The Development of Building Lease Law and the Protection of Lessees in Japan: A Case of Redistribution Through Contract Law

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It is widely accepted that contract law is not an ideal instrument for redistribution. In the United States, the view that contract law should not be concerned with distribution is considered to be "orthodoxy," whereas the view that contract law may be utilized as a tool to achieve redistributive goals is regarded as "heterodoxy." However, in many jurisdictions, including Japan, there are occasions in which contract law is employed for redistributive purposes. This Article explores the historical development of Japanese building lease law and shows that the Japanese courts redistributed housing resources during the housing shortage after the World War II, on the one hand, and the profit generated by the redevelopment of urban areas after a period of economic growth, on the other hand, through the contract law doctrines established by the courts. It also examines whether the doctrines established by the Japanese court may be justified in light of the debate surrounding Kaplow and Shavell's "double distortion" argument. The overall assessment is that the redistributive doctrines are well justifiable, at least to the extent that the doctrines are concerned with the redistribution of housing resources. The historical development of Japanese building lease law shows that heterodoxy may be persuasive even in advanced economies in certain contexts and is filled with lessons on how to achieve redistribution through contract law.

I. INTRODUCTION 130
II. JAPANESE CONTRACT LAW THEORIES AND DISTRIBUTIVE JUSTICE: A BRIEF SKETCH 133
III. THE HISTORICAL DEVELOPMENT OF BUILDING LEASE LAW IN JAPAN 135
A. Overview 135
B. The "Justifiable Grounds" for Termination of Lease Contracts 137

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1. The Rules in the Civil Code and the Establishment of the "Interest Balancing Doctrine" 137
2. The "Interest Balancing Doctrine and Its Application 139
3. The Act on Land and Building Leases (1991) and Beyond 141
C. The Doctrine of Breach of Mutual Trust..... 143
IV. THE JUSTIFIABILITY OF THE REDISTRIBUTIVE DOCTRINES ESTABLISHED BY THE JAPANESE COURTS 144
A. The Limits of the "Heterodox" View of Contract Law..... 144
B. The "Double Distortion" Argument and Its Critique 145
C. A Brief Examination of the Redistributive Doctrines in Japanese Building Lease Law..... 147
V. CONCLUDING REMARKS..... 151

I. INTRODUCTION

In most jurisdictions, contract law is regarded as a legal instrument that enables private parties to exchange their assets based on their will. Although it is not a logical consequence, it is therefore widely believed that contract law is concerned with commutative justice (*iustitia commutativa*), i.e., fairness among exchanging parties, and not with distributive justice (*iustitia distributiva*), i.e., the equitable allocation of resources within a group. Hence, it is also generally accepted that contract law is not a qualified instrument for solving or mitigating inequality among citizens in our society.

A classical textbook on legal philosophy in Germany, for instance, formulates that commutative justice (*ausgleichende Gerechtigkeit*) is justice for private law, whereas distributive justice (*austeilende Gerechtigkeit*) is justice for public law.[1] Such a traditional dichotomy, which can be stretched back to Aristotle, is widely accepted in many jurisdictions, particularly in civil law jurisdictions, including Japan,[2] where the distinction between private law and public law is more commonly recognized.

Also in the United States, the view that contract law does not and should not be concerned with the distribution of resources is considered to be "orthodoxy," while the view that contract law may be utilized as a

1. Gustav Radbruch, RECHTSPHILOSOPHIE, 126 (6. Auf., K.F. Koehler Verlag, 1963).

2. For a classical Japanese textbook on jurisprudence written by the chief justice of the Supreme Court of Japan at that time, see KOUTARO TANAKA, HŌRITSUGAKU GAIRON [INTRODUCTION TO JURISPRUDENCE], 50 (Gakuseisha, 1953).

tool to achieve redistributive goals is regarded as "heterodoxy."[3] As will also be discussed in the fourth section of this Article, prominent scholars who employ economic analysis based on welfarism further argue that the redistribution of income should always be achieved through the tax and transfer system, and that legal rules (such as tort law) should not be used for redistributive purposes.[4]

In contrast to the prevailing orthodoxy, it has been recently contended that there are instances in which contract law may and should be employed for redistribution in society: In a pioneering work analyzing the significance of distributive justice in German contract law, Claus-Wilhelm Canaris, based on a thorough dogmatic analysis, argues that contracting parties are subject to distributive justice when there is a special justification for limiting the freedom of contract of the parties.[5] Even in the United States, where the economic analysis of law and welfarism is far more influential than in other countries, there is a recent stream of literature, spurred by exacerbating inequality in its society,[6] that aims to justify the use of contract law for redistribution.[7] Moreover, in an article published in 2022, Kevin Davis and Mariana Pargendler illustrated that in some developing countries, such as South Africa, Brazil, and Colombia, contract law is used as a tool to address serious inequality in each society.[8]

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3. See Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485 (2022).

4. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (Harvard UP, 2002); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, ch. 28 (Harvard UP, 2004).

5. CLAUS-WILHELM CANARIS, DIE BEDEUTUNG DER IUSTITIA DISTRIBUTIVA IM DEUTSCHEN VERTRAGSRECHT (München, 1997). For a more comprehensive analysis of distributive justice in contract law in Germany, see STEFAN ARNOLD, VERTRAG UND VERTEILUNG (Mohr Siebeck, 2014).

6. In this context, THOMAS PICKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Belknap Press, 2014) (originally published in French in 2013), discussing income inequality in the capitalist world, was a high-profile book. The Japanese translation of the book was published in December 2014, and the book drew significant attention in Japan as well, a country traditionally regarded as relatively equal in the distribution of wealth.

7. For example, Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211 (2019). See citations in Davis & Pargendler, *supra* note 3, at 1499.

8. Davis & Pargendler, *supra* note 3. See also KEVIN E. DAVIS & MARIANA PARGENDLER, LEGAL HETERODOXY IN THE GLOBAL SOUTH (Cambridge UP, 2025).

This Article aims to contribute to the current debate by analyzing the historical development of Japanese building lease law. The analysis is of significance for the following reasons.

First, in many jurisdictions, including the United States and Germany,[9] housing lease law is often regarded as a field in which the legal rules perform a redistributional function on behalf of the weaker parties, namely the lessees. This Article intends to enrich the current debate from a comparative perspective by exploring the protection of lessees under Japanese law.

Second, Davis and Pargendler argue that heterodox contract law in developing countries (or the Global South) emerged under socioeconomic conditions that are substantially different from those in advanced economies (or the Global North), where the orthodoxy holds its ground.[10] Japan is a distinct country as it was an emerging economy when the Western legal systems were first transplanted into the jurisdiction in the late nineteenth century,[11] but it became one of the first countries outside the Western world to be regarded as an advanced economy in the twentieth century. Therefore, it is of significance, from a socioeconomic perspective, to look back at the development of Japanese building lease contract law and examine the role that redistributive rules have played during the period of rapid economic growth after the World War II.

