

Judicial Review of Administrative Actions in Japan

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I. Introduction

The system of judicial review is a means for the judiciary to control the legislative and executive branches, as far as the ‘Separation of power’ doctrine is concerned.¹ In Japan, the power to review the constitutionality of an act of the Diet was not embodied until the Constitution of Japan was promulgated on November 3, 1946.² The reason as perceived by Professor Minobe³ during the Meiji Constitution was that “the legislature has the ultimate power to decide whether a statute is repugnant to the Constitution”. The problem arises that the Court in Japan seems to have “its remarkable reluctance” to exercise judicial review⁴. This article will analyze the problems of judicial review in Japan, particularly in the administrative actions. Part II will elaborate the Japanese legal system and its system of judicial review. The historical and social background will also be explained in this Part in order to understand the Japanese legal minds. Part III deals with the judicial review of administrative actions in Japan. The problems in relation to the Administrative Case Litigation Law (ACLL) will be articulated in

this Part. Moreover, administrative guidance is discussed in the last section of this Part since it has played a significant role in administrative field. Part IV will discuss the Court response to the problems in judicial review. The conclusion and some suggestions will be mentioned in Part V.

II. System of Judicial Review In Japan

This part is divided into two sections : the Japanese legal system and the system of judicial review in Japan.

1. The Japanese legal system

Japan had been controlled by the Tokugawa Shogunate since the early seventeenth century.⁵ Law in those days was set aside from the knowledge of people.⁶ Japanese social value highly honors the superiority of the group interest over the individual interests of its members.⁷ Conversely, the rights of the individual was second to societal harmony. The doctrines of social hierarchy and ‘wa’ (harmony) were derived from the Confucian thought.⁸ Confucianism imposes five basic human relations : ruler and

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subject ; father and son ; elder and younger ; husband and wife ; and friend and friend.⁹ The philosophy infers to serve the superior and conserves social harmony within a group. A lawsuit, once filed to the court, was a way to disrupt the society. As a result, people would rather not resort to litigation. The settlement of disputes in a harmonious way through an agreement or conciliation is recommended. Law was perceived as "*a moral statement prescribing good conduct*".¹⁰ It is shameful when a particular case is governed by law in the courtroom, though. Conciliation is an important means in which the parties concerned can settle their dispute and thus restore harmony through the mediation of the third person.¹¹

Another aspect of the Japanese society is the 'ringisei'. 'Ringisei' is the system in which a proposal originating from a lower rank officer is conveyed to high-ranking officers in their chain of command until the proposal reaches the top-level officer.¹² This process brings about 'shared responsibility and consensus' which form the homogeneity of the Japanese social structure.¹³ This characteristic explains why confrontation is usually avoided and why members of a group tend to care for interdependency and 'amae' (The desire to be passively loved and cared for).¹⁴ Law in the Tokugawa era was, by and large, based on precedent or custom.¹⁵ The Court was a branch of the executive and only the executive who performed judicial functions.¹⁶

The Meiji Restoration which took place in 1868 stemmed from the need to "modernize" Japanese law in order to abolish the extraterritoriality provisions.¹⁷ The Meiji Constitution of 1889 was modeled after the German Constitution and based on the concept of the sovereignty of the Emperor.¹⁸ Japan at that time adopted the French and the German legal science. It resulted

in new enacted codes : the Code of Criminal Instruction of 1880 ; the Penal Code of 1907, etc. According to the Constitution, it was the Administrative Court which adjudicated disputes between individuals and the state, but the jurisdiction thereof was given over certain litigation.¹⁹ No judicial review of legislative and administrative acts was performed during that time.²⁰ This is because the judiciary was attached to the Ministry of Justice, a member of the cabinet.²¹ Thus, no room was left for judicial independence even though the separation of powers was introduced in the Meiji constitution. In other words, the executive supremacy was applied in the sense that the judiciary, as well as the administrative, was a part of the executive.²²

2. Judicial review under the 1947 Constitution

The 1947 Constitution was a result of a democratic reform after the Second World War ended in August, 1945.²³ The new Constitution was designed during the American Occupation (1945-1952) in the light of "*a strong parliamentary democracy, with extensive individual rights and freedoms, uniquely pacifist restraints on the military, a group-oriented cabinet executive, limited but potentially creative autonomy for prefectoral, city, and town governments, and an independent national judiciary with comprehensive jurisdiction*".²⁴ The independent judiciary with the power of judicial review was believed to convince people to recourse to the Court, for they were henceforth able to argue their own government.²⁵

It is provided in Article 81 of the Constitution that "*the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act*". However, it is problematic whether the American or the continental type of judicial

review was adopted.²⁶ In order to answer this question, firstly the Japanese judicial system must be understood. Secondly, some idea on the American and the continental judicial review must be illustrated. These two elements are hereinafter narrated.

Paragraph 1 of Article 76 of the 1947 Constitution provides that “*the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law*”. Paragraph 3 further states that “*All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws*”. In this respect, many administration actions have been brought to the courts for judicial review. The result is that there has been judge-made law in the field of administrative law ever since. There are courts of first instance, court of appeals, and a supreme court. The court of first instance is the District Court.²⁷ However, minor civil and criminal cases will, by and large, go to the Summary Courts. The Family Courts uniquely handle “*domestic and juvenile cases which closely affect the home life*”²⁸ The High Courts are normally in charge of all appeal cases, except in a case where the Japan Fair Trade Commission (JFTC) or the Patent Bureau is sued. In that event, the High Court is acting as a court of first instance.²⁹ There are two occasions when a lower court's decision in commercial cases may be appealed: ‘*koso*’ and ‘*jokoku*’³⁰. The ‘*koso*’ appeal is an appeal for “*an alleged error in fact-finding as well as in law*”³¹. The ‘*jokoku*’ appeal, on the other hand, is an appeal either for “*an error in the interpretation of the Japanese Constitution*” or for “*an error in law clearly affecting the litigation's outcome*”³². The Supreme Court in Tokyo “*is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to*

attorneys, the internal discipline of the courts and the administration of judicial affairs”³³. Judges serve their tenures for ten years and will retire at sixty-five years of age.³⁴ They may, however, be removed by public impeachment or by judicial declaration of mental or physical incompetence.³⁵ The administrative court has been abolished and replaced by the ordinary courts.³⁶ This concept is influenced by the Anglo-American legal system as pointed out by Dicey, having prejudice against droit administratif that “*the constitution wrongly adopted the Continental system of administrative courts and that all legal matters should be left to ordinary courts*”³⁷

The Supreme Court as well as lower courts has the power of judicial review set forth in Article 81 to determine the constitutionality of all laws, ordinances, and other official acts.³⁸ It seems unlikely, however, that the Supreme Court uses the judicial review against the government authorities.³⁹

There are two ways to review the constitutionality of laws, namely, the American system and the European system.⁴⁰ The U.S. courts are empowered to exercise judicial review as a part of ordinary proceedings of the court.⁴¹ It is the function of the judiciary to interpret whether the law in question is in conflict with the constitution, and apply it.⁴² The European system of judicial review is adopted in civil law countries, e.g., Austria in 1920, Italy in 1948, Federal Republic of Germany in 1949.⁴³ The Constitutional Court, which does not hear the ordinary cases, is established because a special tribunal is believed to function better than the existing judicial organs for judging special matters.⁴⁴

