Judicial Review of Administrative Actions in Japan

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS IN JAPAN

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INTRODUCTION

Prior to 1946, the institutions of modern Japanese government did not secure the "rule of law." Most exercise of administrative power was kept beyond the reach of the courts. Administrative law was considered a branch of public law, and review of administrative action was generally vested in administrative agencies or in the Administrative Court, rather than in the ordinary judiciary. Furthermore, the jurisdiction of the Administrative Court was very limited; it could review only those administrative actions specifically subjected to review by statute. In this manner, Japanese administrative law during the Meiji era reflected the continental European influences dominant throughout Japanese law of that period.

The new Japanese Constitution changed the situation fundamentally, by placing review of all administrative cases within the jurisdiction of the ordinary courts. Article 76 provides:

1) The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.
2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

Although some commentators argued that this provision did not preclude an Administrative Court, the generally accepted interpretation was that the Administrative Court system should be abolished. The Court Organization Law of 1947 gave effect to the latter interpretation by vesting the ordinary courts with "jurisdiction over all legal controversies."

The reform of administrative litigation under the new Constitution involves a shift from an "administrative state" to a "judicial state."

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1 T. Minobe, Kёmpo gairon (General theory on the new Constitution) 185 (T. Miyazawa rev. ed. 1960).
2 Saibansho kё art. 3 (Law No. 59, 1947). It should of course be kept in mind that this does not preclude providing for administrative review prior to resort to judicial review. Art. 3(2).
This does not mean, however, that the system of administrative litigation is now the same as the system in the Anglo-American "judicial state." The distinction between public and private law is still maintained in Japan, and "administrative acts" (Gyösei-kōi) are regulated by principles of public law quite different from rules applicable to private persons.

In 1948, the Law Concerning the Procedure of Administrative Litigation\(^3\) was enacted to provide for administrative litigation. But this law was limited in scope and proved to be insufficient. The present law, the Administrative Litigation Law,\(^4\) was enacted in 1962 after several years of preparation.

I. OUTLINE OF THE SYSTEM OF JUDICIAL REVIEW

Present Japanese law provides several different forms of legal action to obtain judicial review of administrative acts.\(^5\) Most frequently, administrative acts are challenged directly by an "appeal-type suit" (Kōkoku-soshō).\(^6\) Such a suit may seek either to have an administrative act set aside or to challenge nonaction when an administrative agency does not carry out an affirmative duty. On the other hand, administrative actions may also be challenged collaterally in an ordinary civil suit (Tōjisha-soshō).\(^7\)

The ALL provides two further types of action, whose direct object is to guarantee the regularity of public administration. The first of these is the "people's action" (Minshū-soshō)\(^8\) This action is brought to vindicate the public interest rather than the particular interest of an individual; accordingly, the plaintiff is not required to demonstrate such a personal legal interest. However, the Minshū-soshō is allowed only where the law expressly so provides.\(^9\) A taxpayer's suit would be one example of this form of action.\(^10\) The second of the two types of suit is the "organ's suit" (Kikan-soshō),\(^11\) a suit testing the relative jurisdiction of public bodies. The law defines this as an action between

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\(^3\) Gyöseijiken soshō tokureihō (Law No. 81, 1948).
\(^4\) Gyöseijiken soshōhō (Law No. 139, 1962) [hereinafter cited as ALL].
\(^5\) The Japanese concept of "administrative act" is derived from the French acte administratif and the German Verwaltungsakt.
\(^6\) In a broad sense, this may be described as a counterpart of the Anfechtungsklage in German law.
\(^7\) ALL art. 4. This concept was derived from the German Parteistreitigkeit.
\(^8\) Id. art. 5.
\(^9\) Id. art. 42.
\(^10\) Chihōjichihō (Local autonomy law) art. 242-2 (Law No. 67, 1947) provides for a suit by any resident of the locality.
\(^11\) ALL art. 6.
government agencies or other public bodies, concerning disputes over competence or execution. The *Kikan-soshō* is also permitted only if the law expressly so provides.

The most important method of obtaining judicial relief is the *Kōkoku-soshō*. As stated above, *Kōkoku-soshō* is a proceeding for direct attack upon administrative actions. It must be brought by a person with a legal interest infringed by the act in question.

The law expressly provides for four typical suits in the *Kōkoku-soshō* situation:

1. A suit seeking revocation of an administrative act. "Administrative act" here means the original or basic administrative decision.
2. A suit seeking revocation of a determination or adjudication of an administrative appeal from the original administrative act.

These two suits are the ordinary *Kōkoku-soshō* remedies. Generally such suits must be filed within three months after plaintiff acquires knowledge of the challenged administrative act.

