Promulgation of Civil Procedure in Vietnam from the Viewpoint of Japanese Technical Legal Support

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INTRODUCTION

In recent years there has been significant economic development in Southeast Asia. The rapid development of the market economy unavoidably demands (1) the sharing of common rules that cross national borders and (2) the development of systems to meet the corresponding needs.

It is generally the case that Southeast Asia consists of several countries comprising different races, histories and political systems, and although there are differences in the speed of economic development, each country is currently working towards the advancement of not only the economic and social development of their own country, but also the welfare and happiness of the citizens under the country's basic policies.

The rational modernization and visualization of the civil and private law system, even where it is based on the history and traditions peculiar to a given country, is inevitably required in order to create and establish a social safety net through the law. While being awash with globalization, for the purpose of social and economic development the country must provide an after-the-fact redress system for the appropriate and prompt resolution of civil disputes through impartial institutions; the completeness and accessibility of the system guarantees the free and open economic activity of individuals and businesses.

At the center of such a legal redress system is civil procedure. In the area of this basic procedural law, since the start of this century each Southeast

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Asian country has seen a major reform of the processes that were formed and utilized under the historic background of each country. For example, new civil procedure law was established in Vietnam in 2004. It was promulgated as a result of support for the development of laws in foreign countries.[1] It is thought that an “adversary system” has been adopted with the legislation, which is a fundamental form in a modern code of civil procedure.

I focus this article on the promulgation of the Civil Procedure Code of Vietnam in 2004.

I. 2004 Civil Procedure Promulgation in Vietnam

1. Background to the Enactment of the Civil Procedure Code

a) The previous laws and the path to revision

Vietnam was the first country to receive from Japan development support as regards the operative legal system. Vietnam adopted the Doi Moi Policy in 1986, which was the Vietnamese new economic program. This aimed to change the planned economy and promote market-oriented economic reform under socialism. In accordance with this basic policy, a constitution that recognized private property rights was enacted in 1992, and the country had to establish certain legal systems that could accommodate a market economy by way of Constitutional revisions in 2001.

During this era there were three Orders promulgated by the National Assembly’s Standing Committee that regulated civil court processes, namely the Order on Civil Case Resolution Procedure of 1989, the Order on Economic Case Resolution Procedure of 1992 and the Order on Labor Case Resolution Procedure in 1996. When adopted these Orders were planned to be revised as laws passed by the National Assembly in later years.

There were several differences in the regulations of these Orders, but they had certain basic elements in common:[2] for the most part, the procedural characteristics included a wide scope in terms of subject-matter; there was wide scope regarding the judgment that could be rendered, which was not limited to the subject matter of the claim (i.e. there was no principle by which the judgment was restricted to addressing the applicable subject matter under the claim); the principle of ex officio examination of evidence was adopted; a detailed examination of evidence was performed in the

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1 See K. Kagawa / Y. Kaneko (eds.), *Hōseibi shien ron – Seido kōchiku no kokusai kyōryoku nyūmon* [Legal System Development Support Theory – Introduction to International Support of System Development] (Tōkyō 2007) 1.

2 Regarding the following, see M. Iseki, *Betonamu minji soshō-hō* [Vietnam’s Civil Procedure Law]; Kagawa / Kaneko, *supra* note 1, at 85–86.

absence of the parties as preliminary examination prior to the trial; the trial was in principle limited to occurring in one continuous session in order to allow the prompt conclusion of the procedure; and the effect of the judgment could extend broadly beyond the plaintiff and defendant. Further, socialist legal characteristics of the provisions included separate procedures for economic and civil cases, the prosecutor's ability to commence a suit, the panel structure of the courts for trials that includes citizen lay judges (called people's jurors), the procurator's authority to attend the trial, the procurator's right of appeal, the existence of a cassation system and provisions for rehearing a case.

b) *Support from Japan and the United States*

In general, Japan's legal system development support for Vietnam commenced in 1994 in the areas of civil and commercial law; subsequently, it was in 1992 that Japan's legal system development support as regards actually drafting a new civil procedure code commenced. The writing of the draft law was based upon two fundamental policies. One aim was to respond to the demands of contemporary Vietnam, and the other was to make the continual development of civil procedure possible, that is, the aim to establish a civil procedure code that measured up to the tides of internationalization.[3]