Third, from the perspective of institutional competence, whereas the Japanese judiciary is traditionally considered to be very restrained, lease contract law is regarded as a field in which the Japanese courts have played an active role in creating legal norms to protect the interests of lessees.[12] This Article aims to draw implications for the justification and

9. As for the United States, see the classical articles by Bruce Ackerman and Duncan Kennedy. Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987). In Germany, Arnold, *supra* note 5, at 299, states that social lease contract law (*soziales Mietrecht*) is a clear manifestation of the role distributional justice plays under German contract law.

10. Davis & Pargendler, *supra* note 3, at 1530-1532.

11. For a brief English account of the history of modern Japanese law, see HIROSHI ODA, JAPANESE LAW, ch.1 (4th ed., Oxford UP, 2021).

12. See Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 UCLA L. REV. 635, 690-691 (1996); DANIEL H. FOOTE, SAIBAN TO SHAKAI: SHIHO NO "JOSHIKI" SAIKO [THE COURTS AND SOCIETY: RECONSIDERING "COMMON KNOWLEDGE" REGARDING JUSTICE], 249-250 (Masayuki Tamaruya trans., NTT Shuppan, 2006). Foote, an American law professor who taught legal sociology at the University of Tokyo, regards lease contract law as an area, along with employment law, in which the Japanese judiciary played an active role, motivated by the philosophy of "maintenance of stability and existing relationships"

the feasibility of the creation of redistributive norms by the courts by exploring the historical development of Japanese building lease law.

In the next section, Japanese contract law theories will be overviewed from the standpoint of distributive justice. The third section will describe the historical development of Japanese building lease law, focusing on how the doctrines with redistributive concerns were established by the Japanese courts. In the fourth section, these doctrines will be analyzed in light of the orthodox view of contract law. The main inquiry of the fourth section is whether the doctrines developed by the Japanese courts are justified based on the debate around the famous "double distortion" argument presented by law and economists Louis Kaplow and Steven Shavell, as their argument may be regarded as the epitome of the orthodox view.

II. JAPANESE CONTRACT LAW THEORIES AND DISTRIBUTIVE JUSTICE: A BRIEF SKETCH

Before exploring Japanese lease contract law in the next section, it will be briefly examined how distributive justice is perceived in Japanese contract law theories. The question of interest is whether mainstream Japanese theories consider distributive justice as one of the goals that should be pursued in contract law, in other words, whether the "orthodox" view is also prevalent among Japanese contract law theorists.

In a classical treatise on Japanese contract law written by Sakae Wagatsuma, which was published in 1954 and is presumably still predominant today, the principle of freedom of contract is regarded as one of the fundamental tenets of modern civil law, alongside the principle of the absoluteness of ownership and the fault principle. Although it is recognized that freedom of contract is restricted in many instances, those restrictions are considered mere exceptions, as freedom of individuals is considered to be the foundational principle underpinning modern civil law.[13]

It was not until the 1980s that prominent civil law scholars in Japan began to recognize the principle of contractual justice as a basic principle of contemporary contract law. In his influential article first published in

in society. This Article adopts a slightly different perspective and attends to the redistributive aspect of Japanese lease contract law and its justifiability.

13. SAKAE WAGATSUMA, MINPŌ KŌGI V1 SAIKEN KAKURON JŌ-KAN [THE COURSE ON CIVIL LAW V1, SPECIFIC PROVISIONS ON LAW OF OBLIGATIONS, FIRST VOLUME], 17-33 (Iwanami-shoten, 1954).

1983, Eiichi Hoshino,[14] a professor at the University of Tokyo at the time, emphasized the significance of the principle of contractual justice (*justice contractuell*, *Vertragsgerechtigkeit*) in today's society, where the disparity among contracting parties makes state interventions inevitable. Hoshino formulated the modern trend in contract law as stemming "from freedom of contract to contractual justice" and "from will of the parties to reason of the parties"—*stat ratio super voluntatem* (let reason stand above will).[15] However, Hoshino, who was a follower of natural law theory, was not entirely clear as to what he meant by contractual justice. Especially as far as distributive justice is concerned, although Hoshino acknowledges that contract may be regarded as a tool to achieve distributive justice under the philosophy of laissez-faire, he only states that it is debatable whether contract law should be used to attain redistributive goals in our society today.[16]

Based on his thorough case analysis, Atsushi Omura,[17] Hoshino's successor at the University of Tokyo, elucidated that whereas the Japanese Civil Code does not provide for an explicit provision on equality in exchange, a rule equivalent to the French *lésion* and German *Wucher*, the Japanese courts have established a distinctive doctrine on behalf of the disadvantaged contracting parties in various types of contracts. Omura intends to utilize the Japanese court-established doctrine of equality in exchange to address the contemporary consumer contract issues. Omura also, however, leaves the question of whether distributive justice should be achieved by the doctrine open.[18]

As a notable opposing theory, Keizo Yamamoto,[19] professor emeritus at Kyoto University, claims that the state's intervention into freedom of contract should not be based on the principle of contractual

14. Eiichi Hoshino, *Keiyaku-shisō, Keiyaku-hō no rekishi to Hikaku-hō* [Philosophy of Contract, History of Contract Law, and Comparative Law] *in* EIICHI HOSHINO, MINPŌ RONSHŪ [COLLECTED PAPERS ON CIVIL LAW] vol. 6 236-276 (Yūhikaku, 1986) (the article was first published in 1983).

15. See the famous maxim epitomizing the principle of private autonomy (*Privatautonomie*): *stat pro ratione voluntas*, in WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 6 (4. Auf., Springer-Verlag, 1992).

16. Hoshino, *supra* note 14, at 266-267, citing Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

17. ATSUSHI OMURA, KŌJO-RYŌZOKU TO KEIYAKU-SEIGI [PUBLIC ORDER, GOOD MORALS, AND CONTRACTUAL JUSTICE] (Yūhikaku, 1995).

18. See Omura, *supra* note 17, at 371.

19. KEIZO YAMAMOTO, KŌJO-RYŌZOKU-RON NO SAIKŌSEI [RECONSIDERING PUBLIC ORDER AND GOOD MORALS] (Yūhikaku, 2000); KEIZO YAMAMOTO, KEIYAKU-HŌ NO GENDAIKA [THE MODERNIZATION OF CONTRACT LAW], vol.1, ch. 3 (Shōji-hōmu, 2016) (first published in 2005).

justice, but rather justified as a means to protect the fundamental rights (*Grundrechte*) of citizens. Strongly influenced by the German theory developed by Canaris,[20] Yamamoto asserts that the state is under a duty to protect the fundamental rights of its citizens (*Schutzpflicht*) and is therefore required to nullify a contract when a contract infringes the fundamental rights of the contracting parties. Although he does not address distributive issues explicitly, he acknowledges the relatively broad discretion of legislators to implement measures necessary to protect the fundamental rights of citizens. It is therefore likely that, in Yamamoto's theory, using contract law for redistributive purposes is permissible as long as such a measure is required to safeguard citizens' fundamental rights.