3. A suit seeking a declaratory judgment that an administrative act is null and void.

Ordinarily suits to revoke or amend an administrative act will not be entertained after expiration of the statutory filing period. However, an administrative act which is clearly and expressly contrary to law is considered to be absolutely null and void, and therefore an aggrieved party may assert the nullity of the act despite the expiration of the statutory filing period. This particular type of claim most often is raised collaterally. Thus the plaintiff asserts that he has a certain right, which is mainly at issue, because a particular administrative act is absolutely null and void. But if 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. The direct appeal under these circumstances is supplementary to the first two types of direct appeal; also it is extraordinary, since it is not subject to any limitation period. Accordingly, a special degree of illegality is

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12 For example, *Chihōjichihō* (Local autonomy law) art. 176 (Law 67, 1947), provides for a suit to resolve disputes between the Chief (governor or mayor) and the assembly of local public bodies.
13 ALL art. 42.
14 See text pp. 1086-88 infra.
15 ALL art. 3(2).
16 Id. art. 3(3).
17 Id. art. 14(1). ALL art. 14(3) provides a one-year limitation on suits, irrespective of the plaintiffs knowledge.
18 Id. art. 3(4).
19 Id. art. 14.
required to invoke this remedy. The concept of "grave and clear" illegality has found general acceptance both in academic analysis and in judicial precedents.20

(4) A suit to have nonaction on the part of an administrative agency declared illegal.21

This type of suit is directed against an administrative agency which has failed to take an action required by law. For example, when a person applies to a competent administrative authority for a license or permit to conduct a business, the administrative authority must dispose of the application within an appropriate period of time. Failure to act (or nonaction) is outside its authority and therefore illegal. In such a case, the applicant may appeal to the courts to vindicate his rights, and if he prevails in this action, the administrative authority will be required to take appropriate action.22 This type of suit resembles, in one sense, the American mandamus or mandatory injunction proceeding. However, the placing of a positive duty to act upon the administrative authority still leaves the administrator with the alternative of accepting or rejecting the original application. If the application is then rejected, the applicant of course can also contest that decision in court.

The above mentioned four types of Kokoku-soshō are expressly provided for by law. However, a fundamental question which remains is whether any other form of remedy is available. This problem will be considered later.23

II. BASIC PROBLEMS OF JUDICIAL REVIEW WITH PARTICULAR REFERENCE TO THE APPEAL-TYPE SUIT

A. The Scope and Boundaries of Judicial Power

The Constitution provides that the whole judicial power is vested in the courts,24 but only "legal controversies" are properly considered justiciable.25 A "legal controversy" is generally defined as a dispute concerning concrete rights or obligations of the parties concerned,
which can be decided by application of law. An individual cannot appeal to the courts for the mere interpretation of legal provisions or the determination of the validity of statutes or orders; Japanese courts will only exercise their power to review the legality or constitutionality of actions or laws when a party has a direct and legally recognized interest at issue. In certain cases, however, a statute or an order may itself infringe directly the specific rights of some person. In such cases, both judicial practice and academic theory agree that the person concerned may challenge the statute or the order whose practical effect is that of a governmental action. Although the draftsmen of the ALL carefully considered this problem and originally attempted to provide expressly for judicial declarations of the invalidity of a particular statute or order, this express provision was not included in the final draft of the ALL because of the technical drafting difficulties.

In addition, of course, in order for a controversy to be justiciable, it must be one which appropriately can be decided by the application of law. Accordingly political, economic, technical or academic questions not posing specific issues of law will not qualify for judicial determination.

The Japanese concept is similar to the American "case or controversy" doctrine developed from U.S. Const. art. III, §2. See Muskrat v. United States, 219 U.S. 346 (1911). The requirement has been explained in a leading Supreme Court case as follows:

[What is conferred on our courts under the system now in force is the right to exercise the judicial power, and for this power to be invoked, the presentation of a concrete legal dispute is necessary. Our Court does not possess the power, in the absence of such a concrete legal dispute, to hand down abstract decisions on disputes relating to the interpretations of the Constitution, statutes, or orders, merely looking for future contingencies. ... [Article 81 of the Constitution] merely provides that the Supreme Court is the court of last resort in cases involving constitutional problems. Accordingly, one cannot argue from that article that the Supreme Court has a power peculiar to itself to try constitutionality in an abstract sense or that the Court has exclusive jurisdiction, i.e., both original and final, in such matters. ...]

If, as the plaintiff argues, the Supreme Court had the power to issue abstract declarations [of unconstitutionality], then, since anyone could bring suits before the Court, the validity of laws, orders, and the like, would frequently be assailed and there would be danger of the Court's assuming the appearance of an organ superior to all other powers in the land, thereby running counter to the basic principle of democratic government: that the three powers are independent, equal, and immune from each other's interference.

Suzuki v. Japan, 6 Saikō saibansho minji hanreishū [hereinafter cited Minshū] 783, 785 (Sup. Ct., G.B., Oct. 8, 1952). This case is well known and is translated into English in J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS (1948-1960) 362 (1964). Mr. Mosaburo Suzuki, the leader of the Left Socialist Party, appealed directly to the Supreme Court to declare the National Police Reserve unconstitutional on the ground that it violated Article 9 of the Constitution (Disarmament clause). The Court declined to decide on the merits.
Another of the most difficult and discussed matters in our legal system is the problem of remedies when the interest of individuals is aggrieved by the nonaction of an administrative agency. Originally both the courts and many academic theoreticians assumed that courts were not competent to order administrative agencies to perform certain actions. This was based on an interpretation of the separation of powers doctrine; to require an administrative agency to take concrete action would violate the reciprocal independence of the judiciary and the executive.