In the first place, a special tribunal system took root in Japan when the French system was embodied into Japan's legal system in 1868.⁴⁵

Under the present Constitution, the special tribunal--the administrative court--is rejected and the ordinary judiciary is maintained.⁴⁶ Under the circumstances that Japan has been influenced by both the Anglo-American and the European legal systems, two distinctive views in connection with the interpretation of judicial review system have come into being. Kisaburoh Yokota views that judicial review in Japan has followed the course of the United States.⁴⁷ The reason underlying his proposition is that the judicial review system stems from the principle of separation of powers and the concept of democracy which are well-shaped in the American theory.⁴⁸ As a result, the Supreme Court cannot judge a law "*in the abstract*", i.e., in the absence of an actual claim.⁴⁹ Conversely, the decision of the unconstitutionality is governed only to a particular case. The Supreme Court in Japan on October 8, 1952, sustained that the validity of laws was applied only in a concrete case.⁵⁰ There must be an actual dispute before the Court. The Court has no power to exercise the constitutionality of any law over future cases. If the Court determines that a certain law in a particular case is unconstitutional, "*it will refuse to apply that law but it will not annul it*".⁵¹

Some commentators deliver a different opinion. They take the stance that the review of the constitutionality of a law is obligated in the light of the trial of a concrete case concerning parties, but the law decided unconstitutional loses its validity in toto or in part from the date of its enactment.⁵² Taking Article 81 of the constitution into account, the power of the Supreme Court should not merely interpret the Constitution, but nullify the law since its final judgment has a general binding effect over all national organs and all matters.⁵³ Moreover, Article 14 of the Rules of the Supreme Court of November 1, 1947, provides that a copy of

the decision on the law declared unconstitutional must be sent to cabinet and to Parliament. This tendency implies that the Supreme Court in Japan can nullify the law at issue. An example of the court ruling is the rejection of Article 200 of the Penal Code which provided a heavier punishment for killing an ascendant.⁵⁴

A line of cases indicates that the Court interpreted Article 81 of the Constitution in the U.S. course to the effect that the inferior courts can also exercise judicial review in constitutional issues and that the Supreme Court cannot determine the law in the abstract.⁵⁵

Three cases have led to a conclusion that the Court in Japan has increased its use of judicial review to overturn statutes. The first one is the **Parricide** case⁵⁶ in 1973 where the Court struck down Article 200 of the Penal Code, which, accordingly, overruled the **Patriicide** decision in 1950.⁵⁷ The second case is **K.K. Sumiyoshi v. Governor of Hiroshima Prefecture**⁵⁸, where the Court held in 1975 that the Pharmaceutical Affairs Law specifying a distance of 100 meters that must be maintained between pharmacies is repugnant to the constitutional right to pursue an occupation.⁵⁹ The **Kurokawa v. Chiba Prefecture Election Commission** case⁶⁰ is the third one where the Court ruled that the apportionment plan being effective in 1972 is unconstitutional. The plan stipulated that an urban district having five times as many voters as a certain rural district would have the same elected representative was violating the provisions in Article 14, 15 and 44 of the Constitution.⁶¹ However, the Court declined to invalidate the election itself since there was an intervening 1975 apportionment.⁶²

The factor that bars the Court to exercise judicial review is the political question doctrine.⁶³ In **Japan v. Sakata or Sunakawa** case,⁶⁴ seven demonstrators were arrested on charge of

tresspassing the American Tachikawa airbase which was built according to the United States-Japan Mutual Security Treaty. The problem arose that if the Treaty were unconstitutional as violating Article 9 of the Constitution, any person who entered without justifiable reason the airbase would not be guilty on this count. The Supreme Court upheld that the validity of the Treaty was a political matter which should be left to the Japanese people--the Diet--to make a decision.⁶⁶ A year later, the Supreme Court, in **Tomabechi v. Japan**,⁶⁶ pointed out that the dissolution of the House of Representative was to be left to the decision of the Prime Minister and his Cabinet members, having knowledge of the full political situation involved, whenever it deemed it necessary to find the general opinion of the people. The Supreme Court in **Koshiyama v. Chairman of the Tokyo Metropolitan Election Administration Commission**,⁶⁷ modified the political question in terms of 'internal discretionary matters'⁶⁸ when holding that the question of the apportionment of the numbers of both Houses to each election district in proportion to the population of the electorate should be left to the discretionary authority of the National Diet.

Some scholars argue that Article 81 of the Constitution does not exempt the courts from the political question, while Article 91 sets aside unconstitutional laws, there is no doubt that the courts are the sole organ to review all government laws or acts of government, no matter whether the laws or acts as such comprise political elements.⁶⁹

III. Judicial Review of Administrative Actions

Prior to 1946, the exercise of administrative power was vested in administrative agencies or in the Administrative Court. The juris-

diction of the Administrative Court, under the Meiji Constitution, was limited to administrative acts.⁷⁰ It was found, later on, that "*the principle of legality of administration⁷¹ and the protection of the rights of the people*" could not be accomplished due to the following reasons.⁷² Firstly, a lawsuit could not be filed unless it was permitted by a statute. Secondly, a large number of cases could not be effectively reviewed by one Administrative Court. Thirdly, the administrative judges were in favor of the government agencies. Fourthly, few procedural safeguards existed in the proceedings of the Administrative Court.

That being so, the new Japanese Constitution replaced the Administrative Court with the Anglo-American judicial review. Article 76 provides :

"The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power."

The issue will be less problematic when taking the Court Organization Law into consideration. A preliminary determinations on administrative actions may be conducted by executive agencies, but the final review will be performed only by the judiciary.⁷³

This Part of the article will elaborate the judicial review of administrative acts, especially in relation to the Administrative Case Litigation Law (ACLL). In the end, this Part will shed some light on an impact on administrative actions as far as judicial review is concerned.

1. Judicial review under ACLL

The abolition of the Administrative Court and the foundation of judicial review of administrative actions to the judiciary marked

a great move in the Japanese legal system.⁷⁴ At the beginning, the Administrative Litigation Special Measures Law⁷⁵ was promulgated. Unfortunately, it did not function properly since "*the courts were required to dismiss all suits if, despite the illegality of the action under review, the relief would be against the public interest.*"⁷⁶ It purported that the courts' capacity was limited to a certain extent even though the administrative action was not based on the law. In addition, the courts' suspension on the execution of administrative actions was restricted to urgent necessity ground, which could still be overridden by the prime Minister.⁷⁷

That being so, the Administrative Litigation Special Measures Law was substituted by the Administrative Case Litigation Law (ACLL) in 1962.