It was the United States that conveyed the requirement of internationalization to the Vietnamese government, and it was the United States that created a direct opportunity for the establishment of a new civil procedure code in Vietnam in a concrete form.[4]

In 2001, the "U.S.-Vietnam Bilateral Trade Agreement" was signed between the United States and Vietnam. Chapter II, Articles 11-13 of the Agreement defined details of procedural regulations concerning civil procedure. Drafting support was performed as a part of the STAR Project (Support for Trade Acceleration Project) by USAID (the United States Agency for International Development).[5]

The aims of the draft included (1) introduction of emergency preservation measures (civil preservation) in order to strengthen the protection of intellec-

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3 D. Q. PHONG, *Betonamu minji soshō no seitei to shikō ni okeru betonamu saikō jinmin saiban-sho no yakuwari* [Role of the Supreme People's Court in the Enactment and Operation of Vietnam's Code of Civil Procedure] ICD News 20 (2005) 32, 34.

4 Y. KANEKO, *Betonamu minji soshō to saiban dōtai – Kihan taikei no mosaku* [Vietnam's Civil Procedure and Trial Dynamics – The Search for Norm System], in: *id.* (ed.), *Ajia no hō-seibi to hō-hatten [*Asian Legal System Development and Legal Development] (University Education Press 2010) 79, 81.

5 What follows is according to KANEKO, *supra* note 4, at 81, 85.

tual property rights, (2) strengthening the "independence of the judiciary" by removing the procurator's right to commence actions, and (3) a dramatic transition from an "inquisitorial system" to an "adversary system", in order to strengthen the rights of parties and lawyers, and to ensure that trials were conducted based upon only the evidence that was introduced in open court.

This support for the drafting of a civil procedure code bill that was provided by the United States' STAR Project was identified as differing from the support provided by Japan. That is, the "support" offered by the United States regarding the civil procedure code had the character of protecting the United States' own interests based upon the bilateral agreement.

Incidentally, Vietnam did not allow foreigners to be directly involved in the legislative process.[6] Vietnamese bureaucrats researched foreign legislative materials and experiences, and safeguarded the principle of drafting legislation containing substantive content that was most suitable to Vietnam's circumstances. On that point, Japan's legal system development support was limited to providing reference materials and advice for that purpose. Three Japanese specialists who were professors of civil procedure were assigned to provide support, which was performed by providing comments and recommendations on the drafts written by Vietnamese officials. In response to this, the Vietnamese side referred in turn to the comments and revised the drafts. The Vietnamese side requested comments on specific points which they took particular interest in, but the Japanese side did not limit themselves to those points and provided comments and suggestions on points that they thought necessary throughout the entire drafts.[7]

In a short period of approximately two years, the draft civil procedure code was prepared, and in June 2004 the new Civil Procedure Code was enacted by the National Assembly. With the Civil Procedure Code coming into force, the aforementioned three Orders were repealed.[8]

c) Specific issues in the establishment of the Civil Procedure Code

According to the explanation from the Vietnamese side, the specific issues arising from the establishment of this Civil Procedure Code are as follows.[9]

The first issue was the "scope of the civil procedure code provisions". There was the question of whether to include several special types of cases in the Civil Procedure Code, namely cases related to electoral enrollment, domicile registration and labor strikes.

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6 Regarding what follows, see ISEKI, *supra* note 2, at 86.

7 ISEKI, *supra* note 2, at 87.

8 It has been pointed out that, ultimately, Vietnam did not incorporate the United States' particular civil procedure law; ISEKI, *supra* note 2, at 90.

9 PHONG, *supra* note 3, at 34–38.

The second issue was the “rights and obligations of related parties with an interest in a case”. Namely, there was the question of whether related parties could apply to a court to protect their rights or interests, whether the prosecutor could do so, etc.

The third issue was the “party’s right of self-determination”, that is, the principle of jus disponendi. The question related to what extent a party’s right of self-determination should be recognized from the aspect of commencing or ending a lawsuit. The issue was whether to recognize the rights for a government institution or other organization (for example, organizations to protect the rights of women and children, labor organizations, etc.) to commence a lawsuit in order to protect the rights or interests of an individual. Further, whether to adopt the principle of restriction so as to restrict the judgment to the applicable subject matter at issue. These are problems of an adversary system generally.