However, a number of academicians dissented, maintaining that it is the courts' duty to determine the proper application of law, so that, if the law requires an administrative agency to do a certain act, the court is not prevented from declaring that the administrative agency must act, and indeed has the duty to do so.

Decisions of some inferior courts appeared in support of this view. These decisions held that the courts are competent to uphold, with a declaratory judgment (kakunin-hanketsu), the duty of administrative agencies either to act or not to act in situations where there is no administrative discretion.28

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28 A Tokyo District Court decision stated:

The State, as a defendant, contends that the plaintiff is seeking a declaratory judgment... and that the plaintiff should not be permitted to demand such a judgment, in the absence of statutes, where it would result in binding the administrative agency prior to its concrete administrative action....

[However,] under the Japanese Constitution, the courts have jurisdiction over all matters regardless whether the matter is of public law or private law, in so far as there exist cases and controversies.

Therefore, the courts are entitled... to render declaratory judgments even before actual administrative decisions are made, provided that plaintiff has standing to ask for a declaratory judgment....

[This holding] would never contradict the constitutional principle of separation of powers.


Another decision, of the Yokohama District Court, stated:

It is true that litigation usually is brought after the administrative act is taken. However, since administrative decisions are subject to judicial review, it is not so important, from the viewpoint of the principle of the separation of powers, whether judicial review be given before or after administrative decisions are made.

The defendant contends that if judicial review of pending administrative decisions were permissible, administrative agencies would be tied up with judgments of the court and the court itself would virtually render administrative decisions.

However, since judicial review cannot interfere with the inherent field of administrative discretion, declaratory judgments would result only in correcting the pending administrative decisions. Thus, even if judicial review is rendered prior to the execution of administrative power, it would never infringe upon the principle of the separation of powers.

Sakamoto v. Expropriation Board of Kanagawa Prefecture, 6 Gyōsei reishitsu 2193, 2199, 2200 (Yakohama Dist. Ct., Sept. 23, 1955). The suit was brought to obtain a
The logic of these decisions is, in my opinion, mere formalism or conceptualism. Their main reasoning is that a court does not deviate from the scope of the judicial power when it only confirms and declares the existence of a legal obligation (as in a declaratory judgment), and does not issue an order to take or not to take a certain administrative act (kyūfu-hanketsu). But in actual effect, there is no realistic difference between these two forms of judgment—declaratory and mandatory—because both of them result in imposing upon administrative agencies an obligation to take certain actions. The issue involved should not be answered by distinguishing the forms of judgment, but by more substantial reasoning with regard to the court's power to control administrative actions. Nor should the problem be solved by formalistic or axiomatic application of the separation of powers doctrine. Rather careful examination is required to establish the rational relationship between judicial and administrative powers.

Taking into due consideration this difference between administrative and judicial authorities, it should be emphasized that generally it is not reasonable for the courts to decide administrative affairs for themselves prior to administrators' actions. Administrative authorities are, in general, competent to conduct affairs in conformity with or in execution of statutes. In accordance with the principles of democratic administration, they are responsible to the Diet and to the people in the exercise of their power. Organization and procedure of administrative authorities are designed to be appropriate, and of themselves, to perform the above-mentioned positive activities. In contrast, the courts have no political and administrative responsibility and have no organization or procedure to perform such activities. In other words, the competent administrative authorities should decide administrative affairs in the first place—these actions of administrative authorities are called "administrative acts"—and thereafter the courts should review the legality of these administrative acts, thus creating a reasonable distribution of competence between judicial and administrative authorities. These are the principles of "prior competence of administrators" and "ex post facto review by the courts." They are the fundamental principles of Japanese law upon which the prevailing opinion and precedents of the courts are based today.

declaratory judgment that the Board had no jurisdiction to examine and adjudicate the compulsory purchase of land which the plaintiff had been cultivating.

20 Japanese Const. art. 66.
When one considers the principle of ex post facto review of the courts in light of the substantial reasons mentioned above, it cannot be asserted, under the name of separation of powers, that the court may not require to take certain actions, unless the requirement is in substantial opposition to the principle of ex post facto review by the courts. In actual cases, insisting on the prior jurisdiction of the administrative authority sometimes may be unreasonable.

With these comments in mind, how does the ALL actually deal with this problem? As above stated, the ALL expressly provides for a suit to have administrative nonaction declared illegal. This suit seeks to redress the illegal failure to act by an ex post facto review of administrative nonaction. If the court determines the agency's nonaction to be illegal, this does not mean that the agency must immediately take specific administrative actions. This type of suit therefore is not contrary to the principle of prior jurisdiction of administrative authorities.

A more difficult problem is posed by the "mandatory suit" (gimuzuke-soshō). This is a suit to demand a particular administrative act—permission to conduct some business, for instance—in case of administrative nonaction. A problem exists as to whether this mandatory suit may be allowed in our legal system. Like the suit provided for by the ALL, the mandatory suit attacks administrative nonaction. But here the court determines an administrative obligation to take specific action prior to the decision of the administrative authority, thus reintroducing the problem of prior control of administrative action. Accordingly, there still exist in principle serious doubts about the propriety of creating such a mandatory suit by statute.