In sum, as influential as the theories emphasizing the principle of contractual justice were, the question of whether redistributive goals should be pursued in contract law remains unanswered in the Japanese mainstream contract law theories. It is, however, noteworthy here that the prominent Japanese scholars do not appear to be hostile towards the redistributive use of contract law, suggesting that the orthodox view is not as firmly grounded in Japan as it is in Western jurisdictions.

III. THE HISTORICAL DEVELOPMENT OF BUILDING LEASE LAW IN JAPAN

A. Overview

As we have taken a brief look at the theories, we will now turn to how the courts have actually addressed one of the most pressing redistributive issues in Japan during and after the wartime period: the housing lease.[21]

20. See CLAUS-WILHELM CANARIS, GRUNDRECHTE UND PRIVATRECHT (Walter de Gruyter, 1999).

21. Important contributions on the historical development of building and land lease law in Japan include YOZO WATANABE, TOCHI TATEMONO NO HŌRITSU-SEIDO [THE LEGAL SYSTEM ON LAND AND BUILDINGS] vol. 1 and 2 (Tokyo UP, 1960 and 1962); ROKUYA SUZUKI, SHAKUCHI SHAKUYA-HŌ NO KENKYŪ [STUDY ON LAND AND BUILDING LEASE LAW] vol. 1 (Sōbunsha, 1984); and Iwao Sato, *Nihon-hō no Tenkai (2) Tokubetsu-hō no Seisei: Shakuchi Shakuya-hō* [Development of Japanese Law (2) Development of Special Legislation: Land and Building Lease Law] *in* MINPŌ-TEN NO HYAKUNEN [THE CENTENNIAL OF THE CIVIL CODE], 231 (Eiichi Hoshino & Toshio Hironaka eds., 1998). For an English account, see John O. Haley, *Japan's New Land and House Lease Law, in* LAND ISSUES IN JAPAN: A POLICY FAILURE? 149 (John O. Haley & Kozo Yamamura eds., 1992). For a general account of Japanese lease contract law in English, see HIROO SONO ET AL., CONTRACT LAW IN JAPAN 206-216 (Wolters Kluwer, 2019).

In Japanese law, the basic rules that govern lease contracts are prescribed in the Japanese Civil Code (*Minpō*),[22] a code that was promulgated in 1896 and 1898. As the Civil Code is founded on the principle of freedom of contract and presupposes contracting parties to be on an equal footing, the Code does not provide for special rules to protect the interests of lessees. The important, mostly mandatory, rules on behalf of lessees of land and buildings are specified in the Act on Land and Building Leases (1991),[23] which was originally promulgated as the Act on Protection of Buildings (1909),[24] the Act on Land Leases (1921),[25] and the Act on Building Leases (1921).[26] The important rules for the protection of the interests of lessees provided in the Act on Land and Building Leases include the following:

1. The rules on the duration of a lease contract (Articles 3 to 8 on land lease, Articles 26 to 29 on building lease),

2. The rules allowing a lessee to assert its right to lease against third parties (Article 10 on land lease, Article 31 on building lease),

3. The rules on the right of a land lessee to transfer the right of lease or to sublease the land (Articles 19 to 20), and

4. The rules on the right of a lessee to request purchase of the building attached to the land or the fixtures attached to the building upon the termination of the lease contract (Articles 13 and 14 on land lease, Article 33 on building lease).[27]

22. Law no. 89 of 1896 and no. 9 of 1898. A non-official English translation of the Japanese Civil Code and other legislation is available at https://www.japaneselawtranslation.go.jp/en.

23. *Shakuchi shakuya-hō*, Law no. 90 of 1991. It should be noted that, as the land and the building are treated as independent immovables under Japanese law, land leases still play an important role in Japan, even though the number of land leases has constantly been decreasing. The second chapter of the Act on Land and Building Leases prescribes provisions on land leases, and the third chapter of the Act provides rules on building leases. The rules in the third chapter of the Act apply not only to leases of buildings for residential purposes but also to those for commercial purposes.

24. *Tatemono hogo-hō*, Law no. 40 of 1909.

25. *Shakuchi-hō*, Law no. 49 of 1921.

26. *Shakuya-hō*, Law no. 50 of 1921.

27. The first three rules are often considered as a manifestation of the "transformation of rights of lease into real property rights (*Verdinglichung des Mietrechts*)." See SAKAE WAGATSUMA, MINPŌ KŌGI V2 SAIKEN KAKURON CHU-KAN1 [THE COURSE ON CIVIL LAW V2, SPECIFIC PROVISIONS ON LAW OF OBLIGATIONS, SECOND VOLUME 1], 419-423 (Iwanami-shoten, 1957).

In the following subsections, the historical evolution of the doctrines mostly related to the first rule will be examined. The analysis will focus on two doctrines established by the Japanese courts that limit the termination of lease contracts by lessors and thereby stabilize the position of lessees: the doctrine regarding "justifiable ground" for termination of a lease contract (B), and the doctrine demanding "breach of mutual trust" for cancellation of a lease contract (C).

B. The "Justifiable Grounds" for Termination of Lease Contracts

1. The Rules in the Civil Code and the Establishment of the "Interest Balancing Doctrine"

Under the rules provided in the Japanese Civil Code, a lessor may terminate a lease contract rather easily. The minimum duration period for a lease contract is not prescribed in the Civil Code, and if the parties do not specify the duration period of a lease, either party may terminate the contract at any time (Article 617). Furthermore, although the Civil Code ostensibly allows a lessee to assert its right of lease against third parties when the right is registered (Article 605), virtually no lessees are capable of doing so because no lessors would allow the lessees to register their right of lease.[28] This means that lessees would not be able to retain possession of the leased object when the object is sold to a third party and the third party seeks eviction.

About ten years after the enactment of the Civil Code, as the First World War broke out, urban areas in Japan faced a shortage of housing. Some lessors, namely the owners of leased houses, sought to take advantage of the shortage and evict lessees by selling the house to a third party when the lessees would not agree to the demanded increase in rent.[29] To deal with such evictions, the government adopted the Act on Building Leases in 1921, the first article of which provided that a lessee of a building may assert its right of lease against third parties as long as the building has been delivered to the lessee, even if the right of lease is not registered. This new rule provided in the 1921 Act was, however, not an

28. Judgment of the Japanese Imperial Court, 11 July 1921, *Minroku* 27, 1378 denied the right of lessees to demand registration.

