The Test for Standing in Administrative Matters

Contemporary Developments in Japan and the Case of 'Nōkotsu-dō'

Maiko ISHIKAWA*

I. INTRODUCTION: JAPAN'S CONTROVERSIAL STANDING TEST FOR ADMINISTRATIVE LAW MATTERS

This article analyses contemporary developments in the test for standing in administrative matters in Japan and demonstrates the application of the test in light of a hypothetical scenario involving 'nōkotsu-dō' (納骨堂). A *nōkotsu-dō* may be translated as a "cinerarium". It is a place where people keep their loved ones' ashes and is a location that can be visited to honor and remember that person, thus performing a function somewhat similar to a gravesite.[1] *Nōkotsu-dō* are facilities which are in high demand due to

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* Assistant Judge, Yokohama District Court.

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All webpages cited were last visited by the author in July 2020.

1 For a visual depiction of such a facility, see: *https://www.youtube.com/watch?v=KtOTPXUuhEQ.*

Japan's super-aging society. Approval for the location and operation of these facilities has, however, been challenged by other local residents and businesses, bringing into question the test for the standing of complainants in such matters. The cases are examples of administrative litigation governed by the provisions of *Gyōsei jiken soshō-hō* (Administrative Case Litigation Act, hereinafter: the Act)[2]. The Act applies to judicial review of dispositions (処分, *shobun*) made by Japanese administrative agencies at both the national and local government levels.

The test for standing in administrative cases has been controversial in Japan amongst scholars, judges and lawyers since the Act was adopted in 1962. Under the Act, it is clear that the person to whom an original administrative disposition is addressed meets the test for standing. However, it is not clear whether other people who are not the person to whom an original administrative disposition was addressed (hereinafter: other people) meet the test. Traditionally, Japanese courts applied the test narrowly in such a way that other people were rarely granted standing. The courts have been criticized for such attitudes.[3] Meanwhile, the Supreme Court of Japan issued very important precedents where the Court upheld the applicants' standing, setting out the elements to be considered when courts decide whether other people meet the test.[4] In 2004, the Act was amended to clearly indicate the elements for the test based on those precedents and to expand the range of people who can seek remedies for an unlawful disposition. The revisions to the Act reflected the importance of administrative law for Japanese society and the need to deal with administrative matters as expeditiously as possible.[5] However, the test for standing is arguably still harder for other people to meet when compared to the equivalent test in other countries.[6]

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2 Law No. 139/1962.

3 N. ŌKUBO, *Gyōsei jiken soshō no genkoku tekikaku no han'i* [The Scope of Standing in Administrative Law Matters], Jurisuto 1263 (2004) 47.

4 Supreme Court (Second Petty Bench), 17 February 1989, Minshū 43, 56, *https://www.courts.go.jp/app/files/hanrei_jp/172/052172_hanrei.pdf*. Supreme Court (Third Petty Bench), 22 September 1992, Minshū 46, 571. *https://www.courts.go.jp/app/hanrei_en/detail?id=1406.* Supreme Court (Grand Bench), 7 December 2005, Minshū 59, 2645. *https://www.courts.go.jp/app/hanrei_en/detail?id=795.*

5 H. MINAMI (ed.), *Jōkai gyōsei jiken soshō-hō* [Clause-by-Clause Descriptions of the Administrative Case Litigation Act] (4th ed., 2014) 296, 297.

6 *Kaisei gyōsei jiken soshō-hō sekō jōkyō kenshō-kai dai-san-kai kaigi giji yōshi* [The Summary of Minutes of a Third Meeting of the Verification Concerning the State of Implementation of the Amended Administrative Case Litigation Act], *http://www.moj.go.jp/content/000103916.pdf*; *Gyōsei soshō ni kansuru gaikoku jijō chōsa kekka* [The Survey Result of the Foreign Treatments on Administrative Law Matters], *https://www.kantei.go.jp/jp/singi/sihou/kentoukai/gyouseisosyou/dai7/7siryou1.pdf*.

II. THE TEST FOR ADMINISTRATIVE STANDING IN JAPAN: OVERVIEW

The Japanese standing test in administrative matters is set out in the Act.[7] Art. 9 para. 1 of the Act states that:

> "An action for the revocation of an original administrative disposition may be filed only by a person who has legal interest to seek the revocation of the original administrative disposition."

The concept of 'disposition' is similar to 'decision' in some other jurisdictions.[8] Art. 9 para. 2 of the Act provides that:

> "When judging whether or not any person, other than the person to whom an original administrative disposition is addressed, has the legal interest prescribed in the preceding paragraph, the court shall not rely only on the language of the provisions of the laws and regulations which give a basis for the original administrative disposition, but shall consider the purposes and objectives of the laws and regulations as well as the content and nature of the interest that should be taken into consideration in making the original administrative disposition. In this case, when considering the purposes and objectives of said laws and regulations, the court shall take into consideration the purposes and objectives of any related laws and regulations which share the objective in common with said laws and regulations, and when considering the content and nature of said interest, the court shall take into consideration the content and nature of the interest that would be harmed if the original administrative disposition was in violation of the laws and regulations which give a basis therefor, as well as in what manner and to what extent such interest would be harmed."

This provision may be summarized as follows.[9] Japanese courts need to consider:

1. the language of the provisions of said laws and regulations;
2. the purposes and objectives of the laws and regulations; and
3. the content and nature of the interest that should be taken into consideration in making the original administrative disposition.

The second item refers to the purposes and objectives of any related laws and regulations which share the objective in common with the laws or regulations under consideration. The third item above requires courts to consider how and to what extent the relevant interests would be harmed if the decision-maker does not comply with applicable laws or regulations.