When directing an administrative agency to take certain specific actions, there may be occasions for such a suit, although courts should be held to strict standards. A court at least should find that every requirement for the specific administrative act exists. But it is difficult for the court to meet this requirement under the present adversary procedure of litigation. This problem is additionally difficult because the administrative agency does not allege or prove the existence or nonexistence of facts.

When an individual is threatened with an unfavorable administrative-
tive act by an administrative agency, he may sue in advance to pre-
vent the act. We may call an action of this type a "preventive suit" 
or "a suit for preventive declaratory judgment" (Yobōteki-kakunin-
soshō). This suit may be seen as a true prior check on administrative 
action. Therefore, under Japanese law, this kind of suit is not ac-
cepted generally. But here again questions are presented which cannot 
be settled by the mere invocation of a general rule. For instance, in a 
case where the administrative agency will undertake a particular ad-
ministrative action the very next day, should redress be denied until 
after the action has been undertaken and with possible severe injury 
to the aggrieved party? Is the principle of ex post facto review so 
strict as a matter of form? There are problems here similar to those 
presented by a mandatory suit.

The ALL gives no definite answer to these problems at present but 
leaves them to be settled in the future. The answer will probably be-
come more clear as the doctrine and case law develop. The ALL should 
never be allowed to prevent such developments, and if the courts 
should accept these types of suits, they should be readily included 
within the ALL. At present, in order to meet this requirement, the 
ALL defines a suit to challenge administrative acts (Kōoku-soshō) 
quite inclusively. In addition to providing explicitly for the four types 
of suit to challenge administrative acts, the ALL defines the appeal-
type suit (Kōoku-soshō) as "a suit complaining about the exercise of 
governmental power." Therefore, where a suit does not fall within 
the four statutory kinds of suits, but still is a suit to attack the exer-
cise of administrative power—a mandatory suit or a preventive suit, 
for instance—the court actually should consider the suit acceptable 
as falling under the comprehensive definition. Such a suit generally is 
called a "nontypical" appeal-type suit. How practice in the area under 
the ALL will develop in the future is an interesting question.

B. Administrative Discretion and the Courts

Related to the foregoing problems is the question of administrative 
discretion. As stated above, the function of the courts is to decide 
legal controversies and to guarantee the correct application of law; 
they are confined to deciding whether the actions of administrative 
agencies are lawful. If administrative agencies err in the exercise of 
their power, discretionary actions thus taken are not illegal so long as

32 ALL art. 3(1).
they are within the limits of the power which the law allows them. They might be thought inappropriate to the public interest or to good administration, but such determinations are for the politically responsible administrators not for judges. This is the principle of "discretionary power of the Administration" or "free discretion" incorporated in the ALL.\textsuperscript{33}

Differentiation between discretionary and nondiscretionary (ministerial) action is a longstanding problem, not yet resolved. Whether certain administrative acts are discretionary or ministerial is of course a matter of interpretation of the statutory provision conferring competence upon an agency. But the words of the statutes are often not clear. For instance, the statute may not define the necessary criteria for an administrative act at all (the "blank concept"). In such cases, some general standard will be necessary in order to interpret the statute.\textsuperscript{34} A leading theory presupposes that, generally, those administrative acts which restrict or invade the rights or interests of individuals are not to be considered discretionary, while those administrative acts which confer rights or interests on individuals are.

The reason for this theory may be stated as follows: The first type of administrative act shall be performed only upon the basis of law (the principle of "administration according to law"), so that such acts cannot be decided at the discretion of administrative authority, and the court has to specifically determine whether they are supported by law. This theory was developed and accepted by a majority of scholars early in the days of the Meiji Constitution, and continues to have currency under the new system. It is also supported by many decisions. For example, a land reform statute\textsuperscript{35} provided that, on application of a prospective owner-farmer, the government might compulsorily purchase, in addition to agricultural land, residential land and leased buildings, where the agricultural land commission of the city deemed it "appropriate." But there was no standard provided for the exercise of such power by the administrative authorities. Most courts held that such a compulsory purchase was not a discretionary act and therefore could be reviewed by the courts. The main rationale of these decisions was that the administrative act of compulsory purchase restricts or invades the rights of the landowners.\textsuperscript{36}

\textsuperscript{33} Id. art. 30.

\textsuperscript{34} This has been a major issue in the thought of administrative law scholars.

\textsuperscript{35} Jisakuunō sōsetsu tokubetsu sochihō (Establishment of Owner Farmers act) (Law No. 43, 1946).