The ACLL allows three types of lawsuits to be filed in the court:⁷⁸

1. 'kokoku' appeal lawsuit--a suit requesting for the revocation of administrative disposition or of administrative decision.⁷⁹ The request may be directed towards the affirmation of the validity of the disposition or action.⁸⁰ Perhaps, it may be applied for administrative inaction.⁸¹ This kind of case may be brought by anybody who may not be an interested party to the case, in order to seek a correct action;⁸²

2. a lawsuit concerning two private parties whose interests are infringed by an administrative disposition or decision;⁸³

3. a lawsuit between governmental agencies in connection with their administrative powers.⁸⁴

Some points should be observed herewith. If an administrative action is repugnant to law, it will be rendered null and void. A lawsuit in this regard can be brought to court even after the prescription pertaining thereto.⁸⁵ In

case that the plaintiff cannot assert his certain right to claim or "*There is no appropriate way to assert such a claim, then the aggrieved can appeal to the court to rule directly upon the validity of the particular administrative act.*"⁸⁶ Another important point is that not only an 'action' causes illegality and thus deprives a person of his right, but a 'nonaction' also constitutes unauthorized. For instance, failure to review an application for a driver's license in due course is an abuse of the administrative's authority. Or, the application as such is returned without sufficient ground, the applicant can petition to the court. Furthermore, an individual may not challenge the administrative order unless he has a direct legal interest being infringed. The Supreme Court in *Suzuki v. Japan*⁸⁷ affirmed that the presentation of a concrete legal dispute was needed in the exercise of the judicial power. The Court could not consider disputes relating to the interpretations of the constitution, statutes and orders for future cases. If the Court had the power as such or in other words, if anybody could recourse to the courts with or without interest, the validity of laws or orders would be contested and the Court's authority among the other two branches of the Government would definitely be imbalanced.⁸⁸

With respect to the court's order, the Tokyo District Court once held, in *Iso Medical Institute v. Japan*,⁸⁹ that "*the courts are entitledto render declaratory judgments even before actual administrative decisions are made, provided that plaintiff has standing to ask for a declaratory judgment.*" It purported that the Courts were permitted to order administrative agencies to perform certain acts in addition to the court's power of judicial review; the orders of that kind in no way interfered with the field of administration.⁹⁰

2. Administrative Discretion

It seems likely that this issue is in a grey area where it is difficult to determine in a particular case whether the discretion is right or wrong. In the event that the administrative discretion in dispute is within the scope of the administrative authority concerned, the act so performed is lawful, no matter whether the referred act is inaccurate or mistaken.⁹¹ This concept is called the principle of 'discretionary power of the administration' or 'free discretion'.⁹²

This kind of discretion is of course extended on the condition that the administrative act itself concerns public policy. In **Matsumoto v. Japan**,⁹³ the plaintiff was a former Vice President of the House of Councillors. When he applied for a passport to go to the People's Republic of China to attend the Asian Pacific Area Peace Conference in 1952, his application was rejected on the ground that the trip to Peking would be harmful to Japan. The Tokyo District Court ruled that the Minister of Foreign Affairs had sufficient reason to refuse to issue a passport since the travel to a communist country would be detrimental to the friendly relations with the United States, United Kingdom, and other democratic nations. The issuance of a passport for that purpose would affect the country's safety.⁹⁴

The Supreme Court, in **Hoashi v. Japan**,⁹⁵ took the same view as in the **Matsumoto** case. The Court gave reason that the refusal to issue a passport to a former member of the National Diet for the purpose of traveling to Moscow was legal. In this respect, the Court would not interfere with the exercise of authority of the Foreign Minister. The Courts' decisions in the two cases could be interpreted in the sense that "*the governmental act was one of a highly political nature, closely related to the fundamentals of national policy.*"⁹⁶

Perhaps, the Courts were so much concerned with the national security at that time. Under the present circumstances where Japan has diplomatic relations with the People's Republic of China, and particularly the trade between the two countries are increasing considerably, the judgment may come out differently. However, a conclusion can be reached that the discretion of a governmental agency can be exercised in full scale unless it is in excess of its authority. Further discussion of these cases will be made in Part IV.

There are two rules that bar administrative discretion. First, Article 14 of the present Constitution has always come into play. Article 14 provides:

"All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

.....

(3) No privilege shall accompany any award of honor, decoration....."

It means that non-discrimination must be honored and that "*an administrative agency is not free to discriminate without reason against a particular individual to his prejudice*"⁹⁷ In case that an administrative agency fails to comply with this doctrine, the administrative action is illegal. Second, the abuse of discretionary power is another threshold that an administrative agency may not cross over. It means that an administrative authority may not act beyond the scope of its discretionary power.⁹⁸ Rather, the action must be done in good faith as a routine work of the authority. This doctrine takes root from the general doctrine of abuse of right (kenri ranyo) as described in Article 1(2), (3) of the Civil Code,⁹⁹ which is pervasive in the basic idea of

law in Japan¹⁰⁰. In **Japan v. Kawamoto**,¹⁰¹ Chisso plant caused industrial pollution in the neighborhood by discharging waste water which was harmful to human and natural environment. Kawamoto suffered from the disease called “Minamata” which was caused by poisonous chemical from the waste water. He attacked some Chisso employees and was indicted for his violence. The Supreme Court evaluated the fact that there were seven separate reports indicating that the Minamata disease was caused by Chisso’s discharge of waste water. It was at least fifteen years later that the government had done nothing to prevent the probable consequences. Also, there had been no police or prosecutorial investigation before the prosecution of this case, which was a violation of Article 248 of the Code of Criminal Procedure. Under the circumstances, the prosecutor failed to take into account “*the character, age and situation of the offender, the gravity of the offense, the circumstances under which the offense was committed, and the conditions subsequent to the offense.*”¹⁰² It means that the prosecutor did not use his proper discretion to justify whether this case should be brought to the court. This case is the first judgment that the Court dismissed an indictment on the basis of the doctrine of prosecutorial abuse of discretion.¹⁰³

3. The ‘shobunsei’ rule

‘Shobun’ or an administrative disposition is an exercise of public power or “*official action which forms the rights and duties of the citizens or confirms the scope thereof.*”¹⁰⁴ It implies that “the supervisory orders, permissions, approvals, and regulations among agencies or within a single agency cannot be the object of litigation because they do not directly create or form the rights and duties of citizens.”¹⁰⁵ The

Supreme Court in **Hayashi Ken Shipbuilding Co. v. Director of High Seas Accidents Inquiry Board**¹⁰⁶ further explained the nature of ‘shobun’ that it had to either impose any duty on a person, or give a direct effect on a person’s rights and duties.

An individual’s right to sue an administrative authority based on the ‘shobun’ would certainly be confined to the extent that the court cannot deliver its decision “in the abstract”.¹⁰⁷ The Tokyo District Court dismissed the contention of the plaintiffs in **Edogawa Ward v. Minister of Transportation**,¹⁰⁸ holding that the decision of the Minister of Transportation to lay out a plan for the bullet trains had not yet infringed citizen’s rights and duties because the approval did not at that time constitute any damage to any person. In sum, judicial review cannot be undertaken unless an administrative action is implemented or practiced whereby a citizen’s legal rights may be affected.¹⁰⁹ In this connection, it seems likely that delay in raising a dispute to the court’s attention may not be avoided.

In some situation, a person may qualify for redress under the ACLL because his rights are affected before a ‘shobun’ takes place. For instance, the Minister of Transportation could be sued on account of increases of unfair bus fare.¹¹⁰ The point is that a plaintiff must provide relevant evidence to prove that his right is directly infringed by the administrative action and the action pre se causes a certain damage to him.¹¹¹ Conversely, the plaintiff has the standing to sue. Upon filing a lawsuit, remedies can, therefore, be exhausted to reverse or overturn the administrative act in dispute.¹¹² Nevertheless, the problem remains that individual may have to suffer first and then claim for the compensation later. This situation can be alleviated if there are some interim measures provided in the ACLL.