The test is a matter to be examined upon the court's own authority (職権調査事項, *shokken chōsa jikō*).[10] In other words, even if the respondent does not

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7 Unless otherwise noted, translations of the Act are taken from the Ministry of Justice's Japanese Law Translation, *http://www.japaneselawtranslation.go.jp/help/?re=01*.

8 See, for example, Australia's Administrative Decisions (Judicial Review) Act 1977 (Cth).

9 MINAMI (ed.), *supra* note 5, 290–310.

object to the applicant having standing, courts may conduct an examination into the applicant's standing and decide whether the applicant meets the test. The onus of proof is on the applicant and generally requires factual evidence such as a certified copy of a residential or commercial registration.[11]

If certain other people can clear the barrier of the Japanese standing test set out in Art. 9 of the Act, they are then subjected to another test, which is set out in Art. 10 para. 1 of the Act. The provision states: "In an action for the revocation of an administrative disposition, the applicant may not seek revocation on the grounds of breach of law which is irrelevant to his/her legal interest". If the court finds that other people seek revocation only on such grounds, the court will reject their claim immediately.[12] Therefore, other people need to carefully establish the grounds of a breach of law as well.

III. THE EVOLUTION OF *NŌKOTSU-DŌ* IN CONTEMPORARY JAPAN

1. The Increasing Demand for Nōkotsu-dō

Most Japanese people today will be cremated after death in accordance with Buddhist traditions. The concept is also practical and became more common in the Meiji Period (1868–1912) because Japan was quickly urbanizing and there was no longer enough land for burying bodies. According to the Japanese Ministry of Health, Labour and Welfare, in 2018 more than 1.4 million bodies were cremated while only about 500 bodies were buried.[13] In other words, bodies were cremated 99.97% of the time in 2018. In 2014, the Imperial Household Agency (Japan) announced that it would reintroduce cremation for the then Emperor (His Majesty the Emperor Emeritus) in response to the current trend.[14] This step was a significant change to historical practices, because Japanese Emperors' bodies have been buried since the Edo Period (1603–1868). The new measure suggests cremation has undoubtedly become a Japanese custom.

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10 See, SHIHŌ KENSHŪ-JO [Legal Research and Training Institute] (ed.), *Gyōsei jiken soshō no ippanteki mondai ni kansuru jitsumuteki kenkyū* [Practical Research into the General Issues in Administrative Case Litigation] (2nd ed., 2000) 112.

11 SHIHŌ KENSHŪ-JO (ed.), *supra* note 10, 112.

12 For example, in the case where the standing of residents near an airport was admitted by reason of noise pollution, it was decided that the residents could not seek revocation on the ground of breach of a statutory provision which purported to protect passengers because the statute was irrelevant to their interests.

13 *Bochi maisō-tō ni kansuru hōritsu ni kakaru gyōsei no shikumi* [The Structure of Administrative Law Matters Concerning Subjects such as Graveyards and Burials], *https://www.mhlw.go.jp/content/11130500/000585194.pdf*.

14 *Kongo no goryō oyobi go-sōgi no arikata ni tsuite* [The Future Way of Imperial Tombs and Funerals] *https://www.kunaicho.go.jp/kunaicho/koho/goryou/pdf/arikata.pdf*.

In Japan, funeral and ancestry traditions require that contemporary family and close friends pay their respects to people who have passed away by periodically going to graveyards or *nōkotsu-dō*, washing stains away from them, offering flowers or food and lighting incense sticks. Where people choose not to use a grave to bury ashes, they may decide to place the ashes in a building known as a *nōkotsu-dō*. Such buildings are usually managed by temples. For a long time, burying ashes in a grave was more common in Japan than using *nōkotsu-dō*.[15] Today, however, *nōkotsu-dō* have gained popularity.[16] One of the reasons is that it is very difficult to erect new gravesites, especially in urban areas. Although the overall population in Japan is rapidly decreasing, populations in urban areas, such as the Tōkyō, Ōsaka and Nagoya areas, have been increasing for more than 60 years according to the Statistics Bureau, Ministry of Internal Affairs and Communications.[17] There is no longer enough land for new graves in urban areas. Moreover, Japan's super-aging society means that more than 1.3 million people die every year.[18] In May 2020, 28.7% of people were over the age of 65, while 12.0% of people were under the age of 14, according to the Bureau.[19]

The combination of urbanization and an aging society has made it very difficult for the ordinary person to maintain and visit distant graves and thus fulfil the traditions associated with funerals and ancestral obligations. As a result, some temples have tried to erect *nōkotsu-dō* in urban areas instead of creating new gravesites. In addition, some *nōkotsu-dō* are striving to meet their contemporary clients' needs by providing innovative solutions. Some facilities, for example, offer people the option of driving into the building, where they can then pray for and honor the deceased loved one or ancestor without even leaving their cars.[20]

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15 For example, in 2018 there were more than 860,000 graves while there were only 12,000 *nōkotsu-dō* according to the statistics published by the Japanese Ministry of Health, Labor and Welfare, *https://www.e-stat.go.jp/stat-search/files?page=1&layout=datalist&toukei=00450027&tstat=000001031469&cycle=8&tclass1=000001132823&tclass2=000001132824&tclass3=000001134083&stat_infid=000031873711.*

16 *Toshi-bu no ohaka jijō to nōkotsu-dō no kanō-sei ni tsuite no kōsatsu* [Comments on the Situation of Tombs in Urban Areas and the Option of *nōkotsu-dō*], *https://www.jri.co.jp/page.jsp?id=27607*.

