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An Overview of Japanese Administrative Law
Part I: The Principle of Legality

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Abstract

This article constitutes Part I of a three-part study providing an overview of Japanese administrative law and focuses on the Principle of Legality. Chapter 0 sets out the background and personal motivations that led to the writing of this article. Chapter 1 explains that the Principle of Legality in Japan has its origins in German law and identifies the characteristics that derive from this history. Chapter 2 surveys the sources of administrative law, as a necessary foundation for the subsequent discussion of the Principle of Legality. Chapter 3 examines delegated legislation, the mechanism by which administrative agencies enact regulations based on statutory delegation. Chapter 4 turns to the reservation of statute, which holds that a certain type of administrative action—typically, one that imposes obligations on individuals or restricts their rights—may not be conducted without statutory authorization. Chapter 5 focuses on law-making by local governments, namely ordinances, and analyses in particular their relationship with national statutes.

Contents

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0. Preliminary Remarks

0.1. Why I Wrote This Article

This article aims to provide an overview of Japanese administrative law in order to promote international understanding of it and to serve as a foundation for comparative administrative law research. While somewhat unconventional for an academic article, I would like to begin by briefly outlining the personal motivations that led me to write this article. I believe that sharing this background will help clarify the significance of the work. The explanation will proceed in three parts.

(1) This article is closely related to a course I teach. At the Faculty of Law at Kobe University, where I work, I have been part of the teaching team for years for an English-language omnibus course titled 'Japanese Legal System II', which is primarily designed for international students, and have given two 90-minute lectures on Japanese administrative law each year.[1]

In the past, I structured these lectures around three parts: (I) the principle of legality, (II) administrative process and procedures, and (III) judicial review and remedies. However, it proved difficult to adequately cover all three areas within a total of three hours. As a result, the lectures often ended up incomplete or superficial.

To address this, I revised the structure starting in 2025. That year, I dedicated nearly all of the two lectures to Part I. The following year, I plan to focus on Part II, and in the year after that, on Part III—thus completing a full cycle over three years.

Under this revised approach, students will only be exposed to one of the three parts depending on the year they attend the course, and will not receive a comprehensive overview of Japanese administrative law. However, the purpose of the course is not to provide a systematic legal education in Japanese law, but rather to offer an entry point for further study and to equip students with the minimum foundational knowledge necessary for that purpose. If a student gains basic understanding of at least one of the three parts, they should be able to deepen their knowledge of Japanese administrative law on their own, using that part as a foundation. At the very least, I believe this method is more effective than providing an incomplete overview of all three parts.

As a result, I needed to expand and improve the lecture notes for each of the three parts. Taking this opportunity, I chose to rework those materials into a series of academic papers offering an overview of Japanese administrative law. This article presents Part I, which was the focus of my 2025 lectures.

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[1] For an account of this lecture, see 興津征雄「英語による日本行政法の講義について――国際発信の観点から」碓井光明先生傘寿記念『公法理論の基底と展望』（信山社、近刊）[Yukio Okitsu, 'Teaching Japanese Administrative Law in English: From the Perspective of International Outreach' in *Essays in Commemoration of Professor Mitsuaki Usui for His 80th Birthday: Foundations and Prospects of Public Law Theory* (Shinzansha, forthcoming)].

Since the *Kobe University Law Review* is published annually, I plan to submit Part II—scheduled to be taught in 2026—for the next issue, and Part III—scheduled for 2027—for the following issue. That said, I cannot completely rule out the possibility that these plans may need to be adjusted.

(2) This article is also related to my engagement with comparative administrative law at the international level. I regularly participate in international conferences, such as the International Society of Public Law (ICON•S), where I present papers and, on occasion, publish in English. I am also a member of the 'Comparative Administrative Law' mailing list,[2] where I occasionally engage in discussions with other members. These presentations, publications, and discussions typically focus on specific, well-defined topics as part of my research.

Since my native language is Japanese and I conduct my research and teaching in Japan, I usually draw on Japanese law as the basis for my work. As a result, when presenting my findings to audiences or readers unfamiliar with Japanese law, I frequently find it necessary to provide some background on the Japanese administrative legal system. In such situations, I often wish I had a reliable, English-language overview of Japanese administrative law that I could cite or refer to.[3]

Unfortunately, to the best of my knowledge, no such resource currently exists.[4] That is why I decided to write this series of overview articles myself. I believe doing so will assist not only my own future work but also provide useful information to those interested in Japanese administrative law who do not read Japanese, and hopefully, to those who will teach the subject to an international audience.

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[2] Comp-Admin-Law -- Comparative Administrative Law <https://mailman.yale.edu/mailman/listinfo/comp-admin-law>. The websites cited in this article were last accessed on 7 October 2025 (the dates of last access are omitted hereafter).

[3] In adjacent fields such as constitutional law and public administration, updated English-language overviews are available. For constitutional law, see Hiroyuki Hata and others, *Constitutional Law in Japan* (Wolters Kluwer, 2nd ed, 2024); Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Hart, 2011). For public administration, see Koichiro Agata and others (eds), *Public Administration in Japan: Governance and Public Management* (Palgrave Macmillan, 2024)<https://doi.org/10.1007/978-3-031-58610-1>. For an English-language compilation of summaries of Supreme Court decisions relating to constitutional law, see Noboru Yanase, 'Constitutional Cases of the Supreme Court of Japan: What the Court Stated and How We Can Obtain Each Text' (2022) 38 *Nihon University Comparative Law* 55–132<https://ssrn.com/abstract=4412204>. These works also contain useful information relevant to administrative law.

[4] A useful bibliographic resource was compiled by a Japanese scholar who lectured at Heidelberg University in Germany: 巽智彦「日本公法に関するドイツ語・英語資料リスト」成蹊法学 91 号（2019 年）255–287 頁 <https://doi.org/10.15018/00000377> [Tomohiko Tatsumi, 'Bibliography of German and English Materials on Japanese Public Law' (2019) 91 *Seikei Hōgaku* 255–287]. This article lists German- and English-language publications—both books and journal articles—on Japanese public law, with a particular focus on administrative law. However, most of the administrative law literature cited is in German. Given the historical influence of German administrative law on Japanese administrative law and the continuing scholarly exchange between the two countries, this is unsurprising. I have great respect for the scholars who have devoted themselves to such work. That said, if Japanese administrative law is to become more globally accessible, it is essential to seriously consider increasing the availability of English-language publications, which would reach a far broader potential readership.

However, there are English-language publications available on certain specific topics. Where relevant, I have cited such works in this article. I am also considering compiling a bibliography of English-language literature on Japanese administrative law and making it publicly available once this series of articles is complete.

The *Kobe University Law Review* is well-suited to publishing this type of overview article for two main reasons. First, it is an open-access journal, and articles published in it are promptly made available through the university's institutional repository.[5] I also plan to upload the article to my page on SSRN.[6] Second, the journal is not peer-reviewed, and members of the Kobe University Faculty of Law can publish in it without undergoing a formal review process. Because overview articles typically lack the kind of academic originality expected by international peer-reviewed journals, they may not be suitable for such venues. While the *Kobe University Law Review* is not widely known internationally and, as a non-refereed journal, may not carry strong academic prestige, it may nonetheless offer a valuable outlet for overview articles, and I hope this article demonstrates the kind of contribution such work can make.

(3) Recent advances in machine translation—particularly through artificial intelligence (AI)—have made it a practical tool for academic writing. For the sake of transparency, I note that this article was written with the assistance of ChatGPT. I input the original Japanese text into the chat interface, and the GPT translated it into English in a style suitable for academic publication. No human (other than myself) was involved in the English-language editing.

Of course, I carefully review the generated English text myself. If any part is unclear or imprecise, I revise it or ask the GPT to rephrase it to ensure that the English reflects my intended meaning as accurately as possible. Even so, the time and effort required are significantly less than if I were to write the entire article in English—my non-native language—from scratch, and the quality of the resulting English is substantially more refined.

As a legal scholar based in Japan, I consider it my social responsibility to contribute to the realization of the rule of law within Japanese society. While I also have a strong interest in the rule of law in other countries and at the global level, the context in which I can most effectively apply my expertise is, first and foremost, Japan.

For this reason, I primarily write in Japanese, with an intended audience of Japanese legal scholars, practitioners, and students. Of course, I recognize the importance of international communication and comparative legal study, and as noted above, I have made modest efforts to present and publish in English. However, such activities account for only a small fraction of my overall academic work.

Recent developments in AI-based machine translation have the potential to significantly alter this situation. This article is, in part, an experimental attempt to explore that potential.

The use of AI in academic writing inevitably raises concerns from the standpoint of research ethics. I am fully aware of the risks associated with AI and believe that such concerns must be taken seriously and addressed responsibly. At

[5] KERNEL – Kobe University Repository <https://da.lib.kobe-u.ac.jp/da/kernel/?lang=1>.
[6] SSRN – Yukio Okitsu <http://ssrn.com/author=2238853>.

the same time, I also believe that it is important to explore the potential usefulness of AI in scholarly work.

In writing this article, I used ChatGPT solely as a linguistic assistant. I would liken the process to working collaboratively with a native English-speaking editor while retaining full control over the content and argumentation. This article is published on the explicit understanding that I alone bear full responsibility for its authorship.

0.2. Note on Sources and Translation

This article presents a condensed version of the foundational content typically taught in Japanese undergraduate law faculties and graduate law schools. Since the topics discussed here are covered in virtually all standard textbooks on Japanese administrative law, I do not cite such textbooks individually as sources.[7] Nor does this article engage in advanced academic analysis; accordingly, I generally refrain from citing Japanese-language scholarly articles on administrative law. An exception may be made in cases where I rely on a particular academic position regarding an issue for which no settled consensus exists. I may also refer to English-language sources where they are relevant.

This article places greater emphasis on primary sources—in particular, statutes and case law—rather than secondary literature. Some Japanese statutes and judicial decisions are available in English translation. Statutory translations can be found on the *Japanese Law Translation* website,[8] provided by the Ministry of Justice.[9] English translations of Supreme Court judgements are available on the English-language section of the *Courts in Japan* website.[10] Those who do not read Japanese are encouraged to consult these resources when referring to primary legal materials.

That said, there are clear limitations to the use of these English translations.[11]

First and foremost, the authentic versions of Japanese statutes and case law are, of course, in Japanese. The English translations are provided solely for

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[7] For a textbook I have authored, see 興津征雄『行政法I行政法総論』（新世社、2023 年） [Yukio Okitsu, *Administrative Law I: General Principles of Administrative Law* (Shinseisha, 2023)]. This volume covers the Principle of Legality, which is the subject of the present article (Part I of the article series), as well as Administrative Procedures, which will be discussed in Part II. A second volume of my textbook, which is intended to cover Judicial Review and Remedies—the topic planned for Part III of this series—has not yet been published.

[8] Japanese Law Translation <https://www.japaneselawtranslation.go.jp/>. For the statutes and regulations cited in this article, URLs are provided where an English translation is available on this website.

[9] Ministry of Justice, 'Translation of Laws and Regulations into Foreign Languages' <https://www.moj.go.jp/EN/housei/hourei-shiryou-hanrei/housei03_00012.html>.