The fourth issue was the “party’s obligation to submit evidence”. Here, the questions included whether to place time limits on the parties’ submission of evidence and under what circumstances a court should be permitted to gather evidence. These were issues of the principles of advocacy under which parties have the authority and responsibility to produce facts and evidence, and they derive from the notion of the adversary system.

The fifth issue was “emergency preservation measures (civil preservation)”. This was an unavoidable issue particularly due to the requirements of internationalization (as a condition of Vietnam’s entry into the World Trade Organization).

The sixth issue was “procedural determination of approval of settlement etc.” This issue related to the process of the parties reaching an agreement and its contents.

The seventh issue was “securing the effectiveness of a judgment’s force”. This issue relates to compulsory execution (law on the enforcement of judgment).

The eighth issue was the preparation of “guidance documents”. This issue related to detailed “guidance documents” that embody the legislation, for example, the format of written judgments that are prepared by the judicial council of the Supreme People’s Court following the establishment of the Civil Procedure Code.

2. *Establishment of the 2004 Civil Procedure Code: Overview of the Code*

a) *In principle adoption of the adversary system*

A thorough examination of the 2004 Civil Procedure Code must be left for a later date, but as an overview, the comments from Japan were largely adopted in the area of respecting the autonomy and right of self-determi-

nation of parties.[10] This demonstrates the fundamental adversarial structure of the Civil Procedure Code. However, rules that are strongly reminiscent of the prior fundamental structure can also be seen.

aa) Adoption of the jus disponendi principle (respecting the self-determination of parties)

The principle of being restricted to the subject of the suit under the jus disponendi principle was not adopted in the civil procedure rules of the earlier legal era. For example, in the procedure for an eviction action by the owner of a house, the court could also order people other than the defendant (third parties) who were living in the house to vacate. In these circumstances, even if there was not a counterclaim filed by the defendant, the court could order the plaintiff to reimburse the associated expenses incurred by the residents. Under the old law, as there was no restriction to the subject of the suit under the jus disponendi principle, it can be thought that the procedure operated on the basis of an authoritative and custodial procedure oriented towards complete resolution of a conflict, where the role of the court was to capture the social conflict in the subject of the lawsuit and resolve all of the legal problems that were included.

Regarding this issue, a provision was established within the 2004 Civil Procedure Code that limited the court's judgment to the scope as set out in a lawsuit's petition or written request (restriction to the subject of the suit. Article 5 of the 2004 Civil Procedure Code (hereinafter referred to as the "2004 Code")); also added were provisions regarding a counterclaim and its procedure (2004 Code, Articles 172–178). Through this, the scope of a court trial and the ensuing judgment became limited, the self-determination of parties in the area of the civil dispute resolution process is respected, and private autonomy is recognized by the court.

Further, provisions including the right of self-determination of parties regarding the bringing an action (2004 Code, Article 5) and concluding an action in accord with the intent of the parties (procedural settlement, etc. 2004 Code, Articles 10, 180‑188; regarding appeals, Article 270) were also established. These are all related to the principle of jus disponendi, expressed as the principle of no adjudication without prosecution, but it means that the basic foundation was adopted in the 2004 Code.

10 What follows is according to ISEKI, *supra* note 2, at 87–88.

bb) Partial adoption of the principles of advocacy (principle of prohibiting ex officio examination of evidence and the principle of admission)

Under the old law, the principle of ex officio examination of evidence existed and judges would examine the case in detail under their own authority when preparing to hear oral pleadings (i.e. the trial). In a sense, it was a process like a "preliminary hearing" in a criminal case.

Regarding this, the 2004 Civil Procedure Code provides that the collection and submission of evidence is within the authority and responsibility of the parties, and the consequences of insufficient evidence are the responsibility of the parties (2004 Code, Article 84; see also Article 7). However, there is a provision prescribing that, limited to the circumstances where a party cannot collect evidence itself and upon application by the party, the court can summon a witness or order the submission of documents (2004 Code, Article 85). The general rule thus adopts the principle of the production of evidence by parties, and allows for a supplementary and limited ex officio examination of evidence (corresponding to the third principle of the principles of advocacy).