29. This was all the more serious with the lease of land. As eviction forces the house built on the land to be removed, as if an earthquake struck the region, sales of land with the aim of eviction were called "earthquake sales." The Act on Protection of Buildings, which provided that a lessee of land may assert her leasing right against third parties when the lessee owns registered buildings on the land, was adopted in 1909 to deal with such "earthquake sales" of land. For details on the adoption of the Act on Protection of Buildings and the Act on Building Leases, see Watanabe, *supra* note 21 (1960), at 167-184, 291-346.

effective measure to protect lessees from eviction. In most building lease contracts, the duration period was not specified, and lessors were hence able to terminate the contract in their own right. The only relief awarded to lessees under the 1921 Act was that they were allowed to possess the leased building for six months after the lessor's notification of termination (Article 3 Section 1).

In 1941, the Act on Building Leases was amended. The amendment introduced a new rule on the termination of building lease contracts, which has historic significance. The newly adopted Article 1-2 of the Act provided that the lessor of a building may refuse renewal of the lease contract or give notice of termination only when the lessor necessitates the use of the building or when there are other "justifiable grounds" for the termination.[30] By introducing the new rule, the legislators intended to prevent the arbitrary termination of lease contracts by lessors and to control the escalation of house rent during the wartime economy. It should be emphasized here that, under the totalitarian regime at that time, the new rule was not legislated as a social security measure on behalf of lessees in need, but as a means to stabilize the housing rental market and mitigate disputes over housing during wartime.[31] The standard-like rule was adopted to encourage flexible dispute resolution through mediation and not to entrench the rights and interests of lessees. As is clear from the legislative intent, the government considered the necessity of the *lessor* to use the leased building a sufficient ground for termination of lease contracts. According to the legislators' view, the necessity of the *lessee* to use the building was, in principle, not to be considered when deciding whether there was a "justifiable ground" for termination.[32]

In 1944, however, prompted by the serious shortage of housing in the late stages of the war, the Japanese Imperial Court, the highest instance court at that time, established a position that not only should the interests of both lessor and lessee be balanced, but also other social circumstances should be taken into consideration upon adjudicating whether a lease contract may be terminated.[33] This doctrine, known as the "interest balancing doctrine," was adhered to by the Japanese Supreme

30. The Act on Land Leases was also reformed in the same year, and the same rule was adopted for the termination of land leases in Article 4 Section 1 of the Act.

31. For details, see Watanabe, *supra* note 21 (1962), at 457-488.

32. See Watanabe, *supra* note 21 (1962), at 475; ROKUYA SUZUKI, KYOJŪ-KEN-RON [THE THEORY ON RIGHT TO HOUSING], 125-127 (new ed., Yūhikaku, 1981).

33. Judgment of the Japanese Imperial Court, 18 September 1944, *Hanrei-Taimuzu* 1, 6=7, 66.

Court, the highest court established after the second world war, for both building and land leases.[34]

2. The "Interest Balancing Doctrine" and Its Application

Under the "interest balancing doctrine," it became substantially more difficult for lessors to terminate building lease contracts and to evict the lessees. By taking the interests of lessees into consideration under the doctrine, the Japanese courts have evolved the rule on termination of building lease contracts into one that generally benefits lessees in times of serious housing shortage.[35] In his early study on lower instance cases in the 1940s and 1950s, Rokuya Suzuki[36] showed that courts exercised broad discretion and balanced many factors in determining whether there was a "justifiable ground" for termination. The main facts that were considered are whether both parties have the actual necessity to use the leased building: When only the lessor necessitates the use, "justifiable ground" is likely to be acknowledged, whereas in cases in which only the lessee needs to use the building, "justifiable ground" is mostly denied. The courts also considered other factors, such as whether the parties have other housing to live in, whether they have enough means to acquire other housing, whether the lessor was aware of the fact that the building was leased when she acquired the building, and also the fact that the lessor offered monetary compensation for the eviction to the lessees.

In the face of the discretionary application of the rules on termination of building lease contracts by the courts, Suzuki recognized that it was the social redistribution of scarce housing, rather than genuine adjustment of private interests, that was at stake when the courts applied the "interest balancing doctrine." He classified the judge-made doctrine restricting the termination of building lease contracts as part of social welfare legislation realized at the sacrifice of the homeowners (lessors) and acknowledged the lessees' "right to housing" as a reflection of such measures. Suzuki believed that such a redistributive doctrine is justified under the condition

34. For building leases, Judgment of the Japanese Supreme Court, 14 February 1950, *Minshū* 4, 2, 29; Judgment of the Japanese Supreme Court, 16 June 1950, *Minshū* 4, 6, 227; Judgment of the Japanese Supreme Court, 14 September 1951, *Minshū* 5, 10, 565. For land leases, Judgment of the Japanese Supreme Court, 6 June 1962, *Minshū* 16, 7, 1265.

35. As of August 1945, it was estimated that the number of shortages amounted to 4.2 million, and the number was more than one-fifth of the total number of dwellings at the time. For an English account of the housing situation in Japan after World War II, see Yosuke Hirayama, *Housing and State Strategy in Post-War Japan in* HOUSING AND THE NEW WELFARE STATE: PERSPECTIVES FROM EAST ASIA AND EUROPE 103-106 (Richard Groves et. al. eds., 2007).

36. Suzuki, *supra* note 32, at 139-202. The first edition of the book was published in 1959.

of a severe housing shortage and a constrained national budget for social security measures. At the same time, however, he emphasized that the housing supply should ultimately be covered by the public budget, not by having homeowners bear the brunt, and that the doctrine adopted by the Japanese courts should be regarded as a mere expedient.[37]

As the decades had passed since the second world war, the housing shortage in Japan had considerably ameliorated. Many believe that the Japanese courts have come to apply the "interest balancing doctrine" more favorably to lessors when compared to the period soon after the war. After a period of steady economic growth in the 1960s and 1970s, many disputes, in which lessors (homeowners or landowners) and real estate developers sought to terminate lease contracts to launch redevelopment or renewal projects in urban areas, were litigated. As a part of his comparative sociological study on building leases, Iwao Sato[38] points out that, in this new type of litigation, the Japanese courts have taken advantage of the "interest balancing doctrine" to consider factors that should be dealt with in legal instruments other than building lease law in a strict sense. First, the courts often consider whether the owner's planned use of the land after eviction is socially desirable, and even whether the developer went through an appropriate procedure for redevelopment. Sato argues that this is a reflection of the insufficiency of land-use regulation in the Japanese legal system. Second, as the amount of monetary compensation offered to the lessee is often a decisive factor in determining whether the eviction is admitted, literature points out that the Japanese courts have utilized the rule on "justifiable ground" as a means to redistribute the economic profit generated by the redevelopment of urban districts to lessees.[39] This is also an issue that is not adequately handled in the Japanese land regulatory scheme.