Under the ACCL, the administrative agency may not be barred by judicial review unless the case is settled.¹¹³ However, in order to “*avoid irreparable damage which may be brought about by the disposition*”, the court may suspend or withhold “*the effect of the disposition, the execution of the disposition or the continuance of procedure*” as deemed necessary provided that the suspension of execution does not have a harmful impact on public welfare, or that merits of the case is seemingly justified.¹¹⁴ The administrative may eventually intervene in the suspension of administrative acts. The Prime Minister can file a motion of objection to revoke the court’s order if he thinks fit, because the Prime Minister as the head of the Administrative and the Executive is supposed to be the only person who can justify the administrative acts.¹¹⁵ Another reason is that the Administrative would like to avoid an examination by other authorities that may, in effect, have different perception in the administrative field.

It had been discussed that Article 27 of the ACCL was unconstitutional since its rationale outweighed the principle of judicial independence.¹¹⁶ However, it is admitted that it will be more suitable if one has to resort to the competent higher authority before a judicial litigation is taken. This is because the administrative agency who orders the administrative act will have a chance to reconsider its own decision. Further, the concept of judicial independence is always maintained once the option is followed.¹¹⁷

In the field of administration, administrative guidance also plays an important role. It is the fact that

“*administrative agencies have exerted greater influence than in many other countries over various phases of economic activity and also over other aspects of social life through informal and extralegal channels.*”¹¹⁸

Administrative guidance (gyosei shido) refers to an act of administrative authorities, which may have no statutory authority with specific administrative fields. It involves both coercive measures and voluntary action. In addition, the authorities exercise influence over the parties’ concurrence through the expression of expectations and wishes, not legal orders or sanctions for failure to comply.¹¹⁹ In practice, administrative guidance may be issued by means of directions (shiji), requests (yobo), warnings (keikoku), suggestions (kankoku) and encouragement (kansho).¹²⁰ Nevertheless, failure to comply with the ‘guidance’ may subject the recalcitrant to a government sanction that may obstruct his business.¹²¹ The **Sumitomo** case¹²² is an example where the Ministry of International Trade and Industry (MITI) cut off coal import quotas of Sumitomo Metal Mining Company after Sumitomo ignored the suggestion of MITI to curtail its production. This type of relations between public and private sectors (government and business) prevails in the Japanese society due to the inheritance of responsible officialdom or the ‘samurai’ image to rule the society.¹²³

The regulated party can be compelled to follow the directive when his import or export quota is cut off,¹²⁴ or when he is threatened to be withheld from sewage and water services in addition to construction permits,¹²⁵ or when he is requested by politicians who are shareholders or who are in the Board of Directors.¹²⁶ Besides, some other burdens or difficulties in doing business may convince the regulated party not to challenge administrative guidance.¹²⁷ On the contrary, those who follow the administrative directions receive financial incentives from the Japan Development Bank.¹²⁸

Since the guidance is based on ‘voluntary compliance’, with no binding legal effect, there is no way that an authoritative agency may adjudicate or enforce a regulated party to obey

the guidance.¹²⁹ Similarly, nobody can contest an administrative guidance because the compliance is voluntary and, thus, nonjusticiable. In **Kansai v. Governor of Kagawa Prefecture**,¹³⁰ a permission was granted by the Prefectural Governor to a fishing cooperative to reclaim certain public shore lands and developed the land for fishing to housing construction. The court reasoned that the permission for the legal development was merely advisory, thus, constituted a non-legal act which could not be challenged as administrative disposition under the ACLL. It purported that a regulated party could not contest the governmental action once he consented to the guidance as such.

A few years later, the court began to allow direct challenges to administrative guidance. In **Shioda v. Ministry of International Trade and Industry**,¹³¹ MTI issued a notice to the local authorities that the plaintiff's rulers must show the units of measurement in centimeters. Later, the local authorities issued a warning to halt production of rulers. The court ruled that the plaintiff could not contend the warning, but the notice. The reasons were that even though the notice was an internal directive, it affected the concrete rights and duties of the plaintiff. It was the notice that caused the most direct impact. The warning in this particular case needed only voluntary compliance, thereby did not affect the rights and duties of the plaintiff.

It can be concluded that administrative guidance is not usually challenged so long as the ordinance is within the discretion of the administrative agency and, as a result, the ordinance is not illegal.¹³² From the line of cases, there are the situations that allow the courts' review: 1) the abuse of rights doctrine, which means that the order must be exercised within "*a scope judged reasonable in the light of the prevailing*

social conscience",¹³³ 2) the ordinance falls within the jurisdictional mandate and is in accordance with the consensus of society in general, which confines that the administrative action has to comply with the statute that permits the agency to exert appropriate measures against the regulated party and is certainly not contrary to the societal consensus.¹³⁴

In general, administrative guidance is independent of the Japanese judiciary. The best way to work together with the government and, simultaneously, avoid a conflict that may arise is to consult with the authorities concerned before a project is launched and also while the project is in progress.¹³⁵ It is not only the duty of a particular administrative agency, but also of a regulated party, to consult and cooperate with each other so that a consensus can be reached for mutual benefits.

IV. The Court Response to The Problem in Judicial Review of Administrative Action

It is undoubtedly admitted that an administrative agency can exercise its discretion within the framework of the statute. The discretion in this matter is unreviewable or free from judicial review. In interpreting the law concerning administrative discretion, it appears that the courts give different weights to governmental interests and to private interests. The court response is analyzed from the following landmark cases.¹³⁶

1. Discipline cases

It was held in **Fukuda v. Kyoto Furitsu Ika Daigaku-cho**¹³⁷ that a disciplinary proceeding undertaken by the university was exclusively reserved as an educational establishment and to achieve educational purposes. The plain-

tiffs were the students of Kyoto Prefectural Medical University. They were expelled from the university after having interfered with a faculty meeting of the Women's Professional Department. The Supreme Court took into account “*various factors such as the character and past conduct of the principal party, the influence of the act on other students, and the impact of the disciplinary disposition on this person and other students as a deterrent...*”¹³⁸ The university was thereby entitled to exercise discretionary power whether to discipline the students unless “*it is conspicuously lacking in propriety as conceived by society and exceeds the scope of the discretionary power entrusted to the person with authority to discipline.*” To simply clarify this indictment, The Court attached two major elements: whether the university was provided with discretionary power; and whether the power was abused. In this particular case, the university had that power and the power was not abused since the seriousness of the students’ fault deserved a serious punishment which was the dismiss from the university. The discretion would be considered abusive when the appropriate disposition was selective and contrary to “*the common sense of society after examining such matters as the nature of the incident, its significance, the nature of the duties of the person subject to the disposition, the importance of his status based thereon, his professional history, his performance record, and the extent of his repentance.*”¹³⁹ However, if the case involved the balance between public and private interests, the Supreme Court would not hesitate to give more weight to the public interest.

2. Passport cases

As earlier mentioned in Part III, the courts in **Matsumoto**¹⁴⁰ and **Hoashi**¹⁴¹ shared the same view that the governmental interest--

national security--was to be given more weight than the freedom to travel abroad. It is regulated that the Foreign Minister was authorized to exercise his discretionary power in issuing passports, subject to the Passport Law. In 1960, the Tokyo District Court tried to propose a more liberal judgment. In **Miyamoto v. Gaimu Daijin (Minister of Foreign Affairs)**,¹⁴² the court judged that “*in construing these rules we must interpret them as requiring an adequate concrete examination and review of what sort of influence the international and domestic situation in which our country is currently placed and the said applicant’s trip have on our national interests...*”¹⁴³ Freedom to travel abroad is a fundamental human right as guaranteed in Article 13 of the Constitution, thereby it cannot be infringed by a passport issuance, based on one’s beliefs, association, or ideology to which he adheres.¹⁴⁴ Unfortunately, since this case did not come to the Supreme Court’s attention, it cannot be taken as precedence. However, it is considered to be the first step for the interpretation of a case concerning freedom of traveling. Also, this decision may also be used as analogy to other cases concerning the fundamental rights of the people in the future.