17 *Toshi-bu e no jinkō shūchū dai-toshi-tō no zōka ni tsuite* [The Population Concentration in Urban Areas and the Increase of Large Cities] *https://www.soumu.go.jp/main_content/000452793.pdf* (in Japanese), *https://www.metro.tokyo.lg.jp/tosei/hodohappyo/press/2020/01/31/06.html*.

18 *Jinkō suikei 2020-nen 5-getsu hō* [The Estimate of the Population in May 2020] *https://www.stat.go.jp/data/jinsui/pdf/202005.pdf.*

19 *Ibid*.

20 For example, this company provided the innovative service, *http://aishoden-ueda.com/?page_id=157* (in Japanese).

2. The Resistance to Nōkotsu-dō

However, residents and other stakeholders are sometimes opposed to the erection of *nōkotsu-dō*. There are various reasons for these objections. Some residents argue that, "[O]ur tranquil life will be hindered by the bad feeling or fear of the *nōkotsu-dō* because we associate it with ghosts".[21] Some landlords claim that, "[T]he *nōkotsu-dō* will pull down the value of our land".[22] Other people worry that the danger of fire will increase because the visitors to the *nōkotsu-dō* will handle candles to light incense sticks.[23] Some doctors whose clinics or hospitals are near the *nōkotsu-dō* argue that patients will avoid their facilities because they are likely to associate the *nōkotsu-dō* with death.[24]

If people plan to erect and manage a *nōkotsu-dō*, they must obtain permission to do so from the local governor in accordance with Art. 10 para. 1 of the Graveyards and Burials Act (hereinafter: the Graveyards Act).[25] The Graveyards Act does not require applicants to obtain consent from other members of the neighborhood[26] or to hold an explanatory meeting for the neighborhood.[27] However, some local ordinances or regulations require applicants to hold an explanatory meeting before applying for permission.[28]

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21 See, Fukuoka High Court, 27 May 2008, reported in *courts.go.jp. https://www.courts.go.jp/app/files/hanrei_jp/418/036418_hanrei.pdf*, and Tōkyō District Court, 16 April 2020, reported in *courts. go.jp, https://www.courts.go.jp/app/files/hanrei_jp/814/080814_hanrei.pdf*.

22 See, Fukuoka High Court, 27 May 2008, *supra* note 21.

23 For example, see this blog post of a party opposed to the erection of a *nōkotsu-dō, http://inagekyougikai.seesaa.net/article/471565680.html* (in Japanese).

24 See this news report published by J-CAST on 30 June 2017, *https://www.j-cast.com/2017/06/30302049.html?p=all* (in Japanese).

25 *Bochi maisō-tō ni kansuru hōritsu*, Law No. 48/1948.

26 Generally speaking, it is difficult to enact a provision which requires applicants to obtain the consent of other members of the neighborhood as a prerequisite for permission because such a provision arguably converts the neighborhood into the de facto decision-maker. In some cases, it may constitute a violation of constitutional rights given by Art. 22 para. 1 of *Nihon-koku Kenpō* (Constitution of Japan): "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare". See, Y. KITAMURA, *Bochi ni kansuru seisaku kenkyū ni yosete* [Policy and Research Concerning Graveyards], Kanagawa Seisaku Kenkyū Daigaku Kenkyū Jānaru 3 (2012) 31.

27 See, Art. 10 para. 1 of the Graveyards Act.

28 For example, see the Kanagawa prefecture website and the Shinagawa ward website, *https://www4.city.kanazawa.lg.jp/data/open/cnt/3/1805/1/siryou.pdf?2014020 4163454, https://www.city.shinagawa.tokyo.jp/reiki/reiki_honbun/g110RG00000599.html#e000000270* (in Japanese).

Even if there are no such ordinances or regulations applicable to some applicants, they may need to make an effort to secure the understanding of the neighborhood in order to prevent future disputes.[29]

If an applicant fulfills all of the applicable requirements, the local governor has to permit the project. In such cases, the authority cannot reject the application just because there are conflicting opinions about whether the facility should be allowed.[30] (According to research subsidized by the Japanese Ministry of Health, Labour and Welfare, there were some cases where applicants who sought permission for a *nōkotsu-dō* sued local governments, alleging that the local governor forced them to obtain consent from their neighborhood in spite of a lack of legal basis; these applicants were later granted compensation.[31]) If the local governor approves the application for the facility, the residents and other stakeholders may try to file an action before a court and ask the court to revoke the permission.

IV. Applying the Tests to an Administrative Matter in Contemporary Japan: the Case of *Nōkotsu-dō*

1. Introduction

This section of the article analyses the contemporary legal problems in Japan associated with the evolution of *nōkotsu-dō* in order to highlight the application of the test for standing and for the restriction of grounds in administrative matters. Applying these principles to the case of *nōkotsu-dō* provides an opportunity to consider criticism of the test, despite reforms to the legislation in 2004.

29 See the study *Kaku chihō kōkyō dantai ni okeru bochi kei'ei ni kansuru jōhō kyōyū no arikata ni kansuru kenkyū* [Research Concerning the Sharing of Information on the Management of Graveyards in Each Local Public Body], subsidized by the Japanese Ministry of Health, Labor and Welfare. *http://www.zenbokyo.or.jp/h28kenkyu-houkoku/index06_01_03.html*.