In this sense, as Sato argues, Japanese building lease law is "overloaded" with problems that should be addressed through public regulatory legislation, not private contract law.[40] From the perspective of

37. See Suzuki, *supra* note 32, at 33-58.

38. IWAO SATO, GENDAI-KOKKA TO IPPAN JŌKŌ: SHAKUYA-HŌ NO HIKAKU-REKISHI-SHAKAIGAKUTEKI-KENKYŪ [MODERN STATE AND GENERAL CLAUSE: A COMPARATIVE HISTORICAL SOCIOLOGICAL STUDY ON HOUSING LEASE LAW] (Sōbunsha, 1999).

39. Sato, *supra* note 38, at 292; KATSUMI YOSHIDA, SHIJŌ, JINKAKU, TO MINPŌ-GAKU [MARKET, PERSONALITY, AND CIVIL LAW SCHOLARSHIP] ch. 9 (Hokkaido UP, 2012) (thinking highly of the rule on justifiable ground as a means to realize distributive justice regarding land resources).

40. Sato, *supra* note 38, at 310. See also Sato, *supra* note 21, at 268-269; KATSUMI YOSHIDA, GENDAI-SHAKAI TO MINPŌ-GAKU [THE MODERN CIVIL SOCIETY AND CIVIL LAW SCHOLARSHIP], 240-242 (Nihon-hyōron-sha, 1999).

using contract law for redistributive purposes, the Japanese courts have taken advantage of the standard-like rule on termination of leases as a means to redistribute scarce housing during the period of housing shortage soon after the World War II, on the one hand, and to redistribute development profit, i.e., positive externalities, after a period of economic growth in the 1960s and 1970s, on the other.

3. The Act on Land and Building Leases (1991) and Beyond

In 1991, the Act on Land and Building Leases, which is still in effect today, was promulgated. The new act integrated the Act on Protection of Buildings, the Act on Land Leases, and the Act on Building Leases and updated the rules therein. The main objective of the update was "to rationalize" the rules on land and building leases based on the present situation and "to diversify" the rules in the light of varying needs of the parties.

As a part of the "rationalization," the legislator intended to clarify the rule on "justifiable ground," as the courts had considered many factors that were not explicitly provided for in the Act on Land Leases and the Act on Building Leases. In the course of the legislation, as a rise in land prices was an important social issue in the 1980s in Japan, real estate developers urged that an adequate plan for economic use of the property should be explicitly prescribed in the new act as a factor to approve the existence of "justifiable ground," and thereby to allow eviction. The 1991 Act, however, came to a rather moderate conclusion to restate the case law, and set out that the existence or non-existence of "justifiable ground" is determined by taking into account the circumstances in which the lessor and the lessee of the building requires the use of the building, the history of the building lease, the state of the building use, the current state of the building, and the monetary compensation offered by the lessor (Article 28 on building lease and Article 6 on land lease).

As for "diversification," the 1991 Act introduced a new set of rules on "fixed-term leases," according to which a lease contract of land or a building will surely end after a determined duration period, without the application of the rule on "justifiable ground." As for land leases, according to Article 22 of the 1991 Act,[41] a lease contract with a duration of fifty years or more will surely end after the specified duration period without renewal, when the parties have made a special agreement opting out of an extension by a document such as a notarial deed. For building

41. For a fixed-term land lease for business purposes, see Article 24 of the 1991 Act (which corresponds to the present Article 23).

leases, on the other hand, fixed-term leases were admitted only in exceptional cases under the 1991 Act (see Article 38 on leases during periods in which the lessor is temporarily on leave).

Soon after the enactment of the 1991 Act, several economists ardently argued that the obscure rule on "justifiable ground," which made it difficult for lessors (homeowners) to terminate lease contracts, was preventing the supply of quality housing in the lease market, especially the supply of large housing in urban areas. As part of the "deregulation" movement in Japan in the 1990s,[42] they alleged that "fixed-term leases," to which the rule on "justifiable ground" does not apply, should be adopted for house leases as well.[43] After a heated debate among economists—most of whom were in support of introducing a new type of housing lease contract without renewal—and legal scholars—mostly critical of the newly proposed rule—the 1999 Act, which was drafted by members of the Diet with the support of the economists, introduced "fixed-term leases" for building leases. Article 38 of the 1999 Act provides that parties may agree to a building lease contract with a specified duration and opt out of renewal when the contract is concluded by a document such as a notarial deed, and that the lessor must deliver to the lessee a document stating that the lease will not be renewed and that it will be terminated upon expiration of the specified period and the lessor must explain these facts in advance. While many legal scholars are critical of this new type of building lease contract adopted in the 1999 Act as an erosion of the rule on "justifiable ground," which has played an important role in ensuring lessees' stable residence, some are more receptive to it as an exception admitted only under the strict conditions provided in Article 38 of the 1999 Act.[44]

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42. For an English account of the economic policy in Japan in the 1990s and the deregulation during that period, see COMMITTEE ON THE HISTORY OF JAPAN'S TRADE AND INDUSTRY POLICY RIETI, DYNAMICS OF JAPAN'S TRADE AND INDUSTRIAL POLICY IN THE POST RAPID GROWTH ERA (1980-2000), ch. 4 (Springer, 2020). For the change in Japanese housing policy in that period, see Hirayama, *supra* note 35, at 122-125.

43. See Kikuo Iwata, *Shakuchi Shakuya no Jiyū-ka* [Deregulation of Land and Housing Lease] *in* TOSHI TO TOCHI NO RIRON [THE THEORY ON CITIES AND LAND], ch. 4 (Kikuo Iwata et. al. eds, 1992); HIDEO FUKUI, TOSHI-SAISEI NO HŌ TO KEIZAIGAKU [LAW AND ECONOMICS OF URBAN REGENERATION], ch. 6 (Shinzansha, 2001) (first published in 1994); FUKUJU YAMAZAKI, TOCHI TO JŪTAKU-SHIJŌ NO KEIZAI-BUNSEKI [ECONOMIC ANALYSIS OF LAND AND HOUSING MARKET], ch. 2 (Tokyo UP, 1999). For reactions from legal scholars, see TAKASHI UCHIDA, KEIYAKU NO JIDAI [ERA OF CONTRACT], ch. 6 (Iwanami-shoten, 2000) (first published in 1996); Yoshida, *supra* note 39 (first published in 1998).

44. For the latter view, see HIROYASU NAKATA, KEIYAKU-HŌ [CONTRACT LAW], 473-474 (new ed., Yūhikaku, 2021), the latest treatise on Japanese contract law.

C. *The Doctrine of Breach of Mutual Trust*

In this subsection, the other doctrine that stabilizes the position of lessees is briefly discussed: the doctrine of breach of mutual trust.