3. Cases concerning special permission to stay

The Emigration and Immigration Control Order¹⁴⁵ specifies that an alien entering Japan illegally may be deported. The motion of objection of the determination may, however, be petitioned to the Minister of Justice.¹⁴⁶ The Tokyo High Court, in **Ko Lin-mai v. Tokyo Nyukoku Kanri Kyoku Shunin Shinsakan**,¹⁴⁷ asserted that the Minister of Justice had absolute discretion in this regard. The case took place when the plaintiffs, being foreigners, were given and order for their deportation in 1954. The

Tokyo District Court decided that "*determination must be rendered not only in regard to the propriety of the special hearing officer's decision alone, but also after deliberating the point whether a special stay should be approved.... aliens entering and leaving Japan have a corresponding legal interest, and where the Minister of Justice departs from the scope of his authority and renders determination that is conspicuously unfair and lacking in propriety, we must conclude that his disposition issuing a written deportation order based thereon is illegal and that its annulment may be sought.*"¹⁴⁸ The Tokyo High Court reversed, taking a different opinion that as far as customary international law was concerned, the entry of aliens into a country and the permit of stay was conferred to the state per se on the condition that there was no treaty provided otherwise. The Minister of Justice is empowered to use his discretion as provided by the law. The special approval of aliens' stay is a matter of grace. By the same token, the Osaka High Court judged, in a case where a foreigner with a permission to stay temporarily was ordered to leave Japan but failed to comply with the order because of his sick child, that he had no right to stay in Japan without a permission and that permission was subject to the agency discretion.¹⁴⁹

It should be observed that the permission to stay in Japan does not constitute a right to an alien. Rather, it is 'a matter of grace', which is exclusively reserved within the scope of agency's discretion.

4. Cases concerning public order

The first case is the **Nihon Rodo Kumiai So-hyogikai (Japanese General Council of Labor Unions) v. Kosei Daijin (Minister of Welfare)**,¹⁵⁰ where the Minister of Welfare refused to give permission to the plaintiff to

hold an assembly at the Imperial Palace Plaza, a national park where he was in charge. The plaintiff contended that this denial was in violation of the Constitution.¹⁵¹ The Supreme Court ruled that "...*the manner and the extent to which property employed in the public welfare is to be utilized for the people comprises this power (to administer), but of course approval of this utilization, so long as the utilization complies with property's purpose devoted to public use, is not such that it falls within the mere free discretion of the administrator; the administrator should, in accord with the nature of the said property and taking into account its scale and equipment, exercise his power to administer property in such a way as to adequately accomplish its mission as property employed in the public welfare,...*"¹⁵² The Minister's refusal was lawful.

It was remarked that the Supreme Court seemed to be careful to balance between the administrative discretion and individual's interests when it involved the fundamental rights of the people. It is a matter of time that counts since the assembly or demonstration had to be held on that day, not later than that, which was the objectives of the assembly.¹⁵³ In fact, the judicial relief at that time was useless owing to the delay in litigation.

It was shown in the following case the Supreme Court's response to the constitutionality of law on public order. In **Japan v. Teramae**,¹⁵⁴ the defendant was charged with a violation of the Road Traffic Law and the Tokushima City Public Safety Ordinance and with crimes of violence and police obstruction in relation to his demonstration. He raised a contention that even though he failed to obtain a permit to demonstrate from the local public safety commission as required by the Law, he was not deprived of a right to demonstrate as guaranteed in Article

21 and Article 31 of the Constitution.¹⁵⁵ The Supreme Court refused his contention, holding that even though the defendant had liberty to do whatever he wanted and the freedom to demonstrate, he must maintain orderly traffic and public good order. The Tokushima Ordinance or the Road Traffic Law did not forbid the defendant to demonstrate, but stipulated that he had to conduct the demonstration under the rule of the law concerned. The Ordinance and the Road Traffic Law were constitutional. However, the sentences of those convicted were reduced from imprisonment to mild fines.

What is learnt from the two preceding cases are as follows. Firstly, the **Tokushima Public Ordinance** case illustrates that the Court gave more weight to the public interest than the individual's interest as far as the law in dispute was concerned. However, the fundamental right of the people was always preserved as the Court reduced the punishment, otherwise, the defendant would have been imprisoned for life.¹⁵⁶ Secondly, government authorities are empowered to free discretion, taking into consideration the public and private interests, the circumstances involved, and the statutory authority. The right balance between private rights and governmental interests and the fact that agency discretion is not abusive lead the courts to render both the law in dispute and the discretion in question constitutional.

All cases so far mentioned indicate that the discretionary power vested in the authorities concerned is usually honored. The courts will give more weight to the public interests than the private interests after taking into account all relevant factors so as to determine whether the administrative act is in excess of the authorities. In general, the judicial review in administrative action will be denied only on account of the political question doctrine.

V. Conclusion and Suggestions

Despite the fact that judicial review has been incorporated in the Japanese legal system for many decades, it is still polemic, particularly in the field of administrative law. It was narrated in Chapter II that Japan has adopted the civil law system from European countries, i.e., France and Germany. The judiciary has to determine cases according to the existing statute, e.g., the Civil Code (Mimpo), the Commercial Code (Shoho), the Code of Civil Procedure (Minji Sosho Ho), the Penal Code (Keiho), etc. A code is "*an enacted law which purports to deal with the basic law in a certain area in a systematic way.*"¹⁵⁷ It is this system that administrative cases should be brought merely to the Administrative Court for judicial review. It happens also that administrative judges are keen and well-trained in the administrative field. There is no doubt that the Administrative Court should function better than the ordinary courts in this certain area. Unfortunately, the Administrative Court was abolished and it seems likely that the Japanese courts have followed the American course of judicial review. In general, civil law judges express his views and ways of thinking according to the civil law system when dealing with questions of law and questions of fact in ordinary cases. However, it is strange, when administrative acts are concerned, that the judges have to adjust their views and ways of thinking in a different manner--the American approach (the common law system). Since the present Constitution of Japan necessitates the judges to exert judicial review, it is impertive that the judges be well-oriented and well-trained in administrative law.

It is observed that sometimes administrative guidance give rise to serious problems.¹⁵⁸ For example, administrative guidance is supposed

to be conducted with impartiality. Nevertheless, it may not be “*impartial among industries or between firms and households*.”¹⁵⁹ In fact, “*former leading industries such as steel, automobiles, synthetic fibers, and petrochemicals have achieved rapid growth because they had, since before the early 1970s, competed with one another with less government intervention*.”¹⁶⁰ It is thus pointed out that “*Japanese industrial policy--or, in other words, compartmentalized competition--is a successful example of how to combine two conflicting principles, competition*

and intervention, in order to achieve maximum economic growth.”¹⁶¹ In conclusion, administrative guidance is very useful to direct the Japanese economic growth. Administrative guidance has also proved itself that it has functioned and served the Japanese society quite well. Still, it is perceived, since administrative guidance is usually free from judicial review, that it should be carefully exercised and, if possible, should be used only when necessary or vital to national economy.