\textsuperscript{36} See, e.g., Nishiguchi v. Governor of Mie Prefecture, 7 Minshū 439 (Sup. Ct.,
On the other hand, some cases hold that the determination of the validity of administrative acts should rest with the administrative agency rather than with the courts when the administrative acts involve elements of expertise or public policy.\textsuperscript{37}

Recently the Supreme Court rendered an interesting decision. It stated:\textsuperscript{38}

\begin{quote}
[The revocation of a driving license] is not left to the free discretion of the public safety commission, but is to be decided in accordance with certain objective standards according to the intention of law. However, ... the public safety commission should be allowed certain discretion, so that it may determine, in the light of actual facts, what is in accordance with the intention of the statutory provision in the concrete case.
\end{quote}

Even where discretionary power is permitted the administrative authorities in the sense above stated, it is subject to two kinds of limitation. One is an external limitation, called "overstepping discretionary power." The administrative act will be held illegal if it extends outside of the scope of the power allowed by statute. Another is an internal limitation, called "abuse of discretionary power," which means that administrative authorities shall not exercise their power contrary to the intention of the statutes which confer the power upon

\begin{footnotesize}
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\item April 28, 1953). Another decision of the Supreme Court states more generally:

\begin{quote}
It is a restriction of individual freedom to postulate that a lease of agricultural land shall be of no effect unless the administrative agency approves it. Therefore, though there is no standard of approval provided by the statute, the administrative agency can reject the application for a lease only when necessary to do so to carry out the law's intention.... In other words, it is not left to the free discretion of the agency whether the lease should be approved or not. Morimoto v. Governor of Hyōgo Prefecture, 10 Minshū 397, 398 (Sup. Ct., April 13, 1956).
\end{quote}

\item See, e.g., Daimaru-bessō K.K. v. Governor of Fukuoka Prefecture, 12 Minshū 1612 (Sup. Ct., July 1, 1958).
\item Umabayashi v. Public Safety Commission of Hiroshima Prefecture, 18 Minshū 745, 748 (Sup. Ct., June 4, 1964). This decision created controversy among scholars because it admitted some discretion in the field of administrative acts even where the rights of individuals were restricted as a result.
\item In another case, the Tokyo High Court sustained the rejection of a passport application on the following grounds:

\begin{quote}
There may be a split of opinion as to whether it is contrary to the interest of Japan to attend the Moscow Conference.... Even if the court differs from the Minister of Foreign Affairs in opinion, the Minister's refusal to issue a passport should not immediately be considered illegal.... When the Minister decides to refuse issuance of a passport, the court should pay high regard to his decision, unless the court finds a grave error in his fact-finding or an express failure in his reasoning.
\end{quote}

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them, even if their exercise appears to fall within the literal scope allowed by the statutes.

The theory of limitation of discretionary power was accepted by scholars during the Meiji era, but its practical significance has increased as the courts have been given plenary power to control administrative actions. Thus, in a case involving the expulsion of university students, the Supreme Court stated that, as a rule, it yielded to the disciplinary power vested in the president of the university to punish a student for misconduct and also to choose appropriate punishment, but when the punishment was extremely unsound according to social common sense it would be regarded as outside the scope of discretionary power. In another case, the court, while admitting the determination of a farmer’s delivery quota to be one of administrative discretion, recognized that the principle of equality worked as an implied limitation. The court stated: “An administrative agency is not free to discriminate without reason against a particular individual to his prejudice.”

The courts seem inclined to reduce the “clear” distinction between discretionary and nondiscretionary acts, which formerly prevailed. What was once supposed to be a difference in kind has been turned into a difference in degree. This may be a realistic development, since administrative acts generally consist of both discretionary and non-discretionary elements.

C. Interest to Sue (Uttae no rieki)—Standing

Since the essential role of judicial review is the protection of private rights and interests against administrative action, the Kōkoku-soshō plaintiff must be aggrieved by administrative action before he can commence a court action. This problem of “interest to sue” is the Japanese counterpart of the American “standing” doctrine.

An individual’s interest is not a legal interest sufficient to provide standing unless it is recognized by statute. And the plaintiff of course must show a causal relation between the contested administrative action and the alleged adverse effect upon his legal interest. Although

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39 Fukuda v. President Kyōto Prefecture Medical College, 8 Minshū 1501 (Sup. Ct., July 30, 1954).
30 Fujinuma v. Mayor of Minamikōchi Village, 9 Minshū 930, 934 (Sup. Ct., June 24, 1955).
41 The Minshū-soshō and Kikan-soshō do of course have a wider purpose; see text pp. 1076–77 supra.
42 ALL art. 10(1).
the mere possibility of future injury is not sufficient, a suit will be allowed when the injury is reasonably certain to result.\(^4\)

Japanese doctrine also makes a distinction between legal interests and so-called reflex interests which substantially narrows the class of protected interests. Legal interests are created by provisions vesting an administrative agency with the duty of protecting some personal interest. But where an agency is to act for the general public interest, personal interests affected by the action are only reflex interests. A plaintiff with only a reflex interest does not have standing to sue. Of course, in concrete cases the distinction between legal and reflex interests may be hard to draw.\(^4\)

In addition to the above requirements, which the Japanese group together under the heading of subjective standing to sue, or qualifica-

\(^4\) See, e.g., Hirano v. Minister of Construction, 7 Gyôsai reishû 1881 (Tokyo High Ct., July 18, 1956), where the court reasoned as follows:

The administrative determination whether a particular [person] is legally qualified [to condemn property] has, as its natural result, a tremendous impact upon third parties, such as leaseholders. Therefore third parties ought to be well-qualified, in so far as standing is concerned, to bring a suit asking for the annulment of the said administrative determination. This is crystal clear in light of the fact that every person involved is not legally allowed to change the land use or the building shape after the announcement that specific lands are to be compulsorily purchased.

