestag*) and the Federal House of Councilors (*Bundesrat*) are expected to be followed by an open discussion on the state level. However, if the federal government wants to avoid the deviation, informal coordination between federal and state governments may still remain, which is unfavorable for the transparency of the democratic process.⁴⁸

Others, however, consider this deviation system as the start of an experimental federation. With this system, the federal and state governments compete with each other to provide a better regulatory standard.⁴⁹ Since there were also problems of legal interpretation in the former framework legislation, the new application rule, in which the newer act is prior to the older, is simpler than the old one.⁵⁰ From the perspective of democratic decision-making, it is more desirable that a state parliament can decide the policy on its own political responsibility rather than compromise on the federal level.⁵¹

Since this system was just introduced, we have few materials to decide which opinion is true. Nonetheless, it is important to pay particular attention to two interesting points of the system as a policy coordination tool. The first is the balance of the flexibility and the limits set for political decisions. To all appearances, a state government can freely exercise deviatory competence, but there are several limitations scrupulously set up. The deviatory competence is restricted by the state constitution because the legislation belongs to the state law. The federal state has initial legislation competence, which shows the states a legislative model,⁵² and overriding opportunities with enacting a newer federal law against the state law. Constitutional provisions as to the federal system show the principle of loyalty to the federation (Art. 20 German Constitution) and the requirement for the homogeneity to the free and democratic order (Art. 28).⁵³ The

47 H. SCHULZE-FLIELITZ, *Umweltschutz im Föderalismus* [Environmental Protection in Federalism], in: NVwZ 26 (2007) 253; C. STARCK, *Einführung* [Introduction], in: Starck (ed.), *Föderalismusreform* [Federalism Reform] (München 2007) 3; H. HOFMANN, *Föderalismusreformen im Verfassungsstaat* [Federalism Reform in the Constitutional Nation], in: DÖV 61 (2008) 834.

48 H. MEYER, *Die Föderalismusreform 2006* [The Federalism Reform in 2006] (Berlin 2008) 165.

49 C. FRANZIUS, *Die Abweichungsgesetzgebung* [The Deviatory Legislation], in: NVwZ 27 (2008) 499.

50 S. OETER, *Neustrukturierung der konkurrierenden Gesetzgebungskompetenz, Veränderung der Gesetzgebungskompetenzen des Bundes* [The New Structure of the Competitive Legislative Competence and the Change of the Federal Legislative Competence], in: Starck (ed.), *Föderalismusreform* [Federalism Reform] (München 2007) 18.

51 L. MICHAEL, *supra* note 45, 889.

52 J. IPSEN, *Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusnovelle* [The Competence Allocation between the Federation and States after the Federalism Reform], in: NJW 77 (2006) 2804.

53 S. KADELBACH, *Autonomie und Bindung der Rechtsetzung in gestuften Rechtsordnungen* [Legislative Autonomy and Restrictions in the Multilevel Legal Order], in: VVDStRL 66

basic rights provisions also play an important role in setting the limit. In addition, European law (mainly EU law) puts restrictions on deviation.⁵⁴ These limitations softly control the autonomous legislation of a state. The second is the close relationship that exists between the way of coordinating norm effects and that of coordinating policy. The shift from the framework legislation to the deviatory competence leads us to conclude that the stage of policy coordination transfers from the Federal House of Councils to the state parliaments.⁵⁵

3. *Special Economic Zone from a Standpoint of Multilevel Governance*

From the viewpoint of policy coordination, the federal system is similar to SEZs because it has a close relationship with distributing legislative competence vertically. This system attaches importance to the unity of the legal order and the principle of equality. From the functional point of view, SEZs provide a tool that enables a system to distribute legislative competence to local governments within the framework of local autonomy. In other words, SEZs are a centralized assignment of legislative competence with a decentralized element. From the viewpoint of human rights and democracy, there must be an area, which a positive law regulates concretely. Taxation and regulation are the most typical examples. SEZs are a form of governance in which local governments can exclude the national positive law without a federal norm-hierarchy system that consists of federal and state law.