[10] Courts in Japan, 'Judgments of the Supreme Court' <https://www.courts.go.jp/english/Judgments/>. For the Supreme Court judgements cited in this article, URLs are provided where an English translation is available on this website.

[11] Generally on the precautions that non-Japanese speakers should take when studying Japanese law, see Masahiko Kinoshita, 'Causes, Consequences and Mitigation of Language Barriers in the Global Constitutional Dialogue: Insights from Japan' in Erika Arban and others (eds), *The Language of Comparative Constitutional Law* (Hart, 2025) ch 2, 29–33.

reference purposes, and both the Ministry of Justice and the Supreme Court include disclaimers stating that they do not guarantee the accuracy of the translations.

Second, the translated texts are often difficult to read. The government and the Supreme Court tend to favour literal, word-for-word translations over more readable, interpretive ones. This tendency likely reflects a cautious approach: interpretive translations necessarily involve the translator's interpretation, which can be problematic when precision matters. Nevertheless, the result is that these translations are sometimes so convoluted and unnatural that they are nearly unreadable.

This issue arises from two layers of distance. On the one hand, legal language in statutes and judgements is far removed from ordinary Japanese, making it difficult even for native speakers without legal training to understand. On the other hand, Japanese and English differ greatly in terms of vocabulary and syntactic structure, further compounding the difficulty of producing clear and accurate translations.

Accordingly, while I have consulted the English translations provided by the Ministry of Justice and the Supreme Court, the translations used in this article are, for the most part, my own (with the assistance of ChatGPT). Where standard English translations of legal terms exist, I have adopted them. In particular, I have generally followed the translations found in the *Standard Legal Terms Dictionary* available on the *Japanese Law Translation* website.[12] However, my general approach has been to favour readability and accessibility over literal accuracy, aiming for interpretive translations rather than word-for-word renderings. In cases where the translation significantly departs from the original Japanese wording, I have chosen not to enclose the text in quotation marks, instead incorporating it seamlessly into the main body of the text.

1. Introduction

(1) The Principle of Legality,[12a] which may be literally translated as the Principle of Administration Based on Statute (法律による行政の原理), refers to the principle that administrative actions must be grounded in statute. This principle can be justified on the basis of fundamental constitutional concepts such as the rule of law, the separation of powers, and democracy. It is widely accepted without dispute in contemporary constitutional democracies, and Japan is no exception.

[12] Japanese Law Translation, 'Dictionary Search' <https://www.japaneselawtranslation.go.jp/en/dicts/>.

[12a] In UK law, the Principle of Legality refers to the doctrine that any restriction on fundamental rights requires either an explicit statutory basis or a necessary implication arising from the statute. See Paul Craig, 'Legality: Six Views of the Cathedral' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP, 2020) ch 42, 895–898. The usage of the term here, however, is specific to Japanese law.

However, there is one thing that requires particular attention. Japanese administrative law has traditionally been strongly influenced by German law, and the Principle of Legality is a notable example of this influence. In particular, the principle is not articulated as such in the current Constitution of Japan and has instead been developed and elaborated through scholarly theories. It is generally understood that the principle, in its current form, was first formulated by Otto Mayer (1846–1924), often referred to as 'one of the founding fathers of modern administrative law in Germany'.[13] His theory was adopted by Japanese public law scholars prior to World War II, and it has been passed down to the present day.

Of course, necessary modifications were made in response to the transformation from a constitutional monarchy (under the 1889 Constitution of the Empire of Japan, or Meiji Constitution) to a constitutional democracy (under the 1946 Constitution of Japan). Contemporary Japanese administrative law scholarship continues to evolve the principle by referring to post-war German constitutional case law and academic theory. However, due to the absence of an explicit constitutional provision, academic views remain divided on the precise content of the principle, and there is no definitive consensus as to which interpretation should be regarded as authoritative.

This article does not engage with the doctrinal controversy, but instead offers a neutral account of the understanding that is generally accepted in Japanese administrative law.

(2) The following sections explain the standard content of the Principle of Legality in Japanese administrative law in the following order. Chapter 2 discusses the sources of law, or types of legal norms, under Japanese law, which form the foundation for understanding the Principle of Legality. Chapter 3 addresses delegated legislation, that is, the basis and limits of administrative rule-making. Chapter 4 examines the issue commonly referred to as 'reservation of statute', namely, the distinction between subject matters that must be determined by statute and those that need not be. Chapter 5 deals with local government legislation, or local ordinances, focusing in particular on their legal basis and limits in relation to national statutes.

2. Sources of Law

2.1. Introduction

The Principle of Legality requires that administrative actions be based on law. However, in administrative practice, it is common for non-legal rules and standards—such as internal notices, manuals, or guidelines (known by various names)—to be used in a way that resembles law. In fact, it is sometimes said that,

[13] Florian Becker, 'The Development of German Administrative Law' (2017) 24(2) *George Mason Law Review* 453–476, 453.

from the perspective of frontline officials, such practical standards carry more weight than the law itself.

Nevertheless, as these practical standards are not law, they cannot, in principle, serve as the basis for determining the legality or illegality of administrative actions. An administrative action that conforms to internal standards is still unlawful if it contravenes the law. For this reason, a legal evaluation of administrative activity must begin by distinguishing what constitutes law from what does not. In order to do so, it is essential to understand which sources are recognized as sources of law, and which are not.

This Chapter explains the types of sources of law. Internal rules and standards that do not qualify as sources of law will also be mentioned in comparison with delegated regulations (see below 2.2.1.(d)(6)).

2.2. Classification of Sources of Law

Sources of law are classified into written and unwritten sources. Written sources are further divided into those enacted by national institutions and those enacted by local governments.

2.2.1. Written Sources at the National Level

(a) The Constitution

(1) The Constitution of Japan[13a] was promulgated on 3 November 1946 and has been in force since 3 May 1947. It is a rigid constitution, meaning that its amendment procedure is more demanding than the ordinary legislative process (art 96(1)). Since its promulgation, the Constitution has actually never been amended.

The Constitution contains numerous provisions relevant to administrative law. The principle of popular sovereignty, declared in the Preamble and Article 1, serves as a fundamental principle in the interpretation and application of administrative law. Chapter III (arts 10–40) sets forth the rights and duties of the people; the fundamental human rights provided therein must be fully respected by administrative agencies. However, these rights are not absolute, and are subject to limitations based on the public welfare (see arts 12 and 13). In the context of administrative law, the term 'public welfare' is often expressed instead as 'public interest'.

Chapters IV and beyond (arts 41ff) set out the structure of government. Chapter IV (arts 41–64) concerns the legislature, or the Diet, Chapter V (arts 65–75) the executive, or the Cabinet, and Chapter VI (arts 76–82) the judiciary, or the courts. Article 84, which is included in Chapter VII (arts 83–91) on Finance, sets out the principle of statutory taxation and is frequently referenced in

[13a] Constitution of Japan <https://www.japaneselawtranslation.go.jp/en/laws/view/174>.

administrative law (see below 4.3.). Chapter VIII (arts 92–95), which governs local autonomy, is also an important source for regulating the administrative activities of local governments.

The Constitution is the supreme law of the nation, and any statutes or other acts of state that conflict with it are void (art 98(1)). The Constitution expressly provides that the Supreme Court has the power of judicial review (art 81), and lower courts may also exercise this power, provided that the Supreme Court retains the last word. Japan adopts an incidental model of constitutional review, under which the constitutionality of statutes may be challenged by a party in the course of concrete legal proceedings—such as civil, administrative, or criminal litigation—where the constitutional issue arises as a basis for a claim or defence. Japan does not have a specialized constitutional court or a separate procedure for abstract constitutional review.

(2) The relationship between the Constitution and administrative actions is, upon closer examination, quite complex. The following provides an outline and a few examples of the basic approach.

(i) When an administrative action **directly** infringes a constitutional right or violates a constitutional provision, it may be challenged as unconstitutional.

A typical example is when an administrative measure violates the constitutional principle of separation of religion and state. A recent case in point is the Kōshi-byō *(Confucian Temple) Case* (2021).[14] In that case, a private organization owned a Confucian temple located within a public park managed by Naha City, Okinawa. The mayor exempted the organization from paying facility usage fees. Then a group of citizens filed a lawsuit, arguing that the exemption constituted a religious activity by a local government, in violation of Article 20(3) of the Constitution, which provides: 'The State and its organs shall refrain from religious education or any other religious activity.' The Supreme Court upheld this claim, ruling that the exemption was unconstitutional.

Another example involved a claim that an administrative action infringed the freedom of thought and conscience. In 2003, under the direction of then–Governor Shintaro Ishihara (石原慎太郎), a political conservative, the Tokyo Metropolitan Government issued a directive requiring that public high schools display the national flag and have the national anthem sung at entrance and graduation ceremonies. Pursuant to the directive, principals at individual schools issued service orders instructing teachers to stand facing the flag and sing the anthem during these ceremonies. Some teachers, identifying with liberal viewpoints, opposed these orders and filed lawsuits, claiming that the service orders violated Article 19 of the Constitution, which guarantees freedom of

[14] Kōshi-byō *(Confucian Temple) Case*, Supreme Court [Grand Bench], 24 February 2021, 75(2) *Minshū* 29 <https://www.courts.go.jp/english/Judgments/search/1808/>.

thought and conscience. The Supreme Court's three Petty Benches handed down decisions in succession, all of which upheld the constitutionality of the orders.[15]

(ii) When **the statute underlying an administrative act** is declared unconstitutional and void, the administrative act based on that statute also loses its legal basis and becomes unlawful. A well-known case illustrating this principle is the *Pharmacy Distance Requirement Case* (1975).[16]

At the time, the then–Pharmaceutical Affairs Act [17] required that pharmacies maintain a certain minimum distance from one another. If a new pharmacy applied for a licence to operate within that restricted distance from an existing pharmacy, the application was routinely denied. The government justified this restriction on the grounds that it would prevent the distribution of substandard pharmaceuticals caused by unstable management resulting from excessive competition, and that it would avoid the over-concentration of pharmacies in particular areas.

An applicant whose licence had been denied due to this distance requirement filed a lawsuit, claiming that the restriction violated occupational freedom, as guaranteed by Article 22 of the Constitution. The Supreme Court accepted this argument, holding the relevant provision of the Pharmaceutical Affairs Act invalid and the licence denial unlawful.

(iii) In the case of **private law contracts** concluded by national or local governments, the Constitution does not apply directly unless a specific constitutional provision is intended to regulate private law acts. This issue arose in the *Self-Defense Forces (SDF) Hyakuri Air Base Case* (1989).[18] The case involved a dispute over the validity of a contract for the sale of land concluded by the government for the purpose of acquiring a site for an SDF base. The plaintiffs argued that the contract concluded to acquire land for a military base violated Article 9 of the Constitution, which renounces war, and therefore was unconstitutional and void.