When a lessee fails to perform its obligations under the lease contract, the lessor is entitled to cancel the contract under the general rule on the cancellation of contracts prescribed in the Japanese Civil Code (Articles 541 to 543, see also Article 612).[45] The Act on Land and Building Leases and its predecessors do not provide special rules to limit the cancellation of contracts in the case of non-performance by the lessees. However, the Japanese courts again stepped in to restrict the cancellation of lease contracts by establishing the "doctrine of breach of mutual trust." According to the doctrine, which took shape in the 1950s and 1960s, a lessor of a building or land may cancel a lease contract based on the lessee's non-performance only when it amounts to a breach of mutual trust between the parties. For example, in the case of non-performance of a lessee's obligation to pay rent, a lessor can cancel the lease contract only when the non-payment continues for a certain period of time (approximately three months), when it amounts to a certain sum, and when the mutual trust between the parties may therefore be said to be breached.[46]

A study of court cases applying the doctrine of breach of mutual trust has shown that the doctrine has played several distinctive roles within the context of Japanese building lease law.[47] First, the courts have examined whether the lessee's non-performance amounts to a degree that justifies the cancellation under the doctrine. In this context, the courts have adopted a rule that denies cancellation when the non-performance is immaterial, a rule similar to one adopted in many jurisdictions and in international instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) (see Article 49 (1)(a)).[48] Second, the doctrine has promoted negotiation between the

45. For an English account of the rules on cancellation of contract under Japanese law, see Sono et al., *supra* note 21, at 147-151.

46. For a leading case on a lessee's non-performance of the obligation to pay rent, see Judgment of the Japanese Supreme Court, 28 July 1964, *Minshū* 18, 6, 1220.

47. Tomohiro Yoshimasa, *Shinrai-kankei-hakai-hōri no Kinō to Tenbō* [The Function and Outlook for the Doctrine of Breach of Mutual Trust] *in* FUDŌSAN-CHINTAISHAKU NO KADAI TO TENBŌ [THE CHALLENGES AND OUTLOOK FOR LEASE OF LAND AND BUILDINGS],139 (Shōji-hōmu, 2012).

48. It should be noted that Article 541 of the Japanese Civil Code, after the 2017 amendment, provides that a party may not cancel a contract when the non-performance is "minor" in light of the contract and common-sense trading practices. This limitation on the cancellation of a contract was not explicitly provided in the Civil Code prior to the 2017 amendment.

parties when they dispute over the increase or decrease in the amount of rent. By denying cancellation when a lessor insists on an unreasonable raise in rent, on the one hand, and allowing cancellation when a lessee does not seriously consider a justifiable proposal made by the lessor, on the other, the doctrine has encouraged both parties to negotiate in good faith and to come to a settlement by mutual agreement. Third, whereas the Japanese Civil Code provides that a lessor may cancel the lease contract when the lessee assigns the right of lease or subleases the leased object to a third party without the approval of the lessor (Article 612), the courts have limited cancellation to cases in which the lessee had let the third party use a large part of the leased object for a certain period of time.[49] This had a certain significance in times of serious housing shortages soon after the second world war, as there were even cases in which the lessee of a house had subleased a room within it to another family that was unable to find housing on its own. As for the third function, it is clear that the Japanese judiciary played an important role in complementing the insufficient housing supply by denying cancellation in cases of unapproved sublease and allowing lessees and sublessees to maintain their housing. As the housing situation had substantially improved in the 1960s and 1970s, the number of cases in which cancellation for unapproved assignment of the right of lease or sublease was disputed had dramatically decreased. In this sense, as far as the third function of the doctrine of breach of mutual trust is concerned, the doctrine seems to have run its course in the period of economic growth in Japan.

IV. THE JUSTIFIABILITY OF THE REDISTRIBUTIVE DOCTRINES ESTABLISHED BY THE JAPANESE COURTS

A. The Limits of the "Heterodox" View of Contract Law

In this section, it will be discussed whether the Japanese court-established doctrines reviewed in the last section may be justified in light of the debate in the United States: the debate around the "orthodox" view of contract law, i.e., the view that contract law should not be concerned with distributive justice.

In the United States, orthodox contract law is often justified from the standpoint of welfare economics.[50] Many welfarist law and economics

49. As a leading case, see Judgment of the Japanese Supreme Court, 25 September 1953, *Minshū*, 7, 9, 979.

50. For moral justifications for preferring taxation to contractual rules as a method of redistribution and their counterarguments, see Kronman, *supra* note 16, at 499-507. For other English literature, see Davis & Pargendler, *supra* note 3, at 1492-1494, 1525-1529.

scholars argue that contract law should only promote efficiency. They criticize the "heterodox" view, namely the view that contract law may and should be used to achieve redistributive goals, mainly for the following two reasons[51]:

First, it is often argued that it is difficult, if not impossible, to use contract law as a tool to achieve redistributive goals. Even when legal regulations are introduced for redistributive purposes, contracting parties can circumvent the regulation by agreeing on different conditions, particularly a higher price to pass on the loss brought about by the regulation to the very party the regulation intended to benefit. For example, if a legislator introduces a mandatory regulation with the intent to protect a buyer of a product, the producer can simply raise the sales price to cover the additional costs that the regulation imposes upon her.[52] This argument is often called the "contracting-around argument."[53]

Second, many law and economics scholars claim that the legal rules that redistribute income are often, if not always, imprecise and under- or over-inclusive. As for contract law, the parties which redistributive rules intend to assist, e.g., consumers, lessees, etc., are not necessarily those with low incomes. Some consumers and lessees surely earn more income than some sellers and lessors, and the redistribution to the former is difficult to justify. As for redistributive tort law, the victims that the law aims to protect do not always face a dispute, bring litigation, and thus benefit from the rules with redistributive aims. Many refer to this argument as the "haphazardness argument."[54]

B. The "Double Distortion" Argument and Its Critique

Based on a formal analysis, Louis Kaplow and Steven Shavell[55] go on to argue that legal rules should not be used for redistributive purposes

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51. See David Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439 (2003); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 7-8 (6th ed., Pearson, 2016); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS, ch. 18 (5th ed., Wolters Kluwer, 2019).

52. See Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

53. Kyle D. Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 177 (2003); Weisbach, *supra* note 51, at 448.

54. Logue & Avraham, *supra* note 53, at 182; Weisbach, *supra* note 51, at 449. For a counterargument against the "haphazardness" of the redistributive legal rules, see Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1051-1056 (2001).

55. A formal analysis is presented in Kaplow & Shavell, *Why the Legal System Is Less Efficient*, *supra* note 4. For a brilliant analysis of the "double distortion" argument and its critique

because using inefficient rules for redistribution causes "double distortion," [56] meaning that redistributive rules reduce individuals' incentive to work (and cause labor-leisure distortion), and at the same time cause inefficiencies as the rules themselves are not efficient. The tax and transfer system, on the other hand, causes only the former distortion and therefore is always a more efficient way of redistributing income in our society.

As provocative and influential as their thesis was,[57] there are some prominent scholars who endorse welfarism but nevertheless criticize Kaplow and Shavell's argument as being over-inclusive.