Both SEZs and the deviatory competence of ordinance are policy coordination tools among several public entities in a multi-layered system. The deviatory competence makes the order of legal priority clear, which indirectly promotes negotiation among them. On the other hand, SEZs establish policy coordination or negotiation processes. The deviatory competence fits with a more decentralized system because local rules can be enforced until courts decide that national rules are prior to the local rules. However, the deviatory competence can only be used if (a) regional rules have competence on regulation and taxation without individual delegation by the legislator, and (b) regional rules have priority over national rules. It is difficult in Japan to introduce the deviatory competence of an ordinance because the Japanese Constitution does not satisfy condition (b).

(2007) 24; V. HAUG, *Die Abweichungsgesetzgebung* [Deviatory Legislation], in: DÖV 61 (2008) 856.

54 W. KÖCK/R. WOLF, *Grenzen der Abweichung im Naturschutz* [Limits of Deviation in Nature Protection], in: NVwZ 27 (2008) 357.

55 A. BENZ, *Verwaltungspolitik im föderativen Wettbewerb der Länder?* [Administrative Policies in the Federative Competition between the States?], in: Verwaltungsarchiv 97 (2006) 329.

CONCLUSION

SEZs can be used not only for economic development but also for policy innovation or coordination between national and local governments. SEZs and local decentralization are, so to speak, two sides of the same coin. SEZs are a governance structure in which legislative *competence* is assigned to the central government but legislative *function* is distributed to local governments. A significant difference between the federal system and the local autonomy, which the discussion about SEZ and deviatory legislative competence seems to imply, may lie in the distribution of the legislative function.

ABSTRACT

We usually take for granted the notion that Special Economic Zones (SEZs) are a limited area designed for stimulating the whole national economy. Japan has certainly had this type of SEZ since the return of Okinawa. However, we can also use SEZs as a tool for policy innovation and coordination between national and local governments. For example, Japan has such a type of zone, introduced by the Special Zone for Structural Reconstruction Act of 2002. Regulative reforms and deregulation are “tested” within the zone, followed by the introduction of the same regulative policy all over Japan if the test goes well. The Act also has a procedure in which local government proposes the deregulation or regulative reform to the national government, which creates a policy coordination system between the national and local levels.

The reason why SEZs are needed as a tool for multilevel governance is closely related to the status quo of local decentralization in Japan. If a municipality had competence to deregulate national regulations or exempt taxes, or if Japan had a federal system, there would be no need for SEZs. It is therefore very helpful to identify the characteristics of SEZs compared with local autonomy and a federal system. In the Japanese legal system it is possible that an ordinance can have more strict regulations, unless they conflict with the national law. Generally speaking, however, an ordinance cannot relax any national standard established by national law because the latter is considered to set the lower limit of any regulation. Some argue that an ordinance should be able to overwrite national regulatory standards set by national statutes (“deviatory competence”) in order to realize decentralized governance structure. It could, however, destroy the traditional norm pyramid and trigger a collapse of the principle of the law-governed state.

It is appropriate to learn from experiences with the German federal system in order to evaluate the deviatory competence discussion in Japan because Germany introduced the deviatory legislative competence of a federal state in 2006. Although this is a subsystem of the federal structure, there are some remarkable and referable points to the Japanese discussion. This system keeps the balance of the flexibility and the limits set scrupulously for political decisions from the viewpoint of a policy coordination tool. The deviatory competence is restricted by the state constitution because the legislation belongs to state law. The federal parliament has initial legislative competence, which shows states a legislative model, and overriding opportunities with enacting a newer federal law against the state law. Constitutional provisions as to the federal system show the principle of loyalty to the federation and the requirement for homogeneity to the free and democratic order. The basic rights provisions also play an important role in setting the limit. In addition, European law puts restrictions on deviation. These limitations softly control the autonomous legislation of a state. Japan should also introduce such a legal scheme if the deviatory competence of an ordinance were acknowledged.

From a functional point of view, SEZs provide a tool that enables a system to distribute legislative competence to local governments within the framework of local autonomy. In other words, SEZs are a centralized assignment of legislative competence with a decentralized element. SEZs are a form of governance in which local governments can exclude the national positive law without a federal norm-hierarchy system that consists of federal and state law.

ZUSAMMENFASSUNG

Eine Sonderwirtschaftszone wird im Allgemeinen als lokal begrenztes Gebiet begriffen, das die Wirtschaft des gesamten Landes fördern soll. Auch in Japan hat es diese Art der Sonderwirtschaftszone seit der Rückführung von Okinawa gegeben. Jedoch können Sonderwirtschaftszonen auch dazu eingesetzt werden, politische Neuerungen einzuführen und zwischen Nationalregierung und Präfektur- und Kommunalverwaltung zu koordinieren. Diese Art Zone wurde zum Beispiel in Japan durch das Gesetz über die Sonderzone zur Strukturreform von 2002 eingeführt. In einer solchen Zone werden Gesetzesreformen und Deregulierungsmaßnahmen „getestet“, bevor sie, soweit der Versuch Erfolg hat, in ganz Japan eingeführt werden. Das Gesetz sieht auch ein Verfahren vor, durch das die Präfektur- oder Kommunalverwaltung der Nationalregierung solche Neuerungen vorschlagen kann, und stellt dadurch ein System der Politikkoordination zwischen der nationalen Ebene und der Ebene der Präfekturen und Kommunen zur Verfügung.

Dass Sonderwirtschaftszonen zur Abstimmung verschiedener politischer Ebenen eingesetzt werden, hängt eng mit dem status quo der Dezentralisierung in Japan zusammen. Wären Präfekturen und Kommunen befugt, nationale Bestimmungen auszusetzen oder

Steuerbefreiungen zu gewähren, oder hätte Japan ein föderales System, bestünde keine Notwendigkeit, Sonderwirtschaftszonen einzurichten. Es ist daher sachdienlich, die Besonderheiten von Sonderwirtschaftszonen in Abgrenzung zur kommunalen Selbstverwaltung und zum föderalen System herauszuarbeiten. Im japanischen Rechtssystem kann die Satzung einer Gebietskörperschaft strengere Bestimmungen enthalten, soweit sie nicht mit nationalem Recht kollidieren. Im Allgemeinen aber kann eine Satzung nicht die durch nationales Recht gesetzten Vorgaben lockern, da sie als untergeordnete Regelung angesehen wird. Einige sprechen sich dafür aus, dass es möglich sein sollte, einer Satzungsbestimmung Vorrang vor nationalen gesetzlichen Vorgaben einzuräumen (sog. Abweichungskompetenz), um dezentrale politische Strukturen zu verwirklichen. Dies könnte jedoch die traditionelle Normenpyramide zerstören und das Rechtsstaatsprinzip aushöhlen.

Die Erfahrungen mit dem deutschen föderalen System können für die Beurteilung der japanischen Diskussion über die Abweichungskompetenz fruchtbar gemacht werden, da Deutschland die Abweichungskompetenz für die Länder 2006 eingeführt hat. Obwohl diese in Deutschland zur föderalen Struktur gehört, bestehen einige bemerkenswerte Bezüge zur japanischen Diskussion. Als Instrument der Politikabstimmung tariert sie im deutschen System Flexibilität und Grenzen politischer Entscheidungen genau aus. Sie ist durch die Landesverfassung begrenzt, da es sich um Landesrecht handelt. Der Bund darf zuerst von seiner Gesetzgebungszuständigkeit Gebrauch machen, wodurch den Ländern ein Gesetz aufgezeigt wird, an dem sie sich orientieren können, und er hat die Möglichkeit, die Anwendung entsprechender Landesgesetze wiederum durch später erlassenes Bundesrecht zu verhindern. In Bezug auf das föderale System enthält das Grundgesetz den Grundsatz der Bundestreue und den Homogenitätsgrundsatz. Auch die Grundrechte bilden wichtige Grenzen. Zusätzlich beschränkt das europäische Recht die Möglichkeit der Abweichung. So werden der Gesetzgebungskompetenz der Länder flexible Grenzen gesetzt. Auch Japan sollte eine ähnliche Herangehensweise wählen, falls die Abweichungskompetenz anerkannt wird.

In funktionaler Hinsicht ermöglichen es Sonderwirtschaftszonen, im Rahmen der kommunalen Selbstverwaltung Gesetzgebungskompetenzen auf die Präfektur- oder Kommunalverwaltung zu übertragen. Anders gesagt, sind Sonderwirtschaftszonen ein Mittel zur zentralisierten Übertragung von Gesetzgebungskompetenzen mit dezentralem Element. Sie sind ein Steuerungsmittel, das es der Präfektur- und Kommunalverwaltung ermöglicht, die Anwendung positiven nationalen Rechts auszuschließen, ohne dass ein föderales System mit einer Normenhierarchie aus Bundes- und Landesrecht vorausgesetzt wird.

(Übers. d. Red.)