The Supreme Court also has issued a very interesting decision. In Sakamoto v. Governor of Tokyo Prefecture, 20 Minshû 271 (Sup. Ct., G.B., Feb. 23, 1966), plaintiff sought the annulment of a land adjustment plan which might have imposed some restriction on his right to use the land concerned. The Court ruled that a case or controversy did not exist since the plan drafted for the purpose of long-term urban redevelopment differed from a concrete administrative decision made against individuals; the plaintiff could not merely attack the illegality of the plan on its face.

The Court explained:

When a series of administrative acts is involved in an administrative procedure like those pursuant to the Land Adjustment Act, it is a matter of legislative policy to decide at and from what stage of the administrative process the aggrieved person can bring a suit to the courts. It can hardly be argued that the constitutional right to a court trial would be infringed, unless one were to assume that the infringed person be entitled to bring a suit at any stage of the procedure. Even if the aggrieved person is denied access to the court at the publicizing stage of the land adjustment plan, he is quite able to bring [a suit] at later stages such as when the administrative agency concerned issues an order to restore a building or land to the status quo,…or designates tentative lots, or allocates substitutional lots.

\(\text{Id. at 273.}\)

This decision is especially noteworthy as it explains the particular character of planning administration.

\(^4\) A 1962 Supreme Court case involved a by-law of a prefecture, based on a provision of the Public Bathhouse Law, Kôshû yakujôh (Law No. 139, 1948), which provided that the distance between two bathhouses should be at least 250 meters. It was contended that a bathhouse proprietor had a legal interest in the granting of a license to another proprietor who violated the 250 meter requirement. Most lower court decisions and academic opinions presupposed that he had no legal interest on the ground that the law intended to protect only the public health, not the interest of public bathhouse proprietors. But the Supreme Court decided to the contrary:
tion of the plaintiff, there is a requirement of "objective" standing to sue. This requires that the relief sought be essential to the protection of the plaintiff's interests.

One frequently discussed aspect of the "objective" requirement resembles the American concept of mootness. The ALL contains one provision concerning this problem. Article 9 provides that a person who has legal interest to be recovered by annulment of administrative decision or adjudication may bring a suit to reverse or overturn the administrative act "even if the legal effect of the decision or adjudication had been lost by lapse of time or other reasons." Academic opinions are divided as to whether this provision only declares what previously had been admitted in academic doctrine, or is instead intended to extend the concept of "interest to sue," in conflict with the former legal rule. In any case, since the enactment of the ALL, court holdings have been inclined to treat the interest to sue more liberally.45

The reason why the Public Bathhouse Law adopts the licensing system is.... for the sake of securing a reasonable standard of public health. At the same time, however [the provision of 250 meters distance in the by-law], is intended to prevent undue competition among public bathhouse proprietors. Therefore, the plaintiff's business interest should be considered protected by lawful operation of the licensing system; and so, he may well have standing to ask for the annulment of a third party's license, because his interest is not a mere reflex, but rather a legal interest....


In a Supreme Court case involving dismissal of a public official it was stated:

The appellant had been serving as an official of the Ministry of Postal Services at [a certain post office] situated within the jurisdiction of the Nagoya Postal Bureau, until August 12, 1949, when he was dismissed by the chief of the Nagoya Postal Bureau, the appellee.... But in April 1951 he was elected a member of the said city's assembly....

The Nagoya district court stated that since one is deemed under the election statute to have resigned from his official public post when he becomes a candidate for an elected public office, the appellant could not legally regain his former status as an official of the Ministry of Postal Services even if his dismissal had been annulled by the court. Therefore, the district court dismissed claim on the ground that the plaintiff had no standing to protect his rights, without going into the merits.... On appeal, the Nagoya High Court supported the district court decision....

However, while this suit was pending before [this Court], the new ALL provides to the extent that "A suit to annul or revoke an administrative action shall be brought only by persons who have a legal interest in bringing this kind of suit (including persons who have a legal interest which can be recovered by the annulment of the action, even after its effect having expired owing to the passage of time or other reasons)."

[Under this new provision,] even if regaining the status of an official of the Ministry of Postal Services were legally impossible, the appellant ought to be considered as having standing to bring this suit, since there still exists an infringement of some rights, such as the right of remuneration....

D. Theory and Legislation of the "Substantial Evidence Rule"

It is a general principle in Japanese law that the courts have the inherent power to review both the substantive and the procedural aspects of administrative decisions, including findings of fact which did not appear in the administrative decisions or which were not considered by the administrative agencies. Still, this principle should not be absolute; limitations should be imposed to establish a system of reasonable cooperation and a division of labor between administrative and judicial authorities. As noted above, the administrative agency may be organized as an expert body to handle special technical matters, so that it will have greater competence than the courts in its area. So also, agency procedures may be organized in a quasi-judicial manner to protect the interests of the parties and other persons concerned; in such cases courts ought to have respect for the agency's judgment.