The Supreme Court dismissed the constitutional challenge without determining whether Article 9 was violated. It reasoned that Article 9 was not intended to regulate private law acts and therefore could not be applied directly to the contract in question. In a concurring opinion, a Judge, agreeing with the majority's interpretation of Article 9, suggested that other provisions of the Constitution—such as Article 18, which guarantees freedom from involuntary

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[15] *National Flag and Anthem Cases*, Supreme Court [Second Petty Bench], 30 May 2011, 65(4) *Minshū* 1780<https://www.courts.go.jp/english/Judgments/search/1106/>; Supreme Court [First Petty Bench], 6 June 2011, 65(4) *Minshū* 1855<https://www.courts.go.jp/english/Judgments/search/1109/>; Supreme Court [Third Petty Bench], 14 June 2011, 65(4) *Minshū* 2148<https://www.courts.go.jp/english/Judgments/search/1111/>.

[16] *Pharmacy Distance Requirement Case*, Supreme Court [Grand Bench], 30 April 1975, 29(4) *Minshū* 572<https://www.courts.go.jp/english/Judgments/search/42/>.

[17] Pharmaceutical Affairs Act (薬事法), Act No 145 of 1960. It has since been retitled the Act on Securing Quality, Efficacy and Safety of Products Including Pharmaceuticals and Medical Devices (医薬品、医療機器等の品質、有効性及び安全性の確保等に関する法律) <https://www.japaneselawtranslation.go.jp/en/laws/view/3213>.

[18] *SDF Hyakuri Air Base Case*, Supreme Court, 20 June 1989, 43(6) *Minshū* 385<https://www.courts.go.jp/english/Judgments/search/94/>.

servitude, and Article 28, which secures the fundamental rights of workers—might be directly applicable to private law contracts.

(iv) There are cases in which the courts, without declaring a statutory provision unconstitutional and void, interpret it narrowly in light of constitutional principles in order to avoid potential unconstitutionality, and then review the legality of an administrative act based on that interpretation. In such cases, the statute itself is applied as constitutionally valid; however, if an administrative act is based on an **unconstitutional interpretation of the statute**, the act is deemed unlawful on the grounds that the administrative agency misinterpreted the statute. This technique is referred to as 'constitutional saving construction (合憲限定解釈)' of statute.

There are various forms of this interpretive technique, and it is difficult to provide a simple illustrative case. One example often discussed in the context of administrative law concerns the freedom of assembly, as guaranteed under Article 21(1) of the Constitution.

Public facilities established by local governments, such as civic halls, must be made equally available to all residents, in accordance with Article 244 of the Local Autonomy Act.[19] Nevertheless, it is common for a local government to enact a management ordinance that allows for the denial of use when such use is deemed to interfere with facility management. If this denial clause is interpreted broadly, it may result in an unjust restriction of the freedom of assembly when such facilities are used for public gatherings.

In two decisions handed down in succession—one in 1995 concerning Izumisano City, Osaka,[20] and another in 1996 concerning Ageo City, Saitama[21]—the Supreme Court adopted a restrictive interpretation of such denial clauses. It held that the use of a public facility may only be denied when the interference with facility management can be clearly foreseen not merely on the basis of the subjective judgement of the municipal agency, but also in light of objective facts. Based on this interpretation, the Supreme Court upheld the denial in the *Izumisano Case*, finding that the predicted interference did exist, while it struck down the denial in the *Ageo Case* as unlawful, finding no such interference. It has been pointed out that this approach by the Court was influenced by the American constitutional doctrine of the public forum.

(b) Treaties

(1) **Introduction.** A treaty is defined as a written agreement between states. It may be bilateral (concluded by two states) or multilateral (concluded by three

[19] Local Autonomy Act (地方自治法), Act No 67 of 1947.
[20] *Izumisano Civic Hall Case*, Supreme Court, 7 March 1995, 49(3) *Minshū* 687<https://www.courts.go.jp/english/Judgments/search/202/>.
[21] *Ageo Welfare Hall Case*, Supreme Court, 15 March 1996, 50(3) *Minshū* 549<https://www.courts.go.jp/english/Judgments/search/287/>.

or more states). Although such instruments may bear various titles—such as 'treaty', 'agreement', 'protocol', 'declaration', 'charter', or 'covenant'—there is no difference in their legal status. As treaties are sources of international law, it is advisable to consult the literature on international law for general or detailed accounts. This article only explains the treatment of treaties under Japanese law.

Article 98(2) of the Constitution provides: 'The treaties concluded by Japan and established laws of nations shall be faithfully observed.' The term 'established laws of nations' in this provision is understood to include customary international law. On this basis, both treaties and customary international law are also regarded as sources of domestic law in Japan. The discussion here will focus on treaties, which are written sources of law, while customary international law will be addressed later (see below 2.2.3.(a)).

(2) **Treaty-making Procedure**. The Constitution vests the power to conclude treaties in the Cabinet, subject to the approval of the Diet (art 73(iii)). Concluded treaties are promulgated by the Emperor (art 7(i)).[22] According to the government's view, however, not every agreement concluded by Japan with another state requires the approval of the Diet. In 1974, then–Foreign Minister Masayoshi Ohira (大平正芳) explained that an international agreement requires Diet approval if it falls into one of the following three categories ('Ohira Three Principles'): (i) agreements that contain matters which must be prescribed by Diet-enacted statutes; (ii) agreements that affect the national finances; and (iii) agreements that legally regulate the basic relationship between Japan and the other state concerned, or between states in general, and that are therefore of such political importance that ratification is required for them to take effect.[23]

By contrast, agreements that do not fall within these three categories and therefore do not require the approval of the Diet are referred to as 'administrative agreements' or 'administrative arrangements', such as those that set out detailed arrangements for implementing a treaty already approved by the Diet.

(3) **Domestic Status of Treaties**. (i) Under Article 98(2) of the Constitution, treaties become part of the Japanese legal order and acquire **domestic legal force**, once they are concluded by the Cabinet, approved by the Diet, and promulgated by the Emperor.[24] In other words, no special legislative measures are required to incorporate a treaty into domestic law in Japan. Diet approval of a treaty is a procedure distinct from the enactment of statutes and thus does not constitute a legislative measure. In this respect, the Japanese system differs from that of countries such as Germany, which requires a law of approval to domesticate a treaty, and the United Kingdom, which implements the contents of

[22] For a detailed account of the procedures and practice for treaty-making in Japan, see Tadaatsu Mori, 'The Current Practice of Making and Applying International Agreements in Japan' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, 2019) ch 11.

[23] House of Representatives, Committee on Foreign Affairs, 72nd Diet, 20 February 1974.

[24] Yuji Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Clarendon, 1998) 28–30; Shin Hae Bong, 'Japan' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP, 2011) 365.

a treaty by individual statutes. Instead, Japan resembles the United States, where treaties are incorporated into domestic law automatically.[25]

(ii) In terms of the **hierarchy of legal norms**, treaties rank below the Constitution and above statutes, according to the prevailing view.[26] Statutes that conflict with treaties are therefore invalid.

This does not mean, however, that treaties automatically operate as substitutes for statutes. Under Japanese domestic law, a constitutional principle called the Principle of Reservation for Adverse Action or Adverse Principle (see below 4.3.) requires that governmental actions which restrict individual rights or impose duties must be based on a Diet-enacted statute. Accordingly, where the implementation of a treaty rests upon such governmental actions, a statutory basis is required.[27] A treaty itself cannot serve as the legal foundation for right-restrictions or duty-impositions, since the procedure for Diet approval of treaties is less rigorous than the legislative process for enacting statutes.[28]

In practice, when Japan concludes a treaty, a strict review is conducted by the government, including the Cabinet Legislation Bureau, to ensure consistency with domestic law. If existing statutes or regulations conflict with the treaty, they are amended, and if new legislation is required for its implementation, appropriate legislative measures are taken. This practice is referred to as the so-called principle of 'implementing-legislation-perfectionism (完全担保主義)', in the sense that domestic law is perfectly adjusted to secure the implementation of treaties.[29] As a result of this principle, cases in which statutes or regulations are held invalid for being contrary to a treaty are, in reality, rare.

(iii) Even so, there are a few cases in which the courts have reviewed the **conformity of statutes with treaties**.[30] One example that reached the Supreme Court is the *Glaxo Case* (2009).[31] This case concerned the controlled foreign company (CFC) rules under the Act on Special Measures Concerning Taxation,[32] which were challenged as conflicting with the Japan–Singapore Tax Treaty

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[25] Iwasawa (n 24) 32–33.
[26] Iwasawa (n 24) 95–100; Shin (n 24) 375–376.
[27] 松田浩道『国際法と憲法秩序』(東京大学出版会、2020 年) 179–182 頁[Hiromichi Matsuda, *International Law and the Constitutional Order* (University of Tokyo Press, 2020) 179–182]; 島村健「行政機関による国際法規範の国内における実現」法律時報 94 巻 4 号 (2022 年) 22–27 頁、25 頁[Takeshi Shimamura, 'Domestic Implementation of International Legal Norms by Administrative Agencies' (2022) 94(4) *Hōritsu Jihō* 22–27, 25]; 興津・前掲注 (7) 368 頁[Okitsu (n 7) 368].
[28] For example, under the TPP11 Agreement (Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018)), Japan is under an international legal obligation to implement patent linkage—that is, to take into account the patent rights of originator drugs when approving generic drugs. However, the relevant domestic statute does not contain the provisions necessary for the implementation of patent linkage. For discussion of the domestic legal issues arising from this situation, see Yukio Okitsu, 'Patent Linkage and the Rule of Law in the Context of Pharmaceutical Marketing Approval in Japan' (2025) 20(11) *Journal of Intellectual Property Law & Practice* 713–723.
[29] Hiromichi Matsuda, 'International Law in Japanese Courts' in Bradley (ed) (n 22) 541. The translated term 'implementing-legislation-perfectionism' is borrowed from Matsuda's article.
[30] Matsuda (n 29) 540–543; Shin (n 24) 376–379.
[31] *Glaxo Case*, Supreme Court, 29 October 2009, 63(8) *Minshū* 1881 <https://www.courts.go.jp/english/Judgments/search/1030/>.
[32] Act on Special Measures Concerning Taxation (租税特別措置法), Act No 26 of 1957<https://www.japaneselawtranslation.go.jp/en/laws/view/3132>.

prohibiting juridical double taxation. The Supreme Court interpreted both the statutory provision and the treaty in light of their respective purposes and held that no conflict existed between them.

Rather than declaring a statute to be in violation of a treaty, the courts sometimes **interpret statutes in a manner consistent with the treaty**. This technique is employed when a statutory provision, although containing no explicit reference to the treaty, is open to more than one interpretation, and one of those interpretations better gives effect to the treaty. Given that, under domestic law, treaties are ranked above statutes in the hierarchy of legal norms, this method of interpretation may be regarded as a natural consequence. That said, decisions in which courts have expressly adopted this interpretive approach are not particularly numerous.