ENDNOTE

1. Keitetsu Ishimine, "A Comparative Study of Judicial Review under American and Japanese Constitutional Law" Thesis of Cornell University for the Degree of Doctor of the Science of Law, January, 1974. p.1.
2. See Article 81 of the Constitution of Japan, 1946, put into effect on May 3, 1947 [reprinted in Hideo Tanaka, "The Japanese Legal System: Introductory Cases and Materials" (University of Tokyo Press, Tokyo, 1976) p. 12]
3. See Hideo Tanaka, *Ibid.* p. 686.
4. Herbert F. Bolz, "Judicial Review in Japan: The Strategy of Restraint" **Hastings International and Comparative Law Review**, Vol. 4, Fall, 1980. p. 90.
5. Joan Virginia Allen, "The Japanese Judicial System" **San Fernando Valley Law Review**, Vol. 12, 1984. p. 1-2.
6. Joan Virginia Allen, *Ibid.* p. 2.
7. Chin Kim and Craig M. Lawson, "The Law of the Subtle Mind: The Traditional Japanese Conception of Law" **International and Comparative Law Quarterly**, Vol. 28, July 1979. p. 498.
8. Elliott J. Hahn, "An Overview of the Japanese Legal System" **Northwestern Journal of International Law & Business**, Vol. 5, 1983. p. 519.
9. Harold G. Wren, "Legal System of Pre-Western Japan" **Hastings Law Journal**, Vol. 20, 1968. p. 221.
10. Chin Kim and Craig M. Lawson, *Ibid.* p. 506.
11. Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan" in Arthur Taylor von Mehren, edited. "Law in Japan: Legal Order in a Changing Society" (Harvard University Press, 1963) p. 50-51.
12. James R. van de Velde, "The Influence of Culture on Japanese-American Negotiations" **The Fletcher Forum**, Vol. 7, No. 2, Summer, 1983. p. 396.
13. *Ibid.* p. 396.
14. Op. cit., p. 397.
15. Kenzo Takayanagi, "A Century of Innovation: The Development of Japanese Law, 1868-1961" **Law in Japan: Legal Order in a Changing Society** edited by A. von Mehren, *Ibid.* p. 27-34.
16. Harold See, "The Judiciary and Dispute Resolution in Japan: A Survey" **Florida State University Law Review**, Vol. 10, No. 3, Fall, 1982. p. 343.
17. *Ibid.* p. 339, 344.
18. Op. cit., p. 344.
19. Hattori, "The Legal Profession in Japan: Its Historical Development and Present State" in "Law in Japan: The Legal Order in a Changing Society" edited by A. von Mehren Op. cit., p. 129-130.

20. Keitetsu Ishimine, *Ibid.* p. 26.
21. Ito Hirobumi, "Commentaries on the Constitution of the Empire of Japan (1889)" in John M. Maki, "Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-60" (University of Washington Press, Seattle, 1964) p. XVII.
22. *Ibid.* p. XVI-XVII.
23. "Japanese Judicial System under the New Constitution" (Supreme Court of Japan, 1955) p. 2.
24. Lawrence W. Beer, "Japan's Constitutional System and Its Judicial Interpretation" *Law in Japan*, Vol. 17, 1984. p. 8.
25. Alfred C. Oppler, "Legal Reform in Occupied Japan: A Participant Looks Back" (Princeton University Press, New Jersey, 1976) p. 87-88.
26. Toyoji Kakudo, "The Doctrine of Judicial Review in Japan" *Osaka University Law Review*, Vol. 2, 1953. p. 59-60, 69-72.
27. "Japanese Judicial System under the New Constitution" in note. 23. *Supra*, *Ibid.* p. 9.
28. *Ibid.* p. 10.
29. *Op. cit.*, p. 9.
30. Elliott J. Hahn, *Ibid.* p. 533.
31. Elliott J. Hahn, *Op. cit.*, p. 534.
32. Elliott J. Hahn, *Op. cit.*, p. 534.
33. Article 77 paragraph 1 of the 1947 Constitution.
34. Lawrence W. Beer, *Ibid.* p. 20.
35. Article 78 of the 1946 Constitution.
36. Article 76 paragraph 2 of the 1946 Constitution.
37. Kenzo Takayanaki, *Ibid.*
38. H. Itoh and L. Beer, "The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70" p. 266.
39. Lawrence Beer, *Op. cit.*, p. 20.
40. Toyoji Kakudo, *Ibid.* p. 59.
41. **Marbury v. Madison**, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)
42. Mauro Cappelletti, "Judicial Review in Comparative Perspective" *California Law Review*, Vol. 58, No. 5, October, 1970. p. 1035-1037.
43. Mauro Cappelletti, *Ibid.* p. 1038.
44. Akira Mikazuki, "A Comparative Study of Judicial Review Systems" *Law in Japan: An Annual*, Vol. 3, 1969. p. 12-13.
45. Akira Mikazuki, *Ibid.* p. 15; see also Yosiyuki Noda, "NIHON NI OKERU HIKAKU-HO NO HATTEN TO GENJO" (Comparative Jurisprudence in Japan: Its Past and Present) in Hideo Tanaka, *Ibid.* p. 194-196.
46. Article 76 paragraph 2 of the 1946 Constitution.
47. Kinji Urata, "The Judicial Review System in Japan--Legal Ideology of the Supreme Court Judges" *Waseda Bulletin of Comparative Law*, Vol. 3, 1983. p. 26.
48. *Ibid.* p. 26.

49. Shuzo Hayashi, "Supreme Court Rulings on Constitutional Issues" **Japan Echo**, Vol. V, No. 3, 1978. p. 29.

N.B. In the U.S.A., the courts do not render advisory opinion--that is, rulings about hypothetical situation. A dispute must be real and current before a court will agree to accept it for adjudication. [Robert A. Carp and Ronald Stidham, "the Federal Courts" (Congressional Quarterly Inc., Washington, D.C., 1985) p. 48]

50. **Suzuki v. Japan**, 6 Minshu 783 (Sup. Ct., G.B., Oct. 8, 1952) cited in Hideo Wada, "Decisions Under Article 9 of the Constitution--the Sunakawa, Eniwa and Naganuma Decisions" **Law in Japan**, Vol. 9 (1976) p. 119.

51. Yosiyuki Noda, "Introduction to Japanese Law (Translated and edited by Anthony H. Angelo)" (University of Tokyo Press, 1976) p. 121.

52. Toyoji Kakudo, Op. cit., p. 70.

53. Toyoji Kakudo, Op. cit., p. 71.

N.B. It should be borne in mind that the Supreme Court is the court of last resort.

54. **Aizawa v. Japan**, Case Number (A) No. 1310 of 1970, decided on April 4, 1973, in "Law and the Legal Process in Japan : Materials for an Introductory Course on Japanese Law" edited by Dan Fenno Henderson and John Owen Haley, 1979, available at Columbia Law School Library. p. 288.

55. **Komatsu v. Japan**, 2 Keishu 801, 806 (Sup. Ct., G.B., July 8, 1948) cited in Herbert F. Bolz, *Ibid.* p. 98; see also **Suzuki v. Japan** in note 50 supra.