30 The authority may request the applicant to take further actions (non-statutory required actions) to reconcile with the neighborhood. Such a request is categorized as "administrative guidance" (行政指導, *gyōsei shidō*). However, it becomes unlawful if the authority forces the applicant to follow the guidance in practice. See, Supreme Court (First Petty Bench), 18 February 1993, Minshū 47, 574. *https://www.courts.go.jp/app/hanrei_en/detail?id=1391*.

31 See study cited *supra* note 29.

2. Applying the Test for Standing

a) Considering the items indicated in Art. 9 para. 2 of the Act

At the heart of the matter is whether members of a neighborhood where the establishment of a *nōkotsu-dō* receives approval have standing to challenge the administrative disposition represented by that approval decision.

First, the language of the provisions of the relevant laws and regulations needs to be considered by the court. The disposition at issue in these types of cases typically involves a decision made by a local governor that is subject to Art. 10 para. 1 of the Graveyards Act. This paragraph says that the person who plans to operate a graveyard, *nōkotsu-dō* or a crematory must obtain permission from the local governor. The Graveyards Act does not provide any requirements or preconditions. From the language of the provision, it is assumed that the Japanese Parliament (the Diet) intended to give broad discretion to each local governor because religious feelings may vary in each local area in Japan.[32] For example, several villages in Nara prefecture, which used to be a metropolis more than 1300 years ago, continue to follow the custom of burying their dead.[33] Indigenous people in Japan, the Ainu, also traditionally bury their dead.[34] Recently, the number of people who want their family to scatter their ashes in the sea has increased.[35] One of the reasons for this trend is that they are anxious about being a burden on their descendants if those descendants have to visit and maintain their graves.[36] As of now, scattering ashes in the sea is not illegal in Japan. If people scatter ashes in a disorderly way, however, they may be convicted for abandonment of a body subject to Art. 190 Penal Code.[37] (A person who damages, abandons or unlawfully possesses a corpse, the ashes or hair of a dead person, or an object placed in a coffin is subject to imprisonment with labor for not more than 3 years.)[38]

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32 See, Supreme Court (Second Petty Bench), 17 March 2000, Shūmin 197, 661.

33 See the information published by Kōdansha at *https://gendai.ismedia.jp/articles/-/66905* (in Japanese).

34 See the news report published by NHK, *https://www.nhk.or.jp/hokkaido/articles/slug-n9f22f5283e1f* (in Japanese).

35 See the news report published by Tōyō Keizai and by Mainichi Shinbun. *https://toyokeizai.net/articles/-/241449?page=2* (in Japanese), *https://mainichi.jp/articles/20200517/ddm/013/040/014000c* (in Japanese).

36 See, the news reports published by Tōyō Keizai and by Nishi Nippon Shinbun. *https://toyokeizai.net/articles/-/241449?page=2* and *https://www.nishinippon.co.jp/item/n/468195/* (both in Japanese).

37 *Keihō*, Law No. 45/1907.

38 *Kaiyō sankotsu gaidorain* [Guidelines on the Scattering of Ashes at Sea], *https://kaiyousou.or.jp/guideline.html*.

Next, the application of the test for standing requires the court to consider the purposes and objectives of the laws and regulations. Art. 1 of the Graveyards Act states that the objective of the legislation is to provide for the management of graveyards, *nōkotsu-dō* or crematories and burials in accordance with national religious feelings, public health and public welfare. It is important to note the use of the terms 'national' and 'public' in this provision: *national* religious feelings, *public* health and *public* welfare. As such, the article itself does not suggest that it was directly designed to protect the specific interests of individuals from the unlawful or inappropriate management of *nōkotsu-dō*.

In addition to the Graveyards Act, other relevant laws and regulations need to be considered. Each prefecture is permitted by the Graveyards Act to enact ordinances or regulations to provide for their own tests[39] or preconditions for reconciliation of the need for such facilities and local religious feelings.[40] Ōsaka prefecture, for example, enacted the "Implementing Ordinance Referring to the Graveyards Act" (hereinafter: the Ordinance)[41] to enforce the Graveyards Act.

The Ordinance requires people who wish to operate a *nōkotsu-dō* to meet two tests[42] and three preconditions for application.[43] The first test concerns the structure and facilities, including equipping them for fire prevention.[44] The second test is whether the applicant owns the site for the *nōkotsu-dō*, i.e. whether there is a mortgage on the site.[45] The reason for this concern about whether an operator has a mortgage on the site is generally understood to be that the Parliament wants to protect users of *nōkotsu-dō* from unsustainable businesses.[46] That is to say, if an applicant (usually a temple) can no longer pay the mortgage and an obligor (usually a bank) enforces the mortgage, the users may be obliged to move their loved ones' ashes to another facility. The expectation is thus that an applicant has sufficient financial means to operate the *nōkotsu-dō*. The most important precondition is that before submitting an

39 In this article, the statutory requirements which are to be fulfilled when relevant authorities approve applications are referred to as 'tests'.

40 In this article, the statutory requirements which are to be fulfilled before a person submits an application to relevant authorities are referred to as 'preconditions'.

41 *Ōsaka-fu bochi maisō-tō ni kansuru hōritsu sekō jōrei*, Ordinance No. 3/1985. See the Ōsaka prefecture website, *http://www.pref.osaka.lg.jp/houbun/reiki/reiki_honbun/k201RG00000557.html*.