A well-known case at a lower court is the *Nibutani Dam Case* (1997).[33] The case concerned the compulsory acquisition of land in Nibutani (二風谷), Hokkaido, a sacred site of the Ainu people, an indigenous minority who reside in northern Japan and south-eastern Russia, for the purpose of constructing a dam. The legality of the administrative decision approving the expropriation was challenged. The Sapporo District Court, invoking not only the Constitution but also the International Covenant on Civil and Political Rights (ICCPR), held that the Ainu people's interest in their sacred site was protected as part of their cultural rights as a minority (ICCPR, art 27). It ruled that the approval of the expropriation was unlawful because the competent agency had failed to take measures to minimize the impact on Ainu culture.

The judgement did not find the administrative decision unlawful on the ground of a treaty violation. Rather, in applying the relevant provisions of domestic law—Article 20 (iii) of the Expropriation of Land Act[34]—the court derived, through treaty-consistent interpretation, an obligation on the part of the agency to give due consideration to the rights of minorities protected under the ICCPR, even though the Act itself made no reference to the treaty. This interpretive technique is sometimes referred to as the 'indirect application' of a treaty in the international law literature.[35]

By the time of judgement, however, the dam had already been completed. Consequently, the court could not halt the construction. Pursuant to Article 31 of the Administrative Case Litigation Act,[36] it declared the administrative decision unlawful without revoking it.

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[33] *Nibutani Dam Case*, Sapporo District Court, 27 March 1997, 938 *Hanrei Taimuzu* 75.
[34] Expropriation of Land Act (土地収用法), Act No 219 of 1946 <https://www.japaneselawtranslation.go.jp/en/laws/view/3255>.
[35] Shin (n 23) 376–377. See also Yuji Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (Brill, 2023) 210–211.
[36] Administrative Case Litigation Act (行政事件訴訟法), Act No 139 of 1962 <https://www.japaneselawtranslation.go.jp/en/laws/view/3781>.

(c) Statutes

Statutes are laws enacted by the Diet. They occupy the most significant position in relation to administrative activity—particularly in the context of the Principle of Legality.

A few remarks on terminology are necessary at this point. The Japanese word *hōritsu* (法律) is best translated into English as 'statute'. The term 'statute' refers specifically to a law enacted by the legislature, and therefore most accurately reflects the meaning of *hōritsu*. By contrast, the English word 'law' is frequently used in a broader sense to encompass not only statutes but also the Constitution, unwritten norms, and other forms of law. For this reason, when referring specifically to *hōritsu*, it is generally preferable to use 'statute' rather than 'law', unless the context makes the meaning unmistakably clear.

Other terms that sometimes appear in English translations of Japanese legislation are 'act' and 'code'. These are typically used in translating the official titles of particular statutes. For instance, the *Gyōsei Tetsuzuki Hō* (行政手続法) is translated as the Administrative Procedure *Act*, and the *Kojin Jōhō no Hogo ni Kansuru Hōritsu* (個人情報の保護に関する法律) as the *Act* on the Protection of Personal Information. The *Keihō* (刑法) is translated as the Penal *Code*, and the *Keiji Soshō Hō* (刑事訴訟法) as the *Code* of Criminal Procedure.

The designation 'code' is used exclusively for the five fundamental statutes: the Civil Code, Commercial Code, Penal Code, Code of Civil Procedure, and Code of Criminal Procedure. All other statutes are translated with the term 'act'. There is no difference in legal force between an Act and a Code; the distinction is merely one of translational convention. Similarly, in Japanese, some statutes include the word *hōritsu* (法律) in their titles, while others use *hō* (法). This difference has also no effect on legal validity or hierarchical rank.

(d) Regulations

(1) **Definition**. Regulations are legal norms enacted by administrative agencies.[37] At first glance, their very existence appears to raise constitutional concerns. Article 41 of the Constitution provides that 'the Diet shall be *the sole law-making organ* of the State' (emphasis added), and it might therefore be argued that permitting administrative agencies to create legal rules contravenes this provision.

[37] The English term *regulation* is also commonly used in the sense of controlling the conduct of private enterprises or individuals and sanctioning violations of such controls. As a form of legal norm, however, a *regulation* refers more specifically to a rule enacted by an administrative agency. While the content of such regulations may include the control of private actors, it is by no means limited to that function. Whenever the term *regulation* is encountered, it is therefore necessary to determine from the context in which of these senses it is being used. The same applies to the adjective *regulatory*. The expression *the regulatory agency* may refer either to an administrative agency endowed with the power to control private actors, or to one vested with the authority to issue regulations as delegated legislation.

Such concerns are not unfounded. Nevertheless, the practical realities of governance make it necessary for administrative agencies to issue more detailed rules in order to implement statutes. Statutes frequently set out only general principles or broad guidelines. In some instances, moreover, the legislature deliberately refrains from prescribing detailed provisions within the statute itself and instead delegates that task to administrative agencies, thereby enabling them to respond more flexibly to changing circumstances. Unlike statutes, which require a formal and often time-consuming legislative amendment process, administrative regulations can be revised with relative ease and speed. For these practical reasons, administrative agencies are permitted to enact regulations.

Even so, it must be borne in mind that the power to make law rests exclusively with the Diet. This is a matter of democratic legitimacy, for the creation of law ought to be reserved to the representatives of the people.

Accordingly, administrative agencies may issue regulations only on the basis of a delegation of legislative authority. Statutes enacted by the Diet must expressly authorize administrative agencies to issue such regulations and must set out the basic framework within which they are to operate, including the purpose, scope, and limits of the delegated authority.

In this sense, the legislature, which originally holds the law-making power, entrusts part of that power to administrative agencies where necessary. Viewed in this way, the enactment of legal norms in the form of administrative regulations is not regarded as inconsistent with the constitutional principle that the Diet is 'the sole law-making organ of the State'. This practice is commonly referred to as **delegated legislation**.

For delegated legislation to be regarded as constitutional and lawful, two conditions must be satisfied. First, the statute must clearly specify the purpose and scope of the delegation. Second, any regulation issued by the administrative agency must conform to that purpose and must not exceed the limits of the delegated authority. This issue will be examined in more concrete terms in a later section, with reference to relevant judicial decisions (see below 3.).

(2) **Typology**. The principal types of regulations may be outlined as follows. The terminology varies according to the administrative organ that issues them.[38]

Regulations enacted by the Cabinet are termed Cabinet Orders (*seirei* 政令). Those issued by the Ministers heading individual Ministries are termed Ministerial Orders (*shōrei* 省令). For example, a regulation issued by the Minister of Finance is referred to as a Ministry of Finance Order (財務省令). A further category is the Cabinet Office Order (*Naikaku-fu-rei* 内閣府令), which is issued by the Prime Minister in his capacity as head of the Cabinet Office. The Cabinet Office (内閣府) should not be confused with the Cabinet (内閣) itself: it is an organ

[38] For an overview of administrative organizations in Japan's central government, see Izuru Makihara, 'Structure and Functions of the Central Government' in Agata and others (eds) (n 3) ch 5.

that supports the Cabinet and, organizationally, it stands on the same footing as the individual Ministries.

Regulations issued by external organs attached to each ministry are termed Rules (*kisoku* 規則). Such external organs include Commissions—such as the Japan Fair Trade Commission (公正取引委員会)—and Agencies[39]—such as the National Tax Agency (国税庁).[40] They must not be confused with internal rules within administrative organizations (see below (6)).

The term *regulations* functions as a collective designation for all of these forms.

(3) **Hierarchy**. A hierarchical relationship exists among these types of regulations, reflecting the hierarchical structure of the administrative organs that issue them. At the apex of this hierarchy are Cabinet Orders, which take precedence over all other forms of administrative regulation. This is consistent with the position of the Cabinet as the highest organ of the executive.

Ministerial Orders and Cabinet Office Orders possess the same legal force, since the Ministries and the Cabinet Office occupy equivalent positions within the administrative hierarchy. In terms of legal precedence, both stand immediately below Cabinet Orders.

Rules issued by Commissions and Agencies are ranked below Ministerial Orders, as such Commissions and Agencies are established as external organs of the respective Ministries.

In this hierarchy, a subordinate regulation that contravenes a superior regulation is unlawful and void.

(4) **Table**. The foregoing points, together with their respective statutory bases, may be summarized in Table 1 below.

Table 1: Categories of Regulations

Rank	Type	Statutory Basis	Authority to Issue Regulations
1	Cabinet Orders	Constitution, art 73(vi)	Cabinet
2	Cabinet Office Orders	Act for Establishment of the Cabinet Office,[41] art 7(3)	Prime Minister as Head of the Cabinet Office
	Ministerial Orders	National Government Organization Act,[42] art 12(1)	Ministers
3	Rules	Act for Establishment of the Cabinet Office, art 58(4) National Government Organization Act, art 13(1)	Commissions Director-Generals of Agencies

[39] The term *agency* is sometimes used in a general sense to refer to any administrative body, but here it is employed specifically as the translation for *chō* (庁) in the classification of central government organs under the National Government Organization Act. In this article, the term *Agency* is capitalized when used in the latter sense.

[40] Strictly speaking, the authority to enact rules differs between Commissions and Agencies. In the case of Commissions, the rule-making authority lies with the Commission as a collegial body, not with its chairperson or president as an individual. By contrast, in the case of Agencies, which are not collegial bodies, the authority belongs to the agency's head (for example, the Director-General of the National Tax Agency) rather than to the agency as such. This structure is analogous to that of Ministerial Ordinances, the authority for which rests with the Minister rather than the Ministry itself.

[41] Act for Establishment of the Cabinet Office (内閣府設置法), Act No 89 of 1999.

[42] National Government Organization Act (国家行政組織法), Act No 120 of 1948 <https://www.japaneselawtranslation.go.jp/en/laws/view/4678>.

(5) **Public Notices**. A public notice (*kokuji* 告示) is a formal means by which an administrative agency informs the public of its decisions or of certain facts. A public notice, in itself, is not a regulatory form and therefore does not automatically constitute a source of law. However, in some cases, a public notice is used to promulgate rules governing the rights and obligations of individuals pursuant to statutory delegation. In such instances, the notice functions as delegated legislation and thus has the status of a legal norm.

For example, Article 8(1) of the Public Assistance Act[43] authorizes the Minister of Health, Labour and Welfare to establish the standards for public assistance, but it does not specify any particular regulatory form such as a Ministerial Order. Accordingly, the Public Assistance Standards are set by public notice.[44] In this case, the notice is issued on the basis of statutory delegation and determines the substantive content of the right to receive public assistance; it therefore constitutes delegated legislation and serves as a source of law.

Another example of a public notice that has been recognized by the Supreme Court as a source of law is the national curriculum guidelines (学習指導要領),[45] established by the Minister of Education, Culture, Sports, Science and Technology pursuant to delegation under the School Education Act.[46] These guidelines prescribe the content of education in elementary and secondary schools.

By contrast, public notices that have *not* been recognized as sources of law include the environmental quality standards (環境基準) issued under Article 16(1) of the Basic Act on the Environment.[47] A lower court once held that these standards merely constitute policy targets or guidelines for the government in promoting pollution control and do not have binding legal effect.[48]

(6) **Distinction from Internal Rules**. Regulations are distinguished from those internal rules issued within administrative organizations. Internal rules are adopted for the purpose of ensuring uniformity in the interpretation of law or in administrative decision-making. They are often issued as instructions or directives from superiors to subordinates and appear under a variety of names, including instructions (*kunrei* 訓令), circulars (*tsūtatsu* 通達), notices (*tsūchi* 通知), and guidelines (*yōkō* 要綱・要項 or *yōryō* 要領).