56. See note 54 supra.

57. **Yamato v. Japan**, Case Number (A) No. 292 of 1950, in D. F. Henderson and J. O. Haley, *Ibid.* p. 262.

58. See generally in John Owen Haley, "Comments and Case Notes" **Law in Japan**, Vol. 8, 1975. p. 191.

59. See Article 22 (1) of the Constitution.

60. 30 Sai-han Minshu 223 (1976) cited in John Owen Haley, *Ibid.* p. 151.

61. Article 14 reads :

"All of the people are equal under the law and there shall be no discrimination in political, economic or social relations, because of race, creed, sex, social status or family origin..."

Article 15 states:

"The people have the inalienable right to choose their public officials ...Universal adult suffrage is guaranteed..."

Article 44 provides:

"The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex..."

62. Herbert F. Bolz, Op. cit., p. 103, 137.

N.B. As a matter of fact, the Supreme Court used to declare an act of the Diet unconstitutional, e.g., in **Sakagami v. Japan**, 7 Sai-han Keishu 1562 (1953) and also in **Nakamura v. Japan**, 16 Sai-han Keishu 1593 (1962).

63. Under this doctrine, "*the Constitution itself places some questions solely under the competence of the political branches of the government.*" In other words, these questions fall outside the jurisdiction of the judicial branch. The validity of determinations of the political questions should be reviewed by the political branches of the government. (See generally in Kisaburo Yokota, "*Political Question and Judicial Review: A Comparision*" **Washington Law Review**, Vol. 43, 1968. p. 1031)

64. 13 Keishu 3225 (Sup. Ct., G.B., Dec. 16, 1959)

65. Ardath W. Burks, "*The Government of Japan*" (Thomas T. Crowell Company, New York, 1964) p. 165-170.

66. 14 Sup. Ct. Reports (Minshu) 1206, 1209-1210 (1960).

67. 18 Sup. Ct. Reports (Minshu) 270, 272-273 (1964).

68. Kisaburo Yokota, *Ibid.* p. 1045.

69. *Ibid.* p. 1055.

70. Article 61 of the Meiji Constitution provided: "*Litigation alleging an infringement of rights through an illegal disposition by the administrative authorities, which shall come under the judgment of an administrative court separately prescribed by Law, does not come within the purview of the courts of justice.*"

71. It was construed that only government acts in conformity with law were valid. (Kiminobu Hashimoto, "*Judicial Review of Administrative Action in Japan: Restricted Too Much by the Concept of Administrative Discretion? Rendered too Extensive by Trial de novo?*" A paper presented at the Conference on Japanese Law, Harvard University, 1961. p. 5.)

72. Kiminobu Hashinobu Hashimoto, "*The Rule of Law: Some Aspects of Judicial Review of Administrative Action*" in **Law in Japan: The Legal Order in a Changing Society** edited by Arthur Taylor von Mehren (Harvard University Press, Massachusetts, 1963) p. 240.

73. Article 3 No. 1 and 2 of the Court Organization Law read: "(1) courts shall...decide all legal disputes and shall possess such other powers.... (2) the provisions of the proceeding paragraph shall in no way prevent preliminary determinations by executive agencies." (see also Richard M. Lorenzo, "*The Judicial System of Japan*" **Case Western Research Journal of International Law**, Vol. 6, 1974. p. 300-301)

74. See Article 76 and 78 of the 1947 Constitution.

75. Law No. 81 of 1948.

76. J. Haley, "*Postwar Developments in Japanese Administrative Law: The Failure of the Occupation Reforms*" (unpublished manuscript, 1983) cited in Robert W. Dziubla, "The Impotent Sword of Japanese Justice: The Doctrine of 'Shobunsei' as a Barrier to Administrative Litigation" **Cornell International Law Journal**, Vol. 18, 1985 : 37-62.

77. *Ibid.* p. 41.

78. See English translation in Robert W. Dziubla, *Op. cit.*, p. 42.

79. ACLL Article 3 (2, 3).

80. ACLL Article 3 (4).

81. ACLL Article 3 (5).

82. ACLL Article 5.

83. ACLL Article 4.

84. ACLL Article 6.

85. See ACLL Article 3 (4).

86. Ichiro Ogawa, "Judicial Review of Administrative Actions in Japan" *Washington Law Review*, Vol. 43, 1968. p. 1077.

87. See note 50 supra.

88. John M. Maki, *Ibid.* p. 362.

89. 6 Gyosei jiken saibanreishu 1193, 1202 (Tokyo Dist. Ct., May 26, 1955), cited in Ichiro Ogawa, *Ibid.* p. 1080.

90. See also **Sakamoto v. Expropriation Board of Kanagawa Prefecture**, 6 Gyosel reishu 2193, 2199, 2200 (Yokohama Dist. Ct., September 23, 1955) cited in Ichiro Ogawa, *Op. cit.*, p. 1080.

91. ACLL Article 30.

92. Ichiro Ogawa, *Op. cit.*, p. 1084.

93. 3 Gyosai reishu 1863 (Tokyo Dist. Ct., 1952) cited in Keitetsu Ishimine, *Op. cit.*, p. 69.

94. See also Kiminobu Hashimoto, *Ibid.* p. 239, 251.

95. 12 Sup. Ct. Reports (Minshu) 1969, 1996 (Sup. Ct., G.B. September 10, 1958.,) see generally in John M. Maki, *Op. cit.*, p. 117.

96. Kisaburo Yokota, *Op. cit.*, p. 1044.

97. **Fujinuma v. Mayor of Minamikochi Village**, 9 Minshu 930, 934 (Sup. Ct., June 24, 1955) cited in Ichiro Ogawa, *Op. cit.*, p. 1086.

98. Frank Upham, "Japan v. Kawamoto: Judicial Limits on the State's Power to Indict" *Law in Japan: An Annual*, Vol. 13, 1980. p. 141.

99. Civil Code. Article 1 (2) reads:

"The exercise of rights and performance of duties must be done with fidelity (*Shingi ni shitagi*) and in good faith (*seijitsu ni*)."

Article 1 (3) states:

"Abuse of right is not permitted."

(cited in Hideo Tanaka, *Op. cit.*, p. 118)

100. Hideo Tanaka, *Op. cit.*, p. 123.

101. 853 Hanrei Jiho 3 (1977) (Tokyo High Court, June 14, 1977)

102. Article 248 of the Code of Criminal Procedure (Law No.131 of 1948) in Frank Upham, *Ibid.* p. 141.

103. See generally in Frank Upham, *Op. cit.*, p. 137-149.

104. **Sasaki v. Atami City Agricultural Council**, 9 Minshu 217, 218 (Sup. Ct., 1st P.B., February 24, 1955), where the Supreme Court held that a notice from the governmental agency was not a 'shobun' since it did not deprive the right to ownership of the plaintiff's farmland.

105. Frank Upham, "After Minamata: Current Prospects and problems in Japanese Environmental Litigation" *Ecology Law Quarterly*, Vol. 8 (1979) p. 236.

106. 15 Minshu 467 (Sup. Ct., G.B., March 15, 1953) The defendant Board decided that the accident on the high seas between two Japanese ships was a result of the plaintiff's failure inspection and repair of ship's rudder.