42 See, Arts. 12 para. 3 and 14 of the Ordinance.

43 See, Arts. 3, 4 and 5 of the Ordinance.

44 See, Art. 14 of the Ordinance.

45 See, Art. 12 para. 3 of the Ordinance.

46 *Bochi kei'ei kanri no shishin-tō ni tsuite* [Guidance on Operating and Managing Graveyards], *https://www.mhlw.go.jp/topics/0104/tp0413-2.html#betu1*.

application, the applicant must (i) hold an explanatory meeting for local residents and businesses who use or manage buildings within 100 meters of the proposed site of the *nōkotsu-dō* and (ii) provide a report concerning the meeting to the local governor.[47] The Ordinance also requires an applicant to put up the notice on the site to inform about his or her plans.[48]

If a person plans to operate a graveyard or a crematory, two more tests need to be met.[49] The next test is whether the site is located at least 100 meters away from residences, hospitals/clinics, foster homes regulated in Art. 41 Child Welfare Act[50] and similar facilities specified by an Ōsaka prefecture regulation. The final test is that there are no concerns that the graveyard or the crematory may contaminate drinking water.

The background to this Ordinance is an important part of this narrative. In 2000, the Supreme Court of Japan held that residents near one graveyard in Ōsaka prefecture did not meet the standing test so as to be able to seek revocation of the permission at issue.[51] The version of the Ordinance considered by the Court was different from the current formulation of the Ordinance. It did not have the test related to protecting drinking water from contamination nor did it have the precondition relating to an explanatory meeting for local residents and businesses, and the test relating to distance restrictions was more abstract (i.e. the test did not relate to a particular facility and used the phrase '*anything like these'*.). Further, the case was decided before the amendments to the Act in 2004. Accordingly, Art. 9 of the Act did not include paragraph 2, i.e. it did not express what a court needed to consider in determining whether an applicant met the standing test. The majority of the Supreme Court in 2000 construed the Graveyards Act as reflecting the expectation that each local governor should decide whether or not to give permission with due consideration for the purpose of the Graveyards Act, i.e. national religious feelings, public health and public welfare.

The majority of the Court also found that the management of a graveyard deeply involved public interests by nature, and it relied in part on national manners and customs, religious activities and local geographical conditions. The majority went on to say:

"[I]t is difficult to regulate the management of a graveyard in the same way all over Japan. Therefore, Art. 10 para. 1 of the Graveyards Act cannot be construed as intending

47 See, Art. 5 of the Ordinance.
The other preconditions relate to the nature of the business and the notice posted on the site to inform the neighborhood of the proposed plan to erect a *nōkotsu-dō*. See, Arts. 3 and 4 of the Ordinance.

48 See, Art. 4 of the Ordinance.

49 See, Arts. 12 and 13 of the Ordinance.

50 *Jidō fukushi-hō*, Law No. 164/1947.

51 Supreme Court (Second Petty Bench), 17 March 2000, Shūmin 197, 661.

to protect individual interests of the neighborhood. As the appellant pointed out, Art. 7 para. 1 of the Ordinance says graveyards shall be at least 300 meters in distance from residences, schools, hospitals, clinics, offices, shops and anything like these. But it includes many facilities and does not specify a particular facility. In addition to that, the paragraph also says "provided, however, that this shall not apply if a local governor admits there are no conflicts between the graveyards and public health."[52]

According to the majority of the Court, a local governor may only consider public health and public welfare as opposing interests. Hence, Art. 7 para. 1 of the Ordinance cannot also be construed as intending to protect individual interests of some specific facilities near a graveyard. The majority concluded that the appellants did not meet the standing test and dismissed their appeal. The judgment has long been criticized because the Court applied the test too narrowly, thus preventing other people from seeking judicial review.

Public awareness of the necessity to avoid disputes between applicants and local residents and businesses also began to increase.[53] After the Supreme Court decision in 2000, guidelines were published by the Ministry of Health and Welfare (the current Ministry of Health, Labour and Welfare) in 2000.[54] The guidelines are designed to be referred to by local governors when they instruct or supervise individuals who build and manage a graveyard. The guidelines say that it might be possible for local governors to impose some statutory tests and preconditions on applicants to ensure the graveyards harmonize with their surrounding environment. After the Supreme Court judgment in 2000 and the issuing of the guidelines, the relevant Ordinance was amended in 2002 by the Ōsaka government.[55]

The amendments to the Ordinance clarified those facilities covered by distance restrictions. The Ordinance now says that:

"graveyards and crematories shall be at least *100 meters* away from *residences, hospitals/clinics, foster homes regulated in Art. 41 Child Welfare Act*[56] *and similar facilities specified by a regulation of Ōsaka prefecture*; provided, however, that this shall not apply […] where the local governor admits that the graveyards and the crematories reflect the religious feelings of Ōsaka citizens and that there are no conflicts in terms of public health and other public welfare."[57]

These amendments mean that the distance restrictions now relate to particular facilities. Before the amendments the test referred to the phrase '*any-*

52 See, Art. 7 para. 1 of the Ordinance prior to its amendment in 2003.

53 *Bochi kei'ei kanri no shishin-tō ni tsuite* [Guidance on Operating and Managing Graveyards], *supra* note 46.

54 *Ibid*.

55 *Heisei 15-nen Ōsaka-fu jōrei dai-36-gō*, Ordinance No. 36/2003.

56 *Supra* note 50.

57 Art. 12 para. 1 of the Ordinance.

thing like these'.[58] Thus, it appeared to include almost every kind of facility. On the other hand, under the current Ordinance, it is clear that the test does not include some facilities, such as cafés and barber shops. The amendments in 2002 also added the test relating to the protection of drinking water from contamination and the precondition relating to an explanatory meeting for local residents and businesses.