Internal rules do not constitute a source of law and therefore possess no legal force. This has several implications. (i) Internal rules are established without statutory delegation and do not take the form (or title) of Cabinet Orders, Cabinet Office Orders, Ministerial Orders, or Rules. (ii) They are not legally binding on

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[43] Public Assistance Act (生活保護法), Act No 144 of 1950 <https://www.japaneselawtranslation.go.jp/en/laws/view/24>.
[44] Standards for Public Assistance under the Public Assistance Act (生活保護法による保護の基準), Ministry of Health and Welfare Public Notice No 158 of 1963.
[45] *Denshūkan Case*, Supreme Court, 18 January 1990, 1984 (Gyō-Tsu) 45, 719 *Hanrei Taimuzu* 72.
[46] School Education Act（学校教育法), Act No 26 of 1947 <https://www.japaneselawtranslation.go.jp/en/laws/view/4743>.
[47] Basic Act on the Environment (環境基本法), Act No 91 of 1993 <https://www.japaneselawtranslation.go.jp/en/laws/view/3850>.
[48] *Environmental Quality Standards Case*, Tokyo High Court, 24 December 1987, 38(12) *Gyōshū* 1807.

private individuals and do not serve as standards for judicial judgements. If a court considers the interpretation of law set out in an internal rule to be mistaken, it is free to adopt an interpretation it considers correct. (iii) Internal rules are not standards for determining the legality of administrative conduct. Administrative action that conforms to an internal rule may nevertheless be unlawful if it violates statutory provisions, and vice versa.[49] (iv) Some internal rules are made public—for example, through publication on the websites of the relevant Ministry—while others are not. Internal rules that establish criteria for administrative decision-making may be subject to a duty of publication (art 5) or to a duty of endeavour to make them public (art 12) under the Administrative Procedure Act.[50]

The functions of internal rules will be analysed in greater detail in Part II.

2.2.2. Written Sources at the Local Level

As written sources of law at the local level, there are local ordinances (*jōrei* 条例) and local rules (*kisoku* 規則). Ordinances are enacted by resolution of the local assembly, whereas rules are issued by the chief executive of the local government (prefectural governor or municipal mayor). These rules are distinct from those issued by national Commissions or Agencies although they share the same English term.

At first glance, one might assume that local ordinances correspond to statutes and local rules to administrative regulations in the national legal order. This comparison is largely accurate with respect to local ordinances. However, the same cannot be said of local rules. This is because Japanese local governments operate under a dual representation system (below 5.1.): the chief executive of a local government is directly elected by the residents and, therefore, possesses democratic legitimacy independent of the assembly. For that reason, the chief executive may enact rules even without delegation from an ordinance. That said, in practice, many rules are in fact adopted pursuant to the delegation from an ordinance to implement it.

The effect of local ordinances and rules is, in principle, confined to the territory of the local government or to the residents thereof. However, questions concerning the territorial scope of ordinances may arise in certain contexts.

Some local governments, such as Osaka City, have enacted ordinances regulating hate speech.[51] These ordinances apply not only to conduct occurring

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[49] Of course, where an internal rule sets out a correct interpretation of law, an administrative decision taken in accordance with that internal rule is lawful. For example, even where no statutory amendment has been made, a new tax assessment based on a change in statutory interpretation effected by a circular—such that a pachinko machine, previously treated as exempt from taxation, becomes subject to tax—will be lawful if the assessment reflects the correct interpretation of the underlying statute. *Pachinko Machine Taxation Case*, Supreme Court, 28 March 1958, 12(4) *Minshū* 624 <https://www.courts.go.jp/english/Judgments/search/1976/>.

[50] Administrative Procedure Act (行政手続法), Act No 88 of 1993<https://www.japaneselawtranslation.go.jp/en/laws/view/4765>.

[51] Osaka City Ordinance on Measures against Hate Speech (大阪市ヘイトスピーチへの対処に関する条例), Osaka City Ordinance No 1 of 2016. The Supreme Court has upheld its constitutionality in relation to the right to freedom of expression guaranteed under Article 21(1) of the Constitution. Supreme Court, 15 February 2022, 76(2) *Minshū* 190 <https://www.courts.go.jp/english/Judgments/search/1888/>.

physically within the locality, but also to expression disseminated online, insofar as it is directed at, or made by, residents of the municipality. Yet online speech often makes it difficult to ascertain the location of the speaker, and, by its very nature, is transmitted across local boundaries to a potentially global audience. This raises a theoretical question as to whether, and to what extent, a single local government may and should regulate such expression through its ordinance.

2.2.3. Unwritten Sources

(a) Customary Law

Customary law is recognized as a source of law. In administrative law, however, it mostly serves either as the basis of private rights—for example, customary water-use rights (慣行水利権) established through longstanding practice—or as a custom that does not directly affect private rights. By contrast, restrictions on rights or imposition of duties cannot be founded on custom. Under the Principle of Reservation for Adverse Action (see below 4.3.), such restrictions or obligations require a statutory basis enacted by the Diet. For this reason, instances in which customary law plays a role are relatively rare in administrative law.

Customary international law is sometimes mentioned in relation to immigration control. As noted above, Article 98(2) of the Constitution recognizes customary international law as a source of domestic law (see above 2.2.1.(b)(1)). In the well-known *McLean Case* (1978), the Supreme Court grounded its holding that the State has no obligation to admit foreigners on customary international law.[52]

(b) General Principles of Law

(1) **Introduction**. General principles of law, although unwritten, occupy an important place in administrative law. They are regarded as expressions of social reasonableness or justice that have been elevated to the status of legal norms. While such principles cannot override statutes, they nevertheless guide the interpretation of statutory provisions and, in certain circumstances, may serve to supplement them.

Examples include the principle of equality, the principle of proportionality, and the principle of good faith, which is often treated as equivalent to the principle of protection of legitimate expectations.

(2) **Equality**. The principle of equality prohibits discriminatory treatment of individuals by the administration. As an expression of the constitutional guarantee of equality under the law in Article 14 of the Constitution, it applies generally to governmental activity. In some cases, the principle is explicitly

[52] *McLean Case*, Supreme Court [Grand Bench], 4 October 1978, 32(7) *Minshū* 1223 <https://www.courts.go.jp/english/Judgments/search/56/>.

embodied in individual statutes—for example, Article 244(3) of the Local Autonomy Act, which guarantees equal access to public facilities established by local governments.

The principle of equality prohibits only unjust discrimination, that is, differential treatment lacking a rational basis. Accordingly, where a rational justification exists for treating individuals differently, there is no violation of the principle. The application of the principle of equality therefore turns on whether a rational justification is present—or whether there exist particular circumstances that warrant different treatment. Where an administrative agency engages in discriminatory treatment without justification, it acts unlawfully in breach of the principle. Conversely, if there are circumstances that call for differential treatment but the agency fails to take them into account and instead applies a uniform approach, such conduct may be held unlawful.

(3) **Proportionality**. The principle of proportionality requires a reasonable balance between the means employed and the ends pursued. From this principle, three specific requirements may be derived.

First, administrative measures must not be adopted unless they are suitable to achieve the intended objective (**suitability**). Second, they must not go beyond what is minimally necessary to achieve that objective (**necessity**). Third, they must be reasonable, meaning that the benefits of the measures must outweigh the burdens or disadvantages they impose (**reasonableness**, or proportionality in the strict sense).

These three requirements can be illustrated by examples. A measure that is wholly unrelated to the problem— such as ordering the interior redesign of a building simply because it exceeds the height limit, which has nothing to do with remedying the violation—would be unsuitable and thus impermissible. If illegal parking can be prevented by issuing warnings or fines, the confiscation of vehicles would exceed what is necessary and would therefore be disproportionate. Likewise, suspending all public transportation during night hours in order to reduce noise would impose a burden on daily life far greater than the benefit achieved. Such a measure could also be regarded as exceeding the minimum level of intervention required, thereby illustrating the overlap between the second and third requirements.

The basis of the principle of proportionality can be traced to Article 13 of the Constitution, which guarantees respect for individuals and the right to pursue happiness. Some statutes have codified the principle, such as Article 1(2) of the Police Duties Execution Act.[53]

The principle of proportionality has also been applied in some lower court judgements (for example, in the context of reviewing the validity of local ordinances, see below 5.4.3.(b)). However, the Supreme Court has never explicitly

[53] Police Duties Execution Act (警察官職務執行法), Act No 136 of 1948 <https://www.japaneselawtranslation.go.jp/en/laws/view/4043>.

held that a particular administrative action violates the principle.[54] As a result, the manner in which the principle is to be applied in individual cases remains somewhat unclear.

(4) **Good Faith (Protection of Legitimate Expectations).** The principle of good faith is codified in Article 1(2) of the Civil Code.[54a] While this provision applies primarily to private-law relationships, the principle of good faith is also regarded as applicable to public-law relationships in the form of an unwritten legal principle. The principle of protection of legitimate expectations is understood as one specific manifestation of the principle of good faith.

The principle of protection of legitimate expectations seeks to safeguard the trust that individuals place in administrative agencies. More specifically, it applies where: (i) the agency, through its statements or conduct, has led an individual to expect that a certain policy would be pursued; (ii) the individual has relied on that expectation and taken action, such as making investments; (iii) the agency has subsequently altered its policy and acted in a manner contrary to the individual's expectations; (iv) the individual has thereby suffered loss.

It is, however, common for administrative agencies to modify their policies in response to changing circumstances. The principle of protection of legitimate expectations does not therefore apply automatically to every change of policy. For the principle to be invoked, the expectation created by the agency must be regarded as legally worthy of protection.

A notable case concerning this principle reached the Supreme Court in 1981.[55] In Ginoza Village, Okinawa, the then–mayor invited a company to establish a factory and promised full support for the project, including the provision of land for the site. Relying on this assurance, the company undertook preparations for construction and made substantial investments, such as the purchase of equipment. During this period, however, a mayoral election was held in which the incumbent mayor—who had extended the invitation—was defeated. The newly elected mayor opposed the project and, upon taking office, announced that the village would no longer cooperate with the factory's construction. The company consequently abandoned the project and withdrew from the village.

The company filed a lawsuit against the village, seeking compensation for the losses incurred as a result of abandoning the project, including the inability to recover its investments. The Supreme Court considered the factors (i)–(iv) above and held that in such circumstances the company's trust was legally worthy of protection. A central reason was that the former mayor had made clear and specific commitments to cooperate with the project. The Court acknowledged that a

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[54] Narufumi Kadomatsu, 'Functions of the Proportionality Principle in Japanese Administrative Law' (2018) 22 *Academia Sinica Law Journal* 203–242, 208 <https://dx.doi.org/10.2139/ssrn.3401898>. Kadomatsu's article offers valuable insight into the application of the principle in Japanese administrative law, particularly in relation to judicial review of administrative discretion.