In recognition of these considerations, the rule of substantial evidence has been used in the United States as a tool to adjust the relationship of administrative and judicial procedures. It emphasizes the division of work and the cooperation of administrative and judicial authorities. But the Japanese approach to the problem of accommodation traditionally has been quite different. Meiji Japan, under continental European influence, attempted to limit the arbitrary execution of the laws by binding the administrative agencies with statutory provisions of great specificity. The courts then were to determine whether actual administrative actions were in conformity with these legal provisions. And the legal provisions used to limit the administrative authorities were largely substantive rather than procedural. Accordingly, Japanese development of such legal concepts as "due process," "fair procedure," or "quasi-judicial procedure," has been far behind the development of substantive administrative law. Thus the actual framework and background of development of administrative law is very different in Japanese and American law.

After the war, under the influence of American law, the so-called substantial evidence rule was first incorporated into a few statutes. But the American theory of substantial evidence still does not have a solid foundation in Japan. However, for the future, the adjustment of

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\[^{46}\text{Shitekidokusen no kinshi oyobi kōsei torihiki no kako ni kansuru hōritsu (Anti-monopoly law) art. 80 (Law No. 54, 1947); Dempō (Radio wave law) art. 99 (Law No. 131, 1950); Tochi chōsei-shinkai secchiō (Law concerning the establishment of the land adjustment board) art. 52 (Law No. 292, 1950).}\]
relations between administrative and judicial power and the reasonable
division of functions between the administrative agencies and the
courts should be developed more generally and more extensively.

The substantial evidence rule is, as above mentioned, an idea of
reasonable division of functions and reasonable cooperation between
courts and administrators. Much more significance should be attached
to the substantial evidence rule, and its fundamental rationale should
be recognized as a basis of the administrative litigation system.

Looking to the future, the following comments seem in order:

(1) Some administrative adjudication procedures undertaken by
administrative agencies may be characterized as quasi-judicial pro-
cedures. These are undertaken by a specialized and expert adjudica-
tive agency, which reasonably should examine thoroughly every issue
relating to the case. Thereupon, the court should merely review
whether the adjudication procedures were fair and reasonable, and
not re-examine the case de novo. The right to introduce evidence which
did not appear in the administrative adjudication should be sharply
limited, and the court should examine only whether the agency's de-
cision was properly supported by the evidence before it. That is the
theory of "adjudicative decision" advanced by some theorists.\(^4\)
Although this doctrine is not yet accepted by the courts,\(^4\) it deals well
with an important problem.

(2) Assuming that a doctrine of "due process" or "fairness" of
administrative procedure takes root in the Japanese legal system, the
main task of the courts presumably will be to supervise or control
administrative procedures, leaving technical handling of each concrete
case to the administrative agencies. Such a great change in our present
system and theories can only occur gradually, and will not be com-
pleted in the near future.

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\(^4\) H. Kaneko, Shinketsu no shihōshinsa (Judicial review of administrative adjudication), in K. Tarumi & H. Kaneko, Soshō to saiban (Court procedure and judgment) 459 (1956).

\(^6\) See Nintendō K.K. v. Tengudō, 14 Minshū 3103, 3107 (Sup. Ct., Dec. 20, 1960), where the Supreme Court stated:

The appellant argues that the original decision of the High Court was illegal
because the High Court rendered the judgment on the basis of later presented
facts, without paying regard to the principle that contention of a fact which has
not been alleged in the administrative adjudication of the Patent Bureau should
not be admitted in a later law suit. However, the issue of administrative ad-
judication in the present case is whether the trademark of the appellant falls
under Nos. 9 and 11, Sec. 1, Art. 2 of the Trademark Law. Therefore, in so far
as this specific issue is concerned, it should be possible to allege facts de novo
.... As we do not find any substantial evidence clause or administrative finality
provision in the Trademark Law, comparable to article 80 of the Anti-Monop-
oly Law, the above-stated argument made by the appellant should not prevail.
E. Relation Between Administrative and Judicial Procedures—
The Exhaustion of Administrative Remedies

Under the old system of administrative justice, one generally had to make an administrative appeal to the competent higher authorities before presenting a suit to the Administrative Court. This principle was preserved by the Law Concerning the Procedure of Administrative Litigation of 1948. No doubt this principle has its rationale in the possibility of an illegal administrative act being corrected through administrative procedures or by reconsideration on the part of the administrative agency, thereby reducing the burden of the courts. Indeed, the greater portion of tax disputes are resolved by administrative appeals to the tax authorities.

But the principle of prior resort to administrative appeal as a general requirement for all types of administrative litigation may also be attended with undesirable results. Delay is one such result. Furthermore, the system of administrative appeal has left much to be desired. The Administrative Appeal Law of 1890 (Soganhō) remained unmodified for many years and became considerably outmoded. Under this law the challenged administrative act was reviewed by the very administrative agency which issued the particular administrative act, or by its supervising administrative authority. In either case, the reviewing agency was in no position to make an unbiased decision. Moreover, the appellant had no assured right to be heard, although the reviewing agency might conduct an oral trial at its own discretion. Other special legislation dealing with administrative appeals also was both defective and inconsistent. In such a situation, the principle of exhaustion of administrative remedies, requiring prior resort to an administrative appeal, was seriously criticized by many scholars.