This new test and precondition are more important than the clarification of the facilities related to the distance restrictions. Because the Ordinance on its face seems to be concerned with the health of individuals who may drink contaminated water due to graveyards and requires applicants to give consideration to a specific neighborhood's interests by giving individuals and businesses in that neighborhood an opportunity to learn about the building project in advance, the amendments elevate local interests to a more important position than before. A number of other local governments have introduced similar ordinances or regulations.[59] Some lower courts have admitted the standing of members of the relevant neighborhood under these similar ordinances. The courts consider that the residents near a graveyard would be in danger of water contamination and that the contamination would do harm to their lives and health if the decision-maker did not comply with the relevant ordinance.[60]

All these cases involved a graveyard, however, and not a *nōkotsu-dō*. Unlike at a graveyard, people do not bury ashes in the ground at a *nōkotsu-dō*. It is likely to be difficult to conclude that residents near *nōkotsu-dō* are in danger of water contamination. Therefore, the Ordinance does not require that people who wish to operate *nōkotsu-dō* meet the test relating to preventing drinking water contamination. Accordingly, the Ordinance requires potential operators to meet only two tests and preconditions. The first test concerns the structures and facilities, including equipping them for fire prevention. The second test is whether the applicant owns the site for the *nōkotsu-dō* and that the site is thus not collateral for a loan.

Next, the application of the test for standing requires the court to look at the content and nature of the interest that should be taken into consideration in making the original administrative disposition. Generally speaking, life and body (生命身体, *seimei shintai*) are regarded as more important interests

58 See, Art. 7 para. 1 of the Ordinance prior to its amendment in 2003.

59 See, Fukuoka High Court, 27 May 2008, *supra* note 21, and Tōkyō District Court, 16 April 2020, *supra* note 21. And see the Saiki city website and the Tosashimizu city website, *https://www.city.saiki.oita.jp/reiki/reiki_honbun/r159RG00000556.html* and *https://www.city.tosashimizu.kochi.jp/reiki/H418901010002/H418901010002_j.html* (both in Japanese).

60 For example, Tōkyō District Court, 16 April 2020, *supra* note 21.

than financial, commercial, intellectual or psychological interests. Consequently, Japanese courts have shown themselves more willing to apply the test flexibly – and to find standing – in cases involving life and body than in cases where applicants claimed only financial, commercial, intellectual or psychological interests.[61]

There are very important precedents relating to this conceptualization of life and body which also led to the amendment of the Act in 2004. The Supreme Court of Japan decided a case concerning a disposition to permit a power company to install a nuclear reactor at a nuclear power plant in 1992.[62] Although the provision at stake provided general and abstract requirements designed to save human lives and bodies, the Court unanimously upheld the residents' standing, saying their lives and bodies near the nuclear reactor were in danger of being exposed to radiation if the power company received permission in spite of a lack of required safety measures at the nuclear reactor.[63] In another case decided in 2005, the Supreme Court of Japan considered a disposition to allow a rail company to build elevated railways.[64] Individuals in the neighborhood alleged that the railways would do harm to their health because of noise pollution and vibration. The Court also found that the residents in that case had standing. The Court focused on how much and how long the neighborhood's health would be damaged if the administrative decision-maker had not complied with relevant laws and regulations. The Court found that the damage would continue as long as the company provided transport services.[65]

On the other hand, the Court has not been willing to admit the standing of members of neighborhoods who alleged that their sound living environment would be harmed by an unlawful disposition. For instance, it rejected the standing of residents near an off-course betting office.[66] The neighborhood claimed quite a few people would gather to buy tickets and congregate near the office. The Court noted that it was not easy to view a sound living environment as equivalent to lives and bodies because such an interest basically belonged to the public interest. In addition to that, Japanese courts have also been reluctant to admit standing where people have contended that only their

61 MINAMI (ed.), *supra* note 5, 308, 309. SHIHŌ KENSHŪ-JO (ed.), *supra* note 10, 97, 98, 104.

62 Supreme Court (Third Petty Bench), 22 September 1992, Minshū 46, 571; *https://www.courts.go.jp/app/files/hanrei_jp/773/052773_hanrei.pdf.*

63 *Ibid.* 575.

64 Supreme Court (Grand Bench), 7 December 2005, Minshū 59, 2645; *https://www.courts.go.jp/app/files/hanrei_jp/414/052414_hanrei.pdf.*

65 *Ibid.*

66 Supreme Court (First Petty Bench), 25 October 2009, Minshū 63, 1711; *https://www.courts.go.jp/app/hanrei_en/detail?id=1025.*

intellectual or psychological interests would be impacted, although any such decision would depend on the relevant statutes and parliamentary intent.[67]

b) Who should have standing in a nōkotsu-dō administrative matter?

The result in cases involving *nōkotsu-dō* is likely to depend on the position of the applicant and the type of damage that a particular applicant can substantiate.

Residents near the *nōkotsu-dō* may avail themselves of *the first test*, arguing that the legislature, which is the Parliament in Ōsaka prefecture, must expect the decision-maker (the governor of Ōsaka) to confirm existence of the required fire protection safeguards in order to save residents near *nōkotsu-dō* from a fire; nevertheless, the decision-maker failed to do so and permitted the applicant to manage the *nōkotsu-dō* despite a lack of adequate fire prevention safeguards. The better view is probably that the residents potentially satisfy the standing test because their lives and bodies will be affected by a fire in cases where the *nōkotsu-dō* does not have the required fire protection safeguards. However, there may still be room for the respondent (the local government) to obtain a judgment in its favor if the Ordinance is interpreted as protecting from a fire only the users of *nōkotsu-dō* or the ashes in the facility.