[54a] Civil Code（民法）(Part I, Part II and Part III), Act No 89 of 1896 <https://www.japaneselawtranslation.go.jp/en/laws/view/4848>.

[55] *Ginoza Factory Case*, Supreme Court, 27 January 1981, 35(1) *Minshū* 35.

change in mayor following an election, and the accompanying change of policy, are normal and legitimate in a democratic system and are not unlawful in themselves. From the company's perspective, however, the election and change of leadership were internal matters of the village and could not be invoked to justify repudiating the village's prior commitment. The change in mayoral administration therefore did not preclude the application of the principle of protection of legitimate expectations.

(c) Case Law

In Japan, which belongs to a civil law jurisdiction rather than a common law jurisdiction, there is theoretical debate as to whether judicial precedents should be recognized as a source of law. As this issue pertains to jurisprudence in general, it will not be pursued in this article. Regardless of whether one acknowledges their formal status as a source of law, it is generally accepted that judicial precedents have precedential or normative significance for subsequent court decisions and administrative practice. This is especially true in administrative law, where many important concepts and doctrines have been concretized and refined through case law. The importance of judicial precedents in this field can hardly be overstated.

3. Delegated Legislation

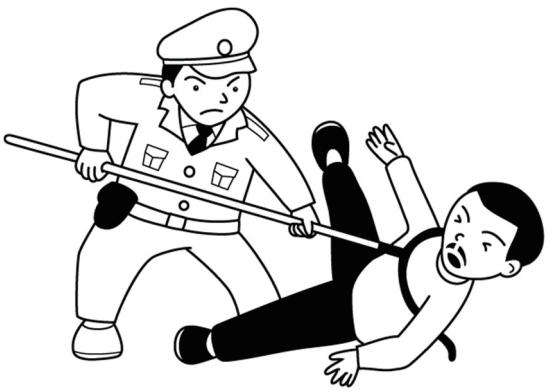
3.1. Introduction

3.1.1. Definition and Illustration

In this Chapter, delegated legislation is examined as part of the Principle of Legality. Article 41 of the Constitution declares that the Diet is 'the sole law-making organ of the State'. As a general rule, therefore, the creation of legal norms is reserved to the legislature. Nevertheless, as an exception to this principle, administrative agencies may be empowered to issue legal norms in the form of regulations, provided that such authority is delegated by statute (see above 2.2.2.(d)).

An illustrative example of delegated legislation may be found in the Juvenile Training School Act.[56] Juvenile training schools are facilities that accommodate juveniles who have committed crimes or engaged in delinquent behaviour, not merely for the purpose of detention but for the provision of guidance and rehabilitation. Article 86 of the Act provides that, where a juvenile in such a facility becomes violent or attempts to cause harm to themselves or others, staff members may employ physical restraint if necessary. The provision further stipulates that the types of security equipment that may be used in such situations are to be specified by Ministry of Justice Order. This is a clear instance of statutory delegation to administrative regulation.

[56] Juvenile Training School Act (少年院法), Act No 58 of 2014 <https://www.japaneselawtranslation.go.jp/en/laws/view/3475>.



Pursuant to this delegation, the Regulation for Enforcement of the Juvenile Training School Act,[57] a Ministry of Justice Order, prescribes the permissible types of security equipment: the *sasumata*, shields, and pepper spray (art 46). A *sasumata* is a pole with a U-shaped end, traditionally used in Japan to restrain intruders or offenders without direct bodily contact (see Figure 1).

Figure 1: Police Officer Restraining a Suspect Using a *Sasumata*[58]

This example demonstrates the division of roles between statute and administrative regulation. Matters of fundamental importance—such as the conditions under which juvenile training school staff may employ physical force—must be determined by the Diet and set forth in statute. Such provisions define the purpose and scope of the delegation. By contrast, the determination of the specific types of security equipment—for example, whether the *sasumata* should be authorized—is a technical detail that does not require parliamentary deliberation. It is more appropriately left to the Minister of Justice to regulate by Ministerial Order.

3.1.2. Two Legal Issues to Be Discussed

Where a statute confers upon an administrative agency the power to make detailed regulations, it must also specify both the purpose of the delegation—that is, the reason for conferring such power—and its scope—that is, the extent to which the power may be exercised. In other words, the statute must establish clear boundaries for the agency. Regulations issued pursuant to such delegation must remain within those boundaries; should they exceed the limits prescribed by the statute, they are unlawful.

This framework gives rise to two principal legal issues.

The first concerns the requirement of specificity in delegation, or the prohibition of so-called **blanket delegations**. The question is how precisely a statute must define the purpose and scope of the delegated power. A delegation that confers authority in overly broad terms, without articulating such parameters, is termed a blanket delegation. In light of Article 41 of the Constitution, blanket delegations are unconstitutional and invalid, as they confer excessive law-making authority upon the executive without adequate legislative control. The difficulty,

[57] Regulation for Enforcement of the Juvenile Training School Act (少年院法施行規則), Ministry of Justice Order No 30 of 2015 <https://www.japaneselawtranslation.go.jp/en/laws/view/5046>.
[58] イラストポップ (Irasutopoppu) <https://illpop.com/png_jobhtm/police_a30.htm>.

however, lies in determining how detailed the statutory guidance must be in order to avoid classification as a blanket delegation. This question will be discussed in 3.2. below.

The second issue concerns the prohibition against **exceeding the purpose or scope of the delegation**. Even where statutory provisions contain some guidance, a regulation may still overreach. The question in such cases is whether the agency has acted beyond the limits of the delegation. A regulation that extends beyond the powers conferred by the delegating statute is in breach of that statute and is therefore unlawful and invalid. This question will be discussed in 3.3. below.

3.2. Prohibition of Blanket Delegations

3.2.1. The State of Japanese Law

With respect to the requirement of specificity in delegation, the Supreme Court has held that it is not necessary for the purpose and scope of the delegation to be explicitly articulated in the text of the statute. Where such elements can reasonably be inferred through interpretation of the statutory provisions, the delegation will not be regarded as a blanket delegation. In practice, there has been no case in which statutory delegating provisions have been declared unconstitutional and invalid on the ground that they constituted a blanket delegation.

A case in point is the prohibition of political activities by public officials. Article 102(1) of the National Public Service Act[59] ('NPSA') provides as follows:

> An official must not solicit, receive, or be in any manner involved in soliciting or receiving any donation or other benefit for any political party or political purpose, nor must engage in any political acts as provided for by Rules of the National Personnel Authority other than to exercise the right to vote. (underline added)

The underlined wording constitutes the statutory delegation to the National Personnel Authority.[60] Pursuant to this provision, National Personnel Authority Rule (人事院規則) 14-7 enumerates specific categories of prohibited political acts. Violation of these rules may give rise to disciplinary sanctions or even criminal liability.

This delegating provision of the NPSA was challenged on the ground that it was overly general and might constitute an unconstitutional blanket delegation. In

[59] National Public Service Act (国家公務員法), Act No 120 of 1947 <https://www.japaneselawtranslation.go.jp/en/laws/view/4519>.

[60] While Rules of the National Personnel Authority constitute a form of regulation (art 16(1) NPSA), they are not included among the categories of regulations identified above (2.2.1.(d)). The National Personnel Authority is an independent administrative organ established by the NPSA (art 3); it belongs neither to any Ministry nor to the Cabinet Office. While designated as *Rules*, National Personnel Authority Rules differ from the Rules issued by Commissions or Agencies. They are accorded the same rank as Cabinet Orders in the hierarchy of legal norms.

the *Sarufutsu Case* (1974),[61] however, the Supreme Court held that Article 102(1) of the NPSA, when reasonably interpreted, could be understood as delegating authority to specify political activities that threaten to impair the political neutrality of public officials. On this basis, the Court concluded that the provision was not unconstitutional. Although the wording of 'activities that threaten political neutrality' is not expressly stipulated in Article 102(1), the Court reasoned that this purpose could be reasonably inferred from the provision, and thus the delegation was not deficient in specificity.

3.2.2. Comparative Analysis

The issue of legislative delegation arises in many jurisdictions, but the legal responses to it differ significantly.

Germany adopts a relatively strict approach to blanket delegation. Article 80(1) of the Basic Law requires that the content, purpose, and scope of any delegated authority be clearly defined in the delegating statute.

In the United States, the non-delegation doctrine—under which Congress may not delegate its legislative power to other entities—remains the formal principle. In practice, however, delegated legislation is widely accepted, provided that Congress sets out an intelligible principle to guide the exercise of the delegated authority. Judicial practice indicates that even broad and abstract standards such as 'just and reasonable' or 'public convenience and necessity' have been regarded as sufficient to satisfy this requirement.[62]

In this respect, the position of the Japanese Supreme Court appears to be relatively close to that of the United States.

If the courts adopt an unduly relaxed approach towards vague delegations of power, the democratic process within the Diet risks being undermined. The Diet is composed of lawmakers elected by the people, who debate policies in an open forum, provide explanations of their decisions to the electorate, and are held accountable through elections. This deliberative process is an essential feature of democratic government.

When important policy choices are left not to the Diet but to administrative agencies acting through delegated regulations, this democratic function is weakened. Unlike statutes, which are debated and enacted in parliament, regulations are formulated by officials within the administration, without open deliberation, and are much easier to change. This undermines both transparency and stability in the legal system. To be sure, the introduction of a public comment procedure has enabled members of the public to submit views on proposed regulations (Administrative Procedure Act, art 39), such that the process is not conducted wholly behind closed doors. Nonetheless, the procedure for enacting

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[61] *Sarufutsu Case*, Supreme Court [Grand Bench], 6 November 1974, 28(9) *Keishū* 393 <https://www.courts.go.jp/english/Judgments/search/1886/>.

[62] Richard J Pierce, Jr, *Administrative Law* (Foundation Press, 4th ed, 2025) 9–12. For the major questions doctrine, however, see ibid 100–101.

administrative regulations remains less transparent and less open to democratic scrutiny than that for statutes.

For these reasons, where governmental measures are likely to have a serious impact upon individual rights and freedoms, the basic rules should be laid down clearly in statute. It should not be left to administrative agencies to determine such matters in their discretion. The statute itself should specify the nature of the decisions that may be taken and the scope of the authority conferred. If the statutory provision is framed in vague terms and fails to make clear what the agency is authorized to do, the courts ought, in principle, to step in by declaring the provision unconstitutional and remitting the matter to the Diet for proper legislative action.

In practice, however, Japanese courts have seldom exercised such strict control. Rather than rejecting vague delegations as unconstitutional, judicial scrutiny has focused more on whether a regulation has exceeded the purpose or limits of the delegating statute. It is at this point that most of the case law has developed. Next, we turn to consider this issue.

3.3. Prohibition of Exceeding the Purpose or Scope of Delegation

3.3.1. Introduction

Compared to the issue of blanket delegations discussed above, the Supreme Court has taken a relatively strict approach to cases in which administrative regulations exceed the purpose or scope of their statutory delegation. In fact, there are several cases in which administrative regulations have been struck down on such grounds (see below 3.3.2. and 3.3.4.).