When the Administrative Objection Review Law was enacted in 1962, abolishing the old Administrative Appeal Law, there was a dispute as to whether the principle of exhaustion of remedies should be maintained. The new statute substantially reformed the administrative appeal system so that the rights and interests of the appellant could be fairly protected in the administrative process. Therefore, some scholars urged that the principle of exhaustion of administrative remedies be preserved. After long discussions however, the ALL provided for the abolishment of the general principle of exhaustion of administrative remedies.

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11 Gyoseijiken soshō tokureihō (Law No. 81, 1948).
Yet it cannot be denied that there still are situations in which it is reasonable to require administrative appeal before going to the courts. Three such situations would be: (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. In such cases specific legislation could provide an ad hoc principle of exhaustion of administrative remedies. However, legislation following the enactment of the ALL appears to require an extensive—and perhaps undue—resort to administrative appeal.

F. Suspension of Administrative Act

Under Japanese law, the operation of administrative acts is not suspended while they are being challenged in the courts by the persons concerned. The administrative agencies may, in general, carry out their acts during the courts' review. But there may be cases where the rights or interests of the plaintiff would be irreparably injured if the administrative action were permitted to continue, even though the plaintiff were finally to prevail. Therefore the ALL provides that the court may, in exceptional circumstances, suspend or postpone execution of administrative acts when necessary to protect the plaintiff's rights. However, care must also be taken lest necessary administrative actions taken in the public interest be paralyzed by such court action. To avoid this, the ALL allows the Prime Minister to object formally to suspension of administrative acts. If the Prime Minister does so, the court then may not suspend the administrative act; a suspension already made must be revoked by the court. This system, originally established during the occupation, places final judgment as to the necessity of a particular administrative action with the Prime Minister, who should be responsible to the Diet or to the people in the exercise of this power.

This system of permitting the Prime Minister to block suspension of an administrative act was once criticized by a justice of the Supreme Court as unconstitutional because it invades the principle of the independence of the judiciary. The system was also the subject

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54 ALL art. 25(1).
55 Id. art. 25(2).
56 Id. art. 25(3).
57 Id. art. 27.
of heated discussion during the drafting of the ALL. In the end, however, the ALL retained it as a final "safeguard" to preserve existing administrative power.

For some time after enactment of the ALL, there were no actual cases in which such action was taken by the Prime Minister, although there had been cases under the 1948 law. Recently, however, there have been cases in which the Prime Minister exercised this power. In one of these, the Public Safety Board of Tokyo Metropolis refused to approve an application for a demonstration in the vicinity of the Diet House unless the parade route was changed. The Tokyo District Court suspended this decision of the board. The Prime Minister raised an objection against this court action, pointing out that the demonstration would disturb the deliberations of the Diet, and the court's suspension order was set aside.

All three cases, which occurred in rapid succession, created criticism that the Prime Minister had not exercised his extraordinary power in conformity with its purpose, and that his exercise was not reasonable, even though not illegal.

III. Conclusion

It has been twenty years since the new system of judicial review was established under the Japanese Constitution. The main areas of change and development in the system during those years may be summarized as follows:

(1) Since the establishment of judicial protection of individual rights against administrative actions, the guarantee of individual rights has been greatly strengthened. However, some problems remain unresolved.

Problems have arisen from the fact that the courts are not almighty in their authorized control of the exercises of executive power. It is necessary to restrict the power of the courts within reasonable spheres. No definite answer as to how this should be done has been given up to this time. A number of academic theories and court doctrines yet to be fully developed give clues to the possible eventual resolution of these problems.

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56 The decisions and Prime Minister's objections appear in 39 Hōritsu jihō 350-54 (1967). The cases were decided in June and July of 1967.
57 Id.
58 An example of the type of problem involved here is the so-called "political question" limitation on the exercise of judicial power, reviewed in former Chief Justice Yokota's article in this symposium, supra p. 1031.
Two particular problems involve the effectiveness of court review of administrative actions. One arises because many judges do not have enough knowledge and experience in the theories and practices of public administration. These judges cannot exercise effective control over administrative actions. This ineffectiveness is unfortunate because administrators often act only out of administrative expediency, and without proper understanding of the principle of administration according to law. In order to control administrators effectively, judges must acquire adequate knowledge of actual administrative practices which the Japanese judiciary lacks at present.

The other problem, closely related to the first, arises because judges often fail to take adequate account either of the need to secure reasonable settlements of administrative affairs or of the public welfare. This problem results from adhering too closely to the literal interpretation of statutory provisions, and sometimes from focusing attention entirely on protection of individual rights. As a result, the courts sometimes exercise too strict a control over administration. Until administrators faithfully recognize both the law and individual rights on the one hand, and until judges obtain proper insights into the administrative process on the other, these problems will not be solved.

(2) From the time of the Meiji era, the Japanese judicial system had been modelled on that of continental Europe. The Anglo-American system and legal theories which were introduced after the Second World War made great changes in the judicial system. Today some aspects of both the European and Anglo-American systems co-exist without complete harmony. A major problem concerns the shaping of a consistent legal system, uniting and harmonizing these systems and theories from different origins. An aspect of this problem—perhaps the most important aspect—is the development of an administrative procedure law which will adequately adjust the relationship between the administrative process and judicial review. Such development is the most important challenge facing the Japanese system of judicial review in future years.