Further, there is a provision whereby a fact does not need to be proven if a party makes an admission regarding that fact (2004 Code, Article 80 (2) and (3). This corresponds to the second principle of the principles of advocacy).

These regulations have the stated aim of reducing the burden of the court, but they also imply recognition of the right to self-determination of the parties and the allowance of autonomy. However, in that the discovery of new evidence after final judgment is a reason for reopening a case (2004 Code, Article 304) and in that the incompatibility of a judgment with the objective facts is a ground for applying for cassation review (2004 Code, Article 283 (1)), it is apparent that there still remains an aspect of prioritizing factual accuracy rather than the stability of the position of the parties based on a final judgment.[11]

However, the principle regarding "facts" (the burden of pleading principle whereby a fact in issue not argued by the parties cannot form the basis of a judgment), which is the first principle of the principles of advocacy under Japanese law,[12] is not specified within the legislation.[13]

11 ISEKI, *supra* note 2, at 88.

12 For example, see S. KAWASHIMA, *Minji soshō-hō* [Civil Procedure Law] (Tōkyō 2013) 431.

13 KANEKO, *supra* note 4, at 97.

cc) Retention of a judgment's broad scope of effect

The effect of a judgment is related to the procedural structure and particularly the structure of the parties and the trial. The Japanese side suggested establishing provisions regarding the effect of a judgment, but the 2004 Civil Procedure Code does not go beyond retaining the provision that all citizens, government agencies and organizations must observe legally effective judgments (2004 Code, Article 19), which is similar to Article 136 of the Constitution. Because government agencies in this context may include a court hearing in a subsequent case, this can be thought of as being similar to the principle of res judicata. There are no provisions in the 2004 Civil Procedure Code that specify limits on the objective and subjective scope of the res judicata of a judgment.

b) Establishment of detailed procedural provisions

In the area of procedural operation, it was found that most of the comments submitted by the Japanese side were adopted.[14]

As an example, provisions regarding jurisdiction have been established, including the scope of civil jurisdiction, subject-matter jurisdiction, geographical jurisdiction, and transfer of jurisdiction (2004 Code, Articles 25–38).

Further, provisions regarding emergency preservation dispositions (civil preservation) that were insufficient in the old law have been established, as have provisions regarding providing security in such instances and regarding appeals (2004 Code, Articles 99–126). The primary utility of these emergency preservation dispositions is demonstrated by being able to use them before commencing a lawsuit, but the emergency preservation dispositions in the 2004 Civil Procedure Code can only be used after commencing a law suit.

Also, provisions which did not exist under the old law regarding the various restraints on the examination of evidence (measures against the obstruction of evidence collection, giving testimony, etc.) and the maintenance of order in court have been newly established under the Chapter titled "Handling Acts of Obstructing Civil Proceedings" (2004 Code, Articles 384–390). In particular, the provisions regarding matters such as orders to submit documentation (2004 Code, Article 389) have stronger coercive power than those in Japan (also see 2004 Code, Article 7).

Concerning oral hearings, which constitute the central mechanism for conducting trials under civil procedure, a basic structure is defined for the examination of evidence, such as the questioning of the parties and witnesses and the presentation of closing arguments (2004 Code, Articles 213–235).

14 ISEKI, *supra* note 2, at 88.

However, the process at the stage of preparing for oral hearing (preparation process stage) is generally not defined (see 2004 Code, Article 179 onwards). Therefore, although the examination of evidence at the preparation stage was not transparent and there is a problem with the involvement of the parties in the process – and given that the methods of limiting the use of the results of examination of evidence during the preparation process are not always sufficient – there has been included a provision of sorts concerning the matter (see 2004 Code, Articles 227, 236).[15]

II. CONCLUSION – REALIZATION OF AN ADVERSARY SYSTEM?

During the establishment of the 2004 Code, one of the conditions required of Vietnam by the United States was, as mentioned previously, "the transition from an authoritative system to an adversarial system". However, this requirement was somewhat abstract and the idea of an adversarial system itself is ambiguous. Moreover, because authoritative systems are not completely avoided in capitalist countries in the modern world, even though the elements of the adversary system are placed at the center of their civil procedure laws, it seems there is a sense of a complimentary existence of adversarial and authoritative systems which contributes to correct and prompt trials and judgments under civil procedure.[16]