Zachary Liscow,[58] for example, argues that legal rules can be a more efficient method of redistribution than the tax and transfer system as long as the distortion caused by inefficient rules does not exceed the cost of redistribution through taxation. Liscow lists six factors that make redistribution through legal rules more desirable. (1) The first factor is the membership of groups based on which income is redistributed, especially income differences among and between the groups. As the groups grow larger, as the difference in average income between the groups grows larger, and as the income within the groups becomes more homogeneous, redistribution through legal rules become relatively preferable. (2) The second factor is the elasticity of group membership, meaning the likelihood that a group's membership will change in response to the legal rules. When the membership is less inelastic, the distortive effect of redistributive legal rules is less important. (3) The third factor is the timing of the responses to a change in legal rules. Legal rules may be more valuable when income is redistributed immediately by the rules rather than when the distortion caused occurs after some time. (4) The fourth factor is economic incidence, namely, who bears the cost caused by the redistribution. (5) The fifth factor is the bargaining costs. When the bargaining costs are low, redistributive legal rules cause fewer problems,

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by a leading tax law professor in Japan, see Takeshi Fujitani, *Hō-seido no Kōritsusei to Sozei-hō no Yakuwari* [Efficiency of Legal System and the Function of Taxation Law], 152 Financial Review, Policy Research Institute, Ministry of Finance, Japan 4 (2023).

56. For a coinage of the term "double-distortion argument," see Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 799 (2000).

57. Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1062 (2015) notes that Kaplow and Shavell's "result and the policy advice have become the conventional wisdom, at least among many law professors who employ economic analysis" and provides references.

58. Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478 (2014).

as the distortion caused by the rules can be reduced through bargaining. (6) The sixth factor is whether the violation of "horizontal equity," the demand to treat individuals in similar situations equally, is important. When "horizontal equity" is not so important, it is easier to defend redistributive legal rules that benefit only those to whom the rules apply.

Lee Anne Fennell and Richard McAdams[59] argue that while the "double distortion" argument presupposes that a redistributive tax and transfer system can be adopted with political costs that are equal to or less than the costs necessary for the adoption of redistributive legal rules, in the real political process, there are many contexts in which the "political action costs" to introduce a desired redistributive tax and transfer system is higher. The reasons that make "political action costs" higher include (1) political inertia, (2) cognitive biases, including the framing effect, and (3) the fairness preferences of society. (1) First, because there are multiple legislative veto points in the actual political process, the political cost of enacting changes to implement redistributive measures may be high. (2) Second, as prospect theory has revealed, framing a particular action as a loss will cause more disutility when compared to cases in which the same action is framed as a gain. The redistribution through a tax and transfer system is often regarded as taking some money away from a liable person, namely as a loss to that person, and may necessitate higher political costs to adopt it. (3) Third, as individuals have preferences as to what is 'fair' or 'unfair', and as redistribution through a tax and transfer system is on many occasions perceived to be 'unfair' compared to redistribution through legal rules, there are cases in which the former will incur more political costs.[60] When these "political action costs" of redistribution through a tax and transfer system are higher than the costs that redistribution through legal rules entails, the latter may be a more preferable method of redistribution.

C. A Brief Examination of the Redistributive Doctrines in Japanese Building Lease Law

As discussed in the previous section, Japanese courts are believed to have applied the rules on "justifiable ground" and the "doctrine of breach

59. Fennell & McAdams, *supra* note 57.

60. See also Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 362-372 (2006) (arguing that redistribution through private law rules is less injurious to the givers' well-being and is thus likely to elicit less resistance and opposition); Zachary Liscow, *Redistribution For Realists*, 107 IOWA L. REV. 495, 516-528 (2022) (arguing that people are more resistant to redistribution through taxation because of the people's notion of desert in their pretax income).

of mutual trust" as a means of redistribution. By taking advantage of these standard-like doctrines, the Japanese courts have redistributed scarce housing resources during the period of housing shortage, on the one hand, and redistributed economic benefits yielded by the redevelopment of an urban district after the period of economic growth, on the other.[61] The question discussed in this last section is whether such norm creation by Japanese courts may be justified in light of the debate in the United States. The analysis is novel both in terms of its substance and the methodology adopted, as it does not simply compare the corresponding rules in two jurisdictions, but uses the political-economic framework established in the United States to examine the Japanese doctrines on building lease contracts.

First, as far as the "contracting-around argument" is concerned, the economists who ardently proposed introducing fixed-term leases for housings in the 1990s argued that the rule on justifiable ground had prevented the supply of quality housing in the Japanese housing rental market. If that were actually the case, the implication would be that the rule and its application by Japanese courts had caused a "contracting around" problem, in the sense that the redistributive rule had decreased the supply of housing and hence caused a rise in rents. Whether this is true is a question to be answered empirically. Surveys show that the number of fixed-term house lease contracts concluded after the enactment of the 1999 Act is not as large as expected: According to the Annual Survey of the Housing Market conducted by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT),[62] as of 2024, only 2.1% of newly concluded house lease contracts in the private sector are fixed-term house leases, and this percentage has been almost unchanged for the last two decades. Regarding housing rents as well, research shows that, as of 2009, one cannot observe a statistically significant decline in rents for fixed-term house lease contracts.[63] These findings may be regarded as an indication that the contracting around problem was not a severe issue in the Japanese housing rental market—at least not to the extent that economists insisted in the 1990s.

Second, regarding the haphazardness argument, (1) it may well be the case that a lessee protected under the court-established doctrines has a higher income than a lessor, and it may seem difficult to justify the

61. See *supra* note 36-39 and accompanying text.

62. Available at https://www.mlit.go.jp/report/press/content/001900667.pdf (in Japanese).

63. Hisaki Yamaga, *Dēta de miru Teiki-shakuya no Genjō* [Examining the Status Quo of the Fixed-Term Housing Lease through Data], 77 TOSHI-JŪTAKU GAKU [URBAN HOUSING STUDIES] 22 (2012).

redistribution to the benefit of a lessee in such a case. (2) It may also be argued that by stabilizing the position of current lessees, the doctrines are treating potential lessees, who do not currently rent, disadvantageously compared to existing lessees. (1) As for the former question, it should be noted that it was the redistribution of scarce housing, not income, that was at stake during periods of housing shortage. Redistribution of housing resources to the benefit of lessees with higher incomes may not have been a serious problem during periods of severe housing shortage, when it was not easy for even those with high incomes to acquire housing. Furthermore, the fact that the Japanese courts considered whether the parties had sufficient means to acquire other housing under the "interest balancing doctrine"[64] may be understood as an attempt to mitigate this problem of undesired redistribution. (2) Regarding the latter problem, Japanese literature also recognized that the rules on lease termination treat current lessees and potential lessees unequally. As Liscow argues, the question is whether the violation of horizontal equity between current lessees protected under the doctrines and potential lessees in the community was a serious concern under the socioeconomic conditions in Japan at that time. The Japanese courts decided that it was not a particularly serious issue and prioritized the interests of current lessees, who continuously reside in the buildings and have connections with the neighborhood, over those of potential lessees.