How about other people who are landlords or building owners near the *nōkotsu-dō*, but who are not living there? Such persons are likely to have financial interests. As such, some respondents may say that these persons fail to meet the standing test. However, it is also possible that they may be admitted standing because their lands or buildings may be damaged by a fire. When financial interests are considered, property rights are important fundamental rights. On the other hand, if the applicants focus on arguments such as a decreasing market price for their land or building, they may not meet the standing test.

How about people who go to a hair salon near the *nōkotsu-dō* once a month? It is unlikely such other people would meet the test. These customers only stay near the *nōkotsu-dō* temporarily and for a short time, so it is difficult to say that their lives and bodies are sufficiently at risk of a fire.

Moreover, if residents near the *nōkotsu-dō* claim only that their life environment will worsen because they associate the building with death or ghosts, they may fail to pass the standing test. These arguments sound like psychological interests. It is difficult to say that the Act or the Ordinance purports to protect such an individual interest. However, the Fukuoka High

67 For example, Supreme Court (Third Petty Bench), 20 June 1989, Shūmin 157, 163; *https://www.courts.go.jp/app/files/hanrei_jp/315/062315_hanrei.pdf.*

Court has admitted standing based on what may be described as psychological interests.[68] The Court held that the relevant ordinance and regulation should have been construed as protecting not only the public interest but also individual interests, i.e. neighborhoods being free from psychological distress caused by graveyards.[69] The ordinance and regulation considered by the Fukuoka High Court were different from the Ordinance and equivalent regulations of Ōsaka prefecture discussed in this article.

If a court considers that the Graveyards Act and the Ordinance require consideration of protecting the lives and bodies of individuals living in the neighborhood from being impacted by a fire, the court also needs to decide the geographical scope of the neighborhood whose interests are protected by these statutes, having regard for the extent to which the fire may spread.

3. Applying the Test for Restriction of Grounds

Even if the residents passed the standing test in terms of protection of their lives and bodies from a fire, they need to establish that the local governor breached a specific article of the Graveyards Act, the Ordinance or the regulations which are relevant to these interests subject to Art. 10 para. 1 of the Act.

In the scenario presently being discussed, the residents may allege that the decision-maker failed to confirm that the *nōkotsu-dō* had the required fire protection safeguards.

The second test is whether the applicant owns the site for *nōkotsu-dō* and has not taken out a mortgage on the site. The second test purports to protect users of *nōkotsu-dō* from unsustainable businesses.[70] However, the court may ask whether the test also purports to protect the members of the neighborhood in which the *nōkotsu-dō* is located. Some neighborhoods could argue that where the financial status of an applicant hoping to operate a *nōkotsu-dō* is unsatisfactory, it is unlikely that the applicant will maintain fire protection safeguards appropriately. Therefore, it could be asserted that not only the first test but also the second test purports to protect these residents' lives and bodies from a fire.

Such arguments are probably less convincing than those which may be made out by users of a *nōkotsu-dō*. If the court rejects the relationship between the neighborhood's interests and the second test relating to the mortgaging of the property, the neighborhood cannot seek revocation on the ground of a breach of the second test.

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68 Fukuoka High Court, 27 May 2008, *supra* note 21.

69 Fukuoka High Court, 27 May 2008, *supra* note 21.

70 *Bochi kei'ei kanri no shishin-tō ni tsuite* [Guidance on Operating and Managing Graveyards], *supra* note 46.

Japanese courts were previously more likely to restrict the scope of the allegation, interpreting it narrowly and applying Art. 10 para. 1 of the Act to each case. There is a famous case from 1989 where the Supreme Court upheld the standing of an individual who lived near Niigata Airport but dismissed the application, saying the applicant sought revocation on the grounds of a breach of law which was irrelevant to his / her legal interest.[71] A number of administrative law professors say that the courts should not have applied the provision inflexibly.[72] Such scholars argue that once an applicant meets the standing test, that applicant should be granted a broader opportunity to quash the disposition at issue.[73]

These scholars' views have been influential. In 2003, the Justice System Reform Council discussed whether Art. 10 para. 1 of the Act should be amended.[74] The Council recommended deletion of the article and the establishment of a new system to enable courts to hear and decide cases more flexibly in accordance with the content and degree of the unlawfulness of dispositions.[75] Furthermore, in 2012, the Japanese Bar Association published its recommendation to delete the paragraph.[76] The Association argued that the article should be removed to facilitate trial and a judicial decision on the merits.[77] The Ministry of Justice also published the report by the Verification Committee concerning the state of implementation of the amended Administrative Case Litigation Act in 2012, whereby the report suggested an interpretation of the paragraph.[78] The Ministry said, taking up a decision of the High Court of Tōkyō,[79] that the paragraph was enacted to indicate the fact that

71 Supreme Court (Second Petty Bench), 17 February 1989, *supra* note 4.

72 *Ihō-sei no shuchō seigen (Gyōsho-hō 10-jō 1-kō no kaishaku o meguri)* [Restriction on the Grounds of Breach of Law (The Interpretation of Art. 10 para. 1 of the Administrative Litigation Act)], *https://ygu.repo.nii.ac.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=3388&item_no=1&page_id=4&block_id=82* (in Japanese); *Torikeshi no riyū no seigen (dai-10-jō 1-kō) ni tsuite* [Restriction on the Grounds for Revocation of Dispositions (Art. 10 para. 1 of the Administrative Litigation Act)], *https://www.kantei.go.jp/jp/singi/sihou/kentoukai/gyouseisosyou/dai13/13siryou1-6.pdf* (in Japanese).