The central basic principle of American civil procedure is the "adversary system". This can be interpreted in Japanese as a "system of opposing parties", "system of confrontation between parties", and a "system of competing arguments", and it is used as the fundamental way of thinking to express the adversary system in American civil procedure (the same expression is similarly used in criminal procedure). Procedurally, the basic thinking is that the opposing parties each submit legal and factual assertions and evidence that benefit their own interests, and, based upon this, a judge positioned as a neutral third party delivers a judgment. Under this system in the United States, it seems that civil procedure can be justified as a process of discovering the substantive facts, and it is evaluated as being not just a simple dispute resolution process, carrying instead also the notion of an enlightened system for the realization of rights.[17]

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15 ISEKI, *supra* note 2, at 88.

16 In Japan this is called a blend of the adversarial system and the authoritative system, which are found to have a complementary relationship. That is to say, from the aspect of the substantive form of the case, the adversarial system (jus disponendi, principles of advocacy) is suitable, while from a procedural aspect the authoritative system (progression by authority) is used. See KAWASHIMA, *supra* note 12, at 297.

17 K. ASAKA, *Amerika minji tetsuzuki-hō* [American Civil Procedural Law], (3rd ed., Tōkyō 2016) 6.

Compared to Japanese law and continental law, such as German law, the interesting part of American law, i.e. an aspect that is unavoidable under the common law, is that fundamental rules regarding jus disponendi and advocacy, which are discrete contents of the adversarial system, do not seem to exist.

For example, it is clear that, when looked at from a formal aspect, the principle of restriction to the subject of the suit (Japan Code of Civil Procedure, Article 246) within jus disponendi does not exist in the United States. Rule 54 (c) of the United States Federal Rules of Civil Procedure provides that, as long as it is not a default judgment (namely, as long as the parties' right to attend court and submit arguments is guaranteed (meaning as long as the right to their day in court is realized)), the court can provide relief which is not restricted to the subject of the suit. However, regarding this legislation, within the common law a prerequisite to the granting of such relief (delivery of judgment) is that there is no element of surprise in the process of argument between the parties; in other words, the opportunity for the opposing party to argue against such a grant of relief is substantially guaranteed and is clearly identified as a prerequisite for granting the relief.[18]

The interesting thing about American procedural law, which is deficient from a formal aspect but is functionally compensated for by the substantive aspects of a trial, is that it differs from the relative resolution of disputes intended in countries such as Japan, and in a sense it creates an opportunity for leading towards an all-inclusive resolution of social disputes.[19] This has an aspect that approaches the form of procedural resolution under the old law in Vietnam mentioned earlier. However, in order to realize the substantive guarantees of self-determination and the autonomy of the parties and the substantive, all-inclusive dispute resolution seen in the United States, there seems to be a large amount of reliance not only upon the capability of judges, but also the ability of the parties and in particular lawyers. In that way, the issues of human resource development and the practical permeation of the results of legislative amendments become apparent.

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18 Y. TANIGUCHI, *Amerika minso ni okeru atarashii kenri no seisei* [Creation of New Rights in American Civil Procedure], *Minji tetsuzuki-hō no kiso riron I (Minji tetsuzuki-hō ronshū – Dai 1 kan)* [Basic Theory of Civil Procedure 1 (Essays on Civil Procedure – Vol. 1)] (Tōkyō 2013) 125.

19 TANIGUCHI, *supra* note 18, at 152, finds that modern American civil procedure intends to provide an all-inclusive resolution for social disputes (real disputes, not a dispute where the plaintiff has artificially cut out and removed aspects), and he furthermore suggests this is not a legal fiction of simple resolution through the expansion of res judicata, but rather an attempt to realize a substantive resolution through the completeness of the trial facts. Civil procedure for Indian law within the United States is, as it were, a "public trial with all people gathered".