As far as the redistribution of development benefits during and after the period of economic growth is concerned, economists criticized the rule on justifiable ground, arguing that the economic benefits generated by the redevelopment should be owned by the landowners (lessors) and that there is no reason for lessees to receive their share. However, this criticism is not necessarily true. The rule on justifiable ground may well be regarded as a legal instrument to *distribute* positive externalities newly produced by the redevelopment, rather than a tool to *redistribute* the benefits inherently owned by lessors.[65] Even from this perspective, however, the distribution of benefits generated by the redevelopment to a lessee seems more difficult to justify than the redistribution of housing resources, because it is not necessarily clear why the positive externalities produced by the redevelopment should be distributed to lessees with higher incomes rather than to other members of society.

64. See *supra* note 36 and accompanying text.

65. See also Fukui, *supra* note 43, at 214 (first published in 1994) (a contribution from an economic perspective arguing that profit from redevelopment should not be owned solely by two contracting parties, i.e., the lessor and the lessee, but should be shared by the community through taxation).

Third, as for other factors that Liscow considers favorable to redistribution through legal rules,[66] the elasticity of group membership is unlikely to be high in the context of building lease contracts, as it is not always easy for homeowners (lessors) to exit the housing rental market and find an equally attractive use for their housing. The fact that the number of fixed-term house lease contracts did not increase after the 1999 amendment also suggests that lessors in the Japanese housing rental market are not responsive to the (re)distributive legal rules. In this connection, in his classical article, Bruce Ackerman showed that under certain conditions, including when no landlord will find it more profitable to abandon his or her housing when faced with the housing codes, the codes will successfully have a redistributive impact in favor of poor tenants.[67] The Japanese housing rental market may be considered as a market in which important assumptions in Ackerman's article were fulfilled. Moreover, in terms of the timing of responses to changes in legal rules, the response in the market is likely to occur sometime after the redistribution, making the present value of benefits produced by the legal rules higher relative to the present value of costs incurred. Finally, as for the bargaining costs, they seem to be relatively low between the lessors and lessees, who have, in many cases, been in a contractual relationship for a certain duration of time. All these factors imply that (re)distribution through lease contract law is relatively likely to be preferable to (re)distribution through taxation.

Fourth, Fennell and Richard McAdams argue that "political action costs" may prevent society from adopting a redistributive transfer system and make redistributive legal rules more favorable under certain conditions. Drawing on their argument, it may be argued that the political costs of adopting redistributive measures on behalf of housing lessees are likely to be considerably high in Japan. A scholar on housing policy notes that the insufficiency of public expenditure on private housing in Japan may be ascribed to what he calls the "de-politicization" of the housing system, meaning that the bureaucracy had controlled housing policy under the longstanding Liberal Democratic Party governments after the second world war.[68] The bureaucrats focused on incentivizing citizens to own their housing and showed little interest in introducing measures in the interest of housing lessees. Given this political configuration, it may

66. See *supra* note 58 and accompanying text.

67. Ackerman, *supra* note 9, at 1102-1119. For a similar argument, see Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 773-774 (1983).

68. YOSUKE HIRAYAMA, JŪTAKU-SEISAKU NO DOKO GA MONDAI KA [WHAT IS WRONG WITH THE HOUSING POLICY], 106-108 (Kōbunsha-shinsho, 2009).

have been more desirable to realize redistribution to the benefit of housing lessees through court-established doctrines on housing leases, as the political costs of redistribution through the tax and transfer system are high in Japan.

In this context, it is also noteworthy that the proponents of fixed-term leases achieved their goal in the 1999 amendment under the auspices of parliamentarians and economists. This suggests that the political costs of introducing measures on behalf of homeowners and landowners (lessors) or large real estate developers may have been lower than the costs of adopting (re)distributive measures to the benefit of lessees, because the actors with political and economic resources were able to exercise their influence in the political process regarding housing policy, while lessees, with fewer resources, were unable to do so.

Based on the above, it may well be that the redistributive doctrines established by Japanese courts are justifiable in light of the debate in the United States, especially as Japanese courts addressed the severe housing shortage after the second world war. The (re)distribution of economic benefits produced by the redevelopment of the urban district, on the other hand, is more disputable. The point of divergence seems to be whether the fact that the housing lessees actually reside in the building provides sufficient ground for (re)distributing the positive externalities to them. If not, the (re)distribution should address the haphazardness argument.

V. CONCLUDING REMARKS

In this Article, the redistributive aspect of Japanese building lease contract law was discussed. Although the analysis in this Article is subject to further study, especially with regard to the details of the costs of redistribution through court-established doctrines and through the tax and transfer system,[69] the overall assessment is that the redistributive doctrines established by Japanese courts are well justified in light of the debate surrounding Kaplow and Shavell's "double distortion" argument.

The analysis in this Article shows that Japanese building lease contract law may be regarded as a field in which the underlying assumptions of the orthodox view of contract do not necessarily hold and in which heterodoxy has gained acceptance. The historical development

69. It should also be examined whether the redistributive lease contract law in Japan may be justified from a perspective other than welfarism. In the United States, for example, Lewinsohn-Zamir, *supra* note 60, defends redistribution through private law on the grounds that private law rules are more conducive to the attainment of objective goods, enhance recipients' valuation of the things they are given, and decrease givers' opposition and injury to givers' welfare. Lewinsohn-Zamir also discusses tenant law (at 380-385).

discussed in this Article also shows that, unlike the jurisdictions Davis and Pargendler have in mind, namely those in the Global South, heterodoxy may be persuasive even in advanced economies in certain contexts. In this regard, the Japanese experience is filled with lessons on how to achieve redistribution through contract law and how to gain approval among members of society, e.g., the desirability of incorporating a mechanism to consider the economic conditions of the protected party within the redistributive doctrine, and the necessity of examining the political configuration in the jurisdiction in which the doctrine is adopted. These lessons should be insightful for many jurisdictions in the West, particularly the United States, where orthodoxy firmly holds its ground, but the pressing need to address inequality is obvious.

In many jurisdictions, including Japan, building lease law is often regarded as a rather classical field of law that attracted attention decades ago. To address the cutting-edge issues that pose novel redistributive challenges,[70] however, it is beneficial to look back at history and explore the pros and cons of the rules that dealt with similar challenges. This was the motivation for studying the historical development of Japanese building lease law in this Article.

70. Recent publications in the United States addressing redistributive aspects of private law include OMRI BEN-SHAHAR & ARIEL PORAT, PERSONALIZED LAW: DIFFERENT RULES FOR DIFFERENT PEOPLE, ch. 7 (Oxford UP, 2021); Tamar Kricheli-Katz & Marotta-Wurgler, The Distributional Costs of Effective Consumer Regulation, NYU Law and Economics Research Paper No. 26-10 (2026), available at SSRN: https://ssrn.com/abstract=6570378.