At the same time, however, when the delegating statute grants discretion to the administrative agency in enacting the regulation, the Court has generally been more deferential, and the regulation is more likely to be upheld as lawful (see below 3.3.3., but see also 3.3.4.(d)).

3.3.2. The *Online Sale of Pharmaceuticals Case*

(a) Facts

A leading example of a regulation being declared unlawful is the case concerning restrictions on the online sale of pharmaceuticals, decided by the Supreme Court in 2013.[63]

In 2006, the then–Pharmaceutical Affairs Act[64] was amended to establish a new classification system for over-the-counter (OTC) drugs (drugs available without prescription). The amendment divided OTC drugs into three categories according to the degree of risk posed: Categories 1, 2, and 3. Category 1 and 2

[63] *Online Sale of Pharmaceuticals Case*, Supreme Court, 11 January 2013, 67(1) *Minshū* 1 <https://www.courts.go.jp/english/Judgments/search/1182/>.
[64] See above n 17.

drugs were regarded as higher risk, and the amended Act required that pharmacists provide appropriate information to consumers when selling them (arts 36-5 and 36-6).

The statute itself, however, contained no requirement that these drugs be sold face to face, nor did it delegate authority to the Minister of Health, Labour and Welfare to impose such a requirement by regulation. The only thing the statute allowed the Minister to do was set rules on how pharmacists should provide information about the drugs.

Nonetheless, the Minister amended the then–Regulation for Enforcement of Pharmaceutical Affairs Act,[65] a Ministerial Order, to prohibit mail-order sales, including internet sales, of Category 1 and 2 drugs. Companies engaged in online sales of pharmaceuticals filed a lawsuit, arguing that the amended Ministerial Order was unlawful.

(b) Decision of the Court

The Supreme Court held that the amended provision of the Ministerial Order prohibiting mail-order sales was unlawful. The Court reasoned that, for such a prohibition to be valid, it must be possible to clearly infer from the relevant provisions of the Pharmaceutical Affairs Act that the Diet had intended to delegate authority to the Minister to regulate mail-order sales. No such intention could be discerned from the text, purpose, or structure of the Act, nor from its legislative history or the parliamentary deliberations at the time of enactment.

The Court further observed that a prohibition of mail-order sales constituted a restriction on the freedom of occupational activity, specifically the freedom of business guaranteed by Article 22(1) of the Constitution. The implication is that such a restriction requires a clear statutory authorization in order to be constitutionally justified.

It is important to note, however, that the Supreme Court did not hold the prohibition unconstitutional on the ground that it violated the freedom of business. Rather, the Court found the regulation to be unlawful because it lacked any legal basis in statute and had been enacted solely by Ministerial Order without proper legislative delegation.

Accordingly, had the statute itself provided an explicit provision authorizing the prohibition of mail-order sales, such a restriction might well have been upheld as lawful.

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[65] Regulation for Enforcement of Pharmaceutical Affairs Act (薬事法施行規則), Ministry of Health and Welfare Order No 1 of 1961. It has since been retitled the Regulation for Enforcement of the Act on Securing Quality, Efficacy and Safety of Products Including Pharmaceuticals and Medical Devices (医薬品、医療機器等の品質、有効性及び安全性の確保等に関する法律施行規則) <https://www.japaneselawtranslation.go.jp/en/laws/view/3215>, following the renaming of the delegating statute itself.

(c) Aftermath

Following the 2013 Supreme Court judgement, the Pharmaceuticals and Medical Devices Act was amended to include a statutory provision requiring face-to-face sales and prohibiting mail-order sales of certain high-risk pharmaceuticals (art 36-6). This amendment was designed to address the deficiency identified by the Court in its 2013 decision.

Subsequently, the statutory prohibition was itself challenged as unconstitutional. However, in 2021, the Supreme Court upheld the amended provision as constitutional.[66]

3.3.3. The *Sabre Registration Refusal Case*

Another Supreme Court decision concerning delegated legislation is the *Sabre Registration Refusal Case* (1990).[67] In contrast to the *Online Sale of Pharmaceuticals Case*, this decision is notable in that the Court upheld the validity of the regulation in question as lawful.

(a) Facts

Japan maintains very strict laws governing the possession of weapons, including both firearms and swords. The relevant statute is the Firearms and Swords Control Act (銃刀法).[68] Under this Act, the private possession of swords is generally prohibited. However, an exception exists for certain swords that are recognized as having artistic or cultural value. Such swords may be legally owned, provided that the owner registers them with the competent agency (art 14).

The Act delegates authority to the then–Ministry of Education, Science, Sports and Culture to issue detailed provisions by Ministerial Order, including standards of appraisal for determining which swords can be registered. Pursuant to this delegation, the relevant Ministerial Order[69] permitted registration only of traditional Japanese swords. Foreign swords were excluded from registration altogether, irrespective of their artistic quality or cultural significance. It is worth noting, however, that the Firearms and Swords Control Act itself does not distinguish between Japanese and foreign swords.

In this case, an individual sought to import a Spanish sabre into Japan and applied to register it as a sword of artistic value. The application was rejected solely because the sword was not Japanese-made. The applicant then challenged

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[66] *'Pharmaceuticals Requiring Guidance' Case*, Supreme Court, 18 March 2021, 75(3) *Minshū* 552 <https://www.courts.go.jp/english/Judgments/search/1820/>.

[67] *Sabre Registration Refusal Case*, Supreme Court, 1 February 1990, 44(2) *Minshū* 369 <https://www.courts.go.jp/english/Judgments/search/1654/>.

[68] The full title is the Act for Controlling the Possession of Firearms or Swords and Other Such Weapons (銃砲刀剣類所持等取締法) (Act No 6 of 1958).

[69] Regulation for the Registration of Firearms and Swords (銃砲刀剣類登録規則), Committee for the Protection of Cultural Properties Rule No 1 of 1958. It then had the force of a Ministry of Education, Science, Sports and Culture Order.

the refusal in court, contending that the Ministerial Order was unlawful. The principal argument advanced was that the Firearms and Swords Control Act, which authorized the Minister to regulate the registration of swords, contained no provision excluding foreign swords, and that, by drawing such a distinction, the Ministerial Order had exceeded the scope of the delegated authority.

If the statute does not limit the scope of registration, yet an administrative regulation does, it may appear that the regulation restricts individual rights without a statutory basis and is therefore unlawful. At first glance, this reasoning might seem persuasive.

(b) Decision of the Court

The Supreme Court, however, did not adopt this view. It upheld the Ministerial Order as lawful. The Court reasoned that, under the Firearms and Swords Control Act, the Minister was authorized, by way of delegated legislation, to determine which types of swords should be regarded as having artistic or cultural value and thus be eligible for registration. This assessment was intended to rest on expert judgement in the relevant field. Accordingly, the statute was interpreted as granting the Minister discretionary power to decide, from a specialized and technical perspective, what kinds of swords possess artistic or cultural value as works of art in Japan.

In the exercise of this discretion, the Minister determined that only Japanese swords satisfied the requisite criteria, given their distinctive significance within Japan's cultural heritage. Foreign swords were excluded from registration on that basis. The Court found that this determination did not amount to an abuse or excess of discretion.

The ordinance was therefore held not to have exceeded the scope of the delegated authority, but rather to fall within the limits of the statutory delegation.

The judgement was accompanied by a dissenting opinion, which took the view that the provision of the Ministerial Order was unlawful and invalid. According to the dissent, the Firearms and Swords Control Act authorized the Minister only to establish standards of appraisal, not to determine which categories of swords should be eligible for registration. Since the Act itself made no distinction between Japanese and foreign swords, the Ministerial Order exceeded the scope of the delegated authority by categorically excluding foreign swords from registration.

The division of opinion within the bench was narrow: of the five Judges sitting in the petty bench, three formed the majority while two dissented.[70]

[70] For an insightful analysis of the relationship between statutory interpretation and administrative discretion (or judicial deference), contrasted through majority and dissenting opinions, see Narufumi Kadomatsu, 'Denial of "Interpretive Discretion" in Japanese Law: Is It Really Different from Chevron Deference?' (2022) 53 *Journal of Japanese Law* 45–69, 57–61.

(c) Analysis

One may ask whether the Supreme Court's reasoning is persuasive. For those who remain unconvinced, a supplementary rationale—though not articulated by the Court—may help explain the result.

In Japan, the private ownership of weapons, including swords, has never been regarded as a fundamental individual right. This stands in contrast to the United States, where gun ownership is understood as a constitutional entitlement closely linked to property and personal liberty (amend II, United States Constitution). By contrast, Japan has long adopted the opposite stance, maintaining strict limits on private possession of weapons in the interest of public safety.

Against this backdrop, the restriction imposed by Ministerial Order may have been seen by the Court as not amounting to a serious infringement of individual rights. Even though the statute itself did not explicitly prohibit foreign swords, their exclusion by regulation could be justified on the ground that no general right to possess swords exists within the Japanese legal system. Thus, such a restriction was unlikely to be viewed as one requiring explicit statutory foundation.

3.3.4. Other Examples of Delegated Regulations Held Unlawful

In addition, there are several cases in which the Supreme Court has found delegated regulations to be unlawful and invalid. A brief overview of these examples will be given below, grouped according to the factors that appear to have been emphasized by the Court.

(a) The Wording of the Delegating Provision

The judgements discussed here all share a common feature: they determined the meaning of the statutory delegating clause strictly according to its wording, and struck down provisions of delegated regulations that sought to extend that meaning.

(1) *The Driftnet Salmon and Trout Fishing Regulation Case* (1963).[71] The Fishery Act[72] delegated to regulation the power to prescribe penal provisions, including confiscation. It authorized confiscation of property that had been *owned* by the offender. However, the delegated regulation extended the scope of confiscation to property that had been *possessed* by the offender.[73] Since *possession* is a broader concept than *ownership*, the regulation effectively expanded the scope

[71] *Driftnet Salmon and Trout Fishing Regulation Case*, Supreme Court, 24 December 1963, 359 *Hanrei Jihō* 63.
[72] Fishery Act (漁業法), Act No 267 of 1949 <https://www.japaneselawtranslation.go.jp/en/laws/view/3846>.
[73] Driftnet Salmon and Trout Fishing Regulation (さけ・ます流網漁業等取締規則), Ministry of Agriculture and Forestry Order No 52 of 1952. It was abolished in 1963 and has since been replaced by the Ministerial Order on Fisheries Licensing and Regulation (漁業の許可及び取締り等に関する省令) (Ministry of Agriculture and Forestry Order No 5 of 1963).

of criminal sanction beyond that authorized by the statute. The relevant provision of the regulation was therefore held to be unlawful.

(2) *The Moneylending Business Act Enforcement Regulation Case* (2006).[74] The then–Act for Controls in the Money Lending Business[75] required moneylenders, as a condition for the validity of repayments of interest exceeding the statutory ceiling (a scheme since abolished), to deliver to the debtor a written document specifying certain information to identify the loan contract. It delegated authority to Cabinet Office Order to prescribe *additional* matters. The Order,[76] however, permitted a loan contract to be identified solely by contract number *in place of* (not in addition to) the statutorily prescribed information. The Supreme Court held that this went beyond supplementing the statute and instead altered its requirements, thereby exceeding the limits of the delegation.