107. See note 49 *supra*.

108. Known as **Narita Shinkansen** case, 691 Hanrei jiho 7 (Tokyo District Ct., December 23, 1972), aff'd 722 Hanrei jiho 52 (Tokyo High Ct., October 24, 1973)

109. Robert W. Dziubla, *Ibid.* p. 47.

N.B. In **Kubota v. Mayor of Chiyoda Village**, 992 Hanrei jiho 41, 44 (Maebashi Dist. Ct., March 27, 1980), the court opined that "*a notice of the shift of the employee in question to the later organization, by itself, is not an independent administrative disposition. It is not something that produces a direct legal effect on the employee in question.*" It may, thus, be inferred that the plaintiff may not claim for the damage until the damage is the direct effect of the administrative action.

110. **Yamaguchi v. Minister of Transportation**, 692 Hanrei jiho 30 (Hiroshima Dist. Ct., January 17, 1973); see also **Umebara v. Japan**, where the Court viewed that an individual's standing to sue was established once a self-executing statute which deteriorated his business operation was enacted, 20 Minshu 1227 (Tokyo Dist. Ct., October 24, 1962), aff'd, 20 Minshu 1234 (Tokyo High Ct., April 26, 1963), aff'd, 20 Minshu 1217 (Sup. Ct., G.B., July 20, 1965) cited in Robert W. Dziubla, *Op. cit.*, p. 49.

111. APLL Article 10 (1).

112. APLL Article 9.

113. APLL Article 25 (1).

114. APLL Article 25 (2), (3).

115. APLL Article 27.

N.B. The Prime Minister had used this power in a case where the accused were charged with a violation of public ordinance when they made a demonstration in the streets around the Diet building. The Tokyo District Court issued an order to withhold the execution of the police order --the arrest. The Prime Minister intervened in this case and thus overrode the court's order. (Judgment of December 2, 1969, 575 Hanrei jiho 10) (See Hideo Tanaka, *Op. cit.*, p. 773-774.)

116. John M. Maki, *Op. cit.*, p. 384.

117. In fact, this idea was preserved in the Law Concerning the Procedure of Administrative Litigation of 1948. Unfortunately, it was repealed by the APLL, except in three situations:

"(1) where a great number of administrative actions are taken periodically, such as tax levying;

(2) where the administrative action is highly technical requiring great expertise; and

(3) where the reviewing agency is organized in an impartial and quasi-judicial form."

(Ichiro Ogawa, *Op. cit.*, p. 1092)

118. Hideo Tanaka, *Op. cit.*, p. 353.

119. See Yoriaki Narita, "Administrative Guidance" in Hideo Tanaka, Op. cit., p. 353-354.

120. Dan Fenno Henderson, "Foreign Enterprise in Japan" (The University of North Carolina Press, Chapel Hill, 1973) p. 202.

121. Richard M. Lorenzo, Ibid. p. 301.

122. Dan Fenno Henderson, Ibid. p. 203.

123. Ibid. p. 202, 208.

124. See note 122 supra.

125. Michael K. Young, "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan" *Columbia Law Review*, Vol. 84, 1984. p. 951.

126. Ibid. p. 951.

127. Op. cit., p. 934.

128. Dan Fenno Henderson, in note 120., Op. cit., p. 203-204.

129. See Yoriaki narita, in Hedio Tanaka, Op. cit., p. 356.

130. 20 Gyosei jiken saiban reishu 452 (Takamatsu Dist. Ct., 1969).

131. 22 Gyosei jiken saiban reishu 1785 (Tokyo Dist. Ct., 1971); see also **Sawarabi Kabushiki Kaisha v. City of Kyoto**, 691 Hanrei jiho 57 (Kyoto Dist. Ct., 1972) (cited in Michael K. Young, Op. cit., p. 958-959)

132. Ichiro Ogawa, Op. cit., p. 1084.

133. **Mitamura v. Suzuki**, 26 Sai-han Minshu 1067, 1069 (S.Ct., Petty Bench, 1972) cited in Kazuaki Sono and Yasuhiro Fujioka, "the Role of the Abuse of Right Doctrine in Japan" *Louisiana Law Review*, Vol. 35, 1975. p. 1037.

134. **Yoshida v. Nakano Ward**, 886 Hanrei jiho 15 (Tokyo Dist. Ct., 1973) cited in Michael K. Young, Op. cit., p. 966-967.

135. Michael K. Young, Op. cit., p. 940.

136. Kiminobu Hashimoto, Ibid. p. 244-261; see also Lawrence W. Beer, Op. cit., p. 27-29.

137. 1 Gyosei jiken saiban reishu 764 (Kyoto Dist. Ct., July 19, 1950).

138. See Kiminobu Hashimoto, Op. cit., p. 246.

139. **Nakatsugawa v. Osaka-shi Keishi-cho Keishi Sokan**, 3 Gyosei reishu 840, 848 (Osaka Dist. Ct., May 9, 1952), Where a police officer was dismissed for misconduct on the ground that he lent some money to a gambler. The Supreme Court affirmed that the enforcement of official discipline was left to the administrator to discipline his subordinates. In the capacity of a law enforcer--a policeman, his behavior was important to the performance of his duty.

140. See note 93 supra.

141. See note 95 supra.

142. 11 Gyosei reishu 1217 (Tokyo Dist. Ct., April 28, 1960)

143. Cited in Kiminobu Hashimoto, Op. cit., p. 253.

144. Ibid. p. 254.

145. Cabinet Order No. 319 of 1951.

146. Article 50 of the Emigration and Immigration Control Order provides:

“The Minister of Justice, even where he recognizes that the motion to the determination...is without reason, may if the said suspect comes under any one of the following items, specially approve this person’s stay... (iii) When the Minister of Justice otherwise recognizes circumstances for which his stay ought to be specially approved.”

147. 8 Gyosei reishu 1903, 1907 (Tokyo High Ct., October 31, 1957)

148. Cited in Kiminobu Hashimoto, Op. cit., p. 256.

149. **Liu Sun-chin v. Osaka Nyukoku Kanri Jimusho Shunin Shinsakan**, 8 Gyosei reishu 2281, 2283 (Osaka High Ct., December 22, 1957)

150. 4 Gyosei reishu 3288, 3292-4 (Sup. Ct., G.B., December 23, 1953)

151. Article 21 of the Constitution states:

“Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.”

152. cited in Kiminobu Hashimoto, Op. cit., p. 260.

153. Kiminobu Hashimoto, Op. cit., p. 260.

154. 28 Keishu 489 (Sup. Ct., G.B., September 10, 1975), or known as the **1975 Tokushima Public Safety Ordinance** case.

155. Article 31 of the Constitution provides:

“No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.”

156. In the U.S., the courts highly honor fundamental liberties of the people. The standard of review of governmental action is justified according to the constitutional doctrine. However, the executive or government is empowered to restrict fundamental liberties of Americans only in time of national security of necessity. See generally in Eric K. Yamamoto, *“Korematsu Revisited--Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties”* **Santa Clara Law Review**, Vol. 26, 1986. p. 1-62.

157. Hideo Tanaka, Op. cit., p. 60.

158. Kozo Yamamura and Yasukichi Yasuba, *“The Political Economy of Japan. Vol. I: The Domestic Transformation”* (Stanford University Press, Stanford, California, 1987) p. 50.

159. Ibid. p. 50.

160. Op. cit., p. 51.

161. Op. cit., p. 51.

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