Also, Vietnam's 2004 Civil Procedure Code does not address the first principle of the principles of advocacy, the "burden of pleading principle".[20] If the provisions regarding the parties' right to submit evidence and the burden of proof (2004 Code, Article 6 (1) and 79) are presupposed, it seems the principle of separating facts and evidence, in other words, the principle of separating procedural materials and evidentiary materials, has not been put into effect. But in reality, if facts are not asserted, then the point of dispute does not become clear, nor does what needs to be proven. Evidence establishes the facts that are the points of dispute, and considering the burden of proof, the facts to be proven must be accepted; also, looking at the contents to be included in a written judgment (2004 Code, Article 238 (5)), it is possible to recognize the substantive weight of the assertion of facts. Under Japanese law too, there are in fact no provisions on this point, but the fundamental principle is recognized in precedents and in theory (there is theoretical argument regarding the identification of the facts in issue (criteria for separating the facts in issue and tangential facts).[21] This fundamental idea can be substantively achieved if the function for preventing surprise is realized in the trial process. Accordingly, it is hard to imagine that the principles of advocacy are instantly contradicted by the absence of provisions regarding the first principle of the principles of advocacy. However, at the same time, securing the fundamental principle relied upon in actual trials in individual cases also creates a large problem.

Moreover, in American law also, this point is not always clearly defined within the United States Federal Rules of Civil Procedure either.[22]

Incidentally, it seems that the adversarial system in the United States is backed by the classical argument about the foundation of civil procedure. Classical research in the United States, particularly regarding the distinguished "forms of action", includes the formative work by Fuller.[23] According to this, the essential "adjudication method" is "participation via evidence and rational argument", and this form can be best achieved by a certain set of procedural attributes, for example, the adversary system, a neutral adjudicator who has excellent understanding, the justification of a decision, and a retrospective ruling. If so, the adversary system in the United States is "participation via evidence and rational argument", and if a fundamental structure of civil procedure guaranteeing such participation is provided, it seems that judicial jurisdiction, judicial independence, and an

20 KANEKO, *supra* note 4, at 88.

21 See KAWASHIMA, *supra* note 12, at 436.

22 See the United States Federal Rules of Civil Procedure, 15 (b).

23 L. L. FULLER, The Forms and Limits of Adjudication, Harvard Law Review 92 (1978) 353.

assurance of delivered judgments backed by retrospective reasoning will be fulfilled along with the requirements of the adversary system (required elimination of the authoritative system). If this Fuller method does not include restriction to the subject of the suit or the principle of assertions but has evidence and participation as the central elements, it seems that Vietnam's 2004 Civil Procedure Code, which appears to provide a "deliberation place" where related parties become entangled in a wide civil procedure process, can be evaluated as having cleared the basic conditions instructed by the United States.[24]

Moreover, in the United States, it seems there is also a background where the prominence of public litigation together with an authoritative system was not evaluated that negatively. This represents transformation in the adversary system in the United States, as well as the removal of polycentric disputes from the subject of civil procedure as lacking the essential attributes of Fuller's adjudication method, and it has provided the highly-respected opportunity to incorporate contended cases.[25]

Having come to view it in this way, one can feel the frustration between the donor countries and Vietnam of living together but in different worlds, or one can sense the flexibility shown by the receiving country in order to realize the results.

The persevering effort to practically realize civil procedure law can be perceived in the subsequent reform of Vietnam's civil procedure law, including the strengthening of parties' rights and reinforcement of the authoritative system. Also, the activity towards publishing precedents traces the reality of civil procedure trials from the results and can be thought of as being inspection and supervision work. Accordingly, it remains for me to keep on researching the practice of civil procedure and its reform movement.

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24 Findings of fact in American civil procedure are conducted on a "preponderance of the evidence" standard, which is understood as being lower than the "high probability" level of proof under Japanese law. KAWASHIMA, *supra* note 12, at 467. Additionally, in the United States, comparing the mildness of legislation regarding factual assertions, emphasis is placed on the value of the evidence. This also relates to the value of discovery.

25 A. CHAYES, The Role of the Judge in Public Law Litigation, Harvard Law Review 89 (1976) 128. See also S. KAWASHIMA, *Kōkyō soshō no kyūsai hōri* [Remedial Process in Public Interest Litigations] (Tōkyō 2016) 43.