(3) *The Local Autonomy Act Enforcement Order Case* (2009).[77] This case concerned whether public officials could serve as representatives of recall petitions for local assembly members. The recall procedure consists of two stages: the recall petition and the recall vote. Article 85(1) of the Local Autonomy Act[78] provided that the recall vote, not the petition stage, was to follow the provisions of the Public Offices Election Act,[79] with specific modifications to be prescribed by Cabinet Order. The Order for Enforcement of the Local Autonomy Act[80] modified provisions of the Public Offices Election Act that prohibit public officials from becoming candidates in elections and applied them to the petition stage, thereby prohibiting public officials from serving as petition representatives. The Supreme Court held that this exceeded the statutory delegation because the Order extended the prohibition to the petition stage beyond the recall vote. A dissenting opinion, however, argued that the purpose of ensuring political neutrality justified that extension.

(b) The Purpose of the Delegating Statute

The judgements discussed here reviewed the legality of the delegated regulation not by a strictly literal interpretation of the wording of the delegating

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[74] *Moneylending Business Act Enforcement Regulation Case*, Supreme Court, 13 January 2006, 60(1) *Minshū* 1 <https://www.courts.go.jp/english/Judgments/search/803/>.
[75] Act for Controls in the Money Lending Business (貸金業の規制等に関する法律), Act No 32 of 1983. It has since been retitled the Money Lending Business Act (貸金業法) <https://www.japaneselawtranslation.go.jp/en/laws/view/3224>.
[76] Regulation for Enforcement of the Act for Controls in the Money Lending Business (貸金業の規制等に関する法律施行規則), Ministry of Finance Order No 40 of 1983. It then had the force of a Cabinet Office Order. It has since been retitled the Regulation for the Money Lending Business Act (貸金業法施行規則) <https://www.japaneselawtranslation.go.jp/en/laws/view/3463>, following the renaming of the delegating statute.
[77] *Local Autonomy Act Enforcement Order Case*, Supreme Court [Grand Bench], 18 November 2009, 63(9) *Minshū* 2033<https://www.courts.go.jp/english/Judgments/search/1033/>.
[78] Local Autonomy Act (地方自治法), Act No 67 of 1947.
[79] Public Offices Election Act (公職選挙法), Act No 100 of 1950.
[80] Order for Enforcement of the Local Autonomy Act (地方自治法施行令), Cabinet Order No 16 of 1947.

clause, but rather by a substantive interpretation of the purpose of the delegating statute.

(1) *The Cropland Act Enforcement Order Case* (1971).[81] The post-war land reform aimed to emancipate tenant farmers and establish independent owner-farmers by compulsorily purchasing farmland from non-cultivating landowners and selling it to tenant farmers. Thereafter, the Cropland Act[82] allowed former landowners to repurchase the farmland once that purpose had ceased to exist, and delegated authority to Cabinet Order to define the categories of land subject to resale. The Enforcement Order[83] excluded from these categories land converted to residential use. The Supreme Court held this restriction unlawful, interpreting the underlying purpose of the Act as restoring ownership once the reason for compulsory acquisition had ended. Accordingly, all land no longer used as cropland—including residential lots—should fall within the scope of resale.

(2) *The Child Rearing Allowance Act Enforcement Order Case* (2002).[84] The Child Rearing Allowance Act[85] listed children in single-mother households as beneficiaries, and delegated to Cabinet Order the task of specifying children in 'equivalent situations'. The Enforcement Order[86] included children born out of wedlock to unmarried mothers, but excluded those acknowledged by their fathers. The Supreme Court declared this exclusion unlawful, reasoning that the purpose of the Act was to support children without financial support from their fathers, and that paternal acknowledgment did not necessarily create an expectation of support. By contrast, a dissenting opinion argued that excluding such children lay within the regulatory discretion of the Cabinet and was therefore lawful.

(c) Consideration of Individual Liberty

Any restriction on individual liberty must have a basis in statute. Put differently, if a statute does not authorize to impose such a restriction, a subordinate regulation may not do so; otherwise, the regulation will be unlawful. The *Online Sale of Pharmaceuticals Case* (see above 3.3.2.) shows that liberty is a key factor in reviewing delegated legislation.

The *Prison Act Enforcement Regulation Case* (1991)[87] is another example. The then–Prison Act[88] subjected meetings between pre-trial detainees and

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[81] *Cropland Act Enforcement Order Case*, Supreme Court [Grand Bench], 20 January 1971, 25(1) *Minshū* 1.
[82] Cropland Act (農地法), Act No 229 of 1952<https://www.japaneselawtranslation.go.jp/en/laws/view/4867>.
[83] Order for Enforcement of the Cropland Act (農地法施行令), Cabinet Order No 445 of 1952.
[84] *Child Rearing Allowance Act Enforcement Order Case*, Supreme Court, 31 January 2002, 56(1) *Minshū* 246<https://www.courts.go.jp/english/Judgments/search/593/>.
[85] Child Rearing Allowance Act (児童扶養手当法), Act No 238 of 1961.
[86] Order for Enforcement of the Child Rearing Allowance Act (児童扶養手当法施行令), Cabinet Order No 281 of 1971.
[87] *Prison Act Enforcement Regulation Case*, Supreme Court, 9 July 1991, 45(6) *Minshū* 1049<https://www.courts.go.jp/english/Judgments/search/1542/>.
[88] Prison Act (監獄法), Act No 28 of 1908. It was abolished in 2007 and has since been replaced by the Act on Penal Detention Facilities and Treatment of Inmates and Detainees (刑事収容施設及び被収容者等の処遇に関する法律) (Act No 50 of 2005) <https://www.japaneselawtranslation.go.jp/en/laws/view/2796>.

outsiders to prior permission and delegated authority to Ministerial Order to regulate restrictions on such meetings. The Ministerial Order[89] prohibited, in principle, meetings between pre-trial detainees and children under 14 for the purpose of protecting the children's emotional well-being.

The Supreme Court declared this regulation unlawful. It reasoned that pre-trial detainees retain, in principle, the freedoms of ordinary citizens, and their liberty may be restricted only to the extent strictly necessary to prevent escape, destruction of evidence, or to maintain order within the prison. Because the prohibition was based on a purpose unrelated to these grounds, it exceeded the scope of the statutory delegation.

(d) Discretion of the Regulatory Agency

In cases such as the *Sabre Registration Refusal Case* (see above 3.3.3.), when the regulatory agency is vested with broad discretion, provisions of delegated legislation are often upheld as lawful because of judicial deference. However, such discretion is not without limits. Where the regulatory agency errs in the exercise of its discretion—by acting arbitrarily, unreasonably, or contrary to the purpose of the delegating statute—the resulting regulation may be declared unlawful.

(1) The *Family Register Act Enforcement Regulation Case* (2003).[90] For the given name of a child, the Family Register Act[91] stipulates that only 'characters that are simple and in common use' may be used, and delegates to Ministerial Order the task of enumerating the specific characters permitted.[92] The Ministerial Order[93] did not include the character 曽 (so). The Supreme Court held that this character qualified as simple and commonly used and therefore found its omission in the Ministerial Order unlawful. The Court showed no deference to the regulatory agency in this case, seemingly considering it evident by social convention that the character is neither obscure nor unusual.

(2) The *Public Assistance Standards Revisions Cases* (2025).[94] The Public Assistance Standards, established by the Minister of Health, Labour and Welfare by public notice, are regarded as a form of delegated legislation under Article 8 of

[89] Regulation for Enforcement of the Prison Act (監獄法施行規則), former Ministry of Justice (pre–1948) Order No 18 of 1908. It then had the force of a current Ministry of Justice Order. It was abolished with the abolition of the Prison Act.

[90] *Family Register Act Enforcement Regulation Case*, Supreme Court, 25 December 2003, 57(11) *Minshū* 2562<https://www.courts.go.jp/english/Judgments/search/673/>.

[91] Family Register Act (戸籍法), Act No 224 of 1947<https://www.japaneselawtranslation.go.jp/en/laws/view/4620>.

[92] Japanese writing employs *hiragana* and *katakana* syllabaries of about fifty characters each, together with innumerable *kanji* (characters originating from Chinese). The use of excessively obscure or eccentric *kanji* in personal names may cause serious inconvenience in social life.

[93] Regulation for Enforcement of the Family Register Act (戸籍法施行規則), former Ministry of Justice (pre–1948) Order No 94 of 1947<https://www.japaneselawtranslation.go.jp/en/laws/view/4189>. It has the force of a current Ministry of Justice Order.

[94] *Public Assistance Standards Revisions Cases*, Supreme Court, 27 June 2025, 2023 (Gyō-Hi) 397; Supreme Court, 27 June 2025, 2024 (Gyō-Hi) 170.

the Public Assistance Act[95] (see above 2.2.1.(d)(5)). The Supreme Court has ruled that, while the Minister has broad technical discretion in determining the standards, judicial review extends to whether there are flaws or omissions in the administrative judgement-making process.[96] Applying this framework, the Court found unlawful the 2013–2015 revisions, which lowered benefit levels to reflect deflation triggered by the 2009 global financial crisis. The Court reasoned that the revisions relied on price data rather than consumption data, contrary to previous practice, but no expert consultation was sought, nor was a rational explanation grounded in professional knowledge provided. In dissent, a Judge further argued that the adjustment mechanism designed to correct distortions among beneficiary households was also unlawful, as only half of the figures recommended by the expert panel were reflected without adequate justification.

(e) Consideration of Multiple Factors

In recent years, the Supreme Court has begun to review the legality of delegated legislation by combining multiple considerations mentioned above. The *Online Sale of Pharmaceuticals Case* marked the beginning of this trend.

A subsequent example is the Furusato Nōzei *Case* (2020).[97] To participate in the *Furusato Nōzei* scheme,[98] a municipality must be designated by the Minister of Internal Affairs and Communications. Acting under a statutory delegation in the Local Tax Act,[99] the Minister established 'eligibility standards' by public notice which excluded from designation municipalities that had previously engaged in excessive solicitation of donations, especially by offering extravagant return gifts. The Supreme Court struck down these standards as unlawful. The Court examined the following factors: (i) the wording of the delegating statute, (ii) the scope of ministerial discretion, (iii) the legislative history and purpose of the statute, and (iv) the degree of disadvantage imposed on municipalities. On this basis, it held that the delegation could not reasonably be interpreted as authorizing the Minister to deny designation by reference to a municipality's past conduct.

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[95] See above n 43.

[96] This framework was first established in the *Old-Age Additional Benefits Cases* (Supreme Court, 28 February 2012, 66(3) *Minshū* 1240<https://www.courts.go.jp/english/Judgments/search/1150/>; Supreme Court, 2 April 2012, 66(6) *Minshū* 2367<https://www.courts.go.jp/english/Judgments/search/1157/>). In these cases, the issue was the legality of revisions abolishing additional benefits previously granted to beneficiaries aged 70 and over. The Supreme Court upheld the revisions as lawful.

[97] Furusato Nōzei *Case