73 For example, *Ihō-sei no shuchō seigen (Gyōsho-hō 10-jō 1-kō no kaishaku o meguri), supra* note 72.

74 The Council discussed it with consideration of the submitted material. *Torikeshi no riyū no seigen (daijūjō dai-ikkō) ni tsuite*, *supra* note 72.

75 *Ibid.*

76 *Gyōsei jiken soshō-hō dai-niji kaisei hōan* [The Second Reform Bill of the Administrative Cases Litigation Act] *https://www.nichibenren.or.jp/library/ja/opinion/report/data/2012/opinion_120615_2.pdf* (in Japanese).

77 *Ibid.*

78 *Kaisei Gyōsei jiken soshō-hō sekō jōkyō kenshō kenkyū-kai hōkoku-sho* [The Report of the Verification Committee Concerning the State of Implementation of the

actions for the judicial review of administrative dispositions were lawsuits in one's own interests, but it was possible for the paragraph to be construed as not preventing an applicant from seeking revocation based on the breach of a law which purported to protect public interests when the public interests were related to the applicant's own interests. The paragraph has not been amended, but these publications may in the future influence Japanese courts and suggest construing the paragraph in a flexible way.

V. Conclusion

The standing test for administrative matters in Japan imposes on the judicial review system the difficult task of balancing the need for relief from unlawful dispositions against the efficiency of administrative affairs. The test requires Japanese courts to deliberate on the construction of relevant statutes with due consideration of both the content and nature of the interest affected by dispositions as well as parliamentary intention. Recent developments reflect the necessity of providing a remedy from unlawful dispositions, which puts more emphasis on interpreting the Act with flexibility. Controversial developments, such as *nōkotsu-dō*, provide an opportunity for courts to further develop their thinking about these matters and to highlight the multitude of new issues requiring court attention as Japan faces the consequences of an aging society.

Summary

The contribution analyses contemporary developments in the test for standing in administrative matters in Japan. This standing test imposes on the judicial review system the difficult task of balancing the need for relief from unlawful dispositions with the efficiency of administrative affairs. The article demonstrates the application of the test in light of a hypothetical scenario involving 'nōkotsu-dō' (納骨堂). The term may be translated as a "cinerarium". These are places where people keep their loved ones' ashes and which can be visited to honor and remember that person. Thus, these facilities perform a function somewhat similar to a gravesite. They are in high demand due to Japan's super-aging society, but their erection in a given location is often controversial. The approval of the location and operation of these facilities has been chal-

Amended Administrative Case Litigation Act] *http://www.moj.go.jp/content/000104214.pdf*.

79 Tōkyō High Court, 4 July 2001, reported in courts.go.jp. *https://www.courts.go.jp/app/files/hanrei_jp/562/015562_hanrei.pdf*.

lenged by local residents and businesses, bringing into question the test for their standing in such matters. The cases are examples of administrative litigation governed by the provisions of the Administrative Case Litigation Act. The Act applies to judicial review of dispositions made by Japanese administrative agencies at both the national and local government levels. The test for standing in administrative cases has been controversial in Japan amongst scholars, judges and lawyers since the Act was adopted in 1962. The article analyses the legal problems associated with the evolution of nōkotsu-dō in order to highlight the application of the test for standing and for the restriction of grounds in administrative matters. This provides an opportunity to consider the ongoing criticism of the test, despite reforms made to the legislation in 2004.

(The editors)

ZUSAMMENFASSUNG

Der Beitrag analysiert die aktuellen Entwicklungen bezüglich der Feststellung, unter welchen Umständen eine Klagebefugnis in Verwaltungsrechtsstreitigkeiten in Japan anzunehmen ist. Dies stellt die Justiz vor die schwierige Aufgabe, ein Gleichgewicht zwischen dem erforderlichen Rechtsschutz gegenüber unrechtmäßigen Verwaltungsakten und der Notwendigkeit einer effizienten Verwaltung zu finden. Der Artikel erläutert dies am Beispiel der ‚nōkotsu-dō' (納骨堂). Der Begriff lässt sich am besten als „Cinerarium" übersetzen. Es handelt sich um Einrichtungen, in denen Personen die Asche ihrer Angehörigen verwahren, und wo sie dieser bei Besuchen gedenken können. Die Einrichtungen erfüllen mithin eine ähnliche Funktion wie Friedhöfe. Angesichts der stark alternden Bevölkerung Japans besteht eine hohe Nachfrage nach nōkotsu-dō, deren Inbetriebnahme jedoch oftmals umstritten ist. Die verwaltungsrechtlichen Genehmigungen zu der Errichtung und des Betriebs sind von Anwohnern und ortsansässigen Unternehmen vielfach angefochten worden, was die Frage nach deren Klagebefugnis aufgeworfen hat. Derartige Klagen sind verwaltungsrechtlicher Natur und unterfallen dem Verwaltungsgerichtsgesetz. Das Gesetz findet auf eine gerichtliche Überprüfung von Maßnahmen der nationalen wie lokalen Verwaltungsbehörden in Japan Anwendung. Die Frage der Klagebefugnis in Verwaltungsrechtsstreitigkeiten ist seit dem Inkrafttreten des Gesetzes im Jahr 1962 zwischen Rechtswissenschaftlern, Richtern und Anwälten umstritten. Der Beitrag untersucht dieses rechtliche Problem im Zusammenhang mit der Entwicklung der nōkotsu-dō, um die Voraussetzung für eine Klagebefugnis und deren Einschränkung aus verwaltungsmäßigen Gründen zu erhellen. Dies gibt die Möglichkeit, die Kritik zu diskutieren, welche trotz einer Gesetzesreform im Jahr 2004 andauert.

(Die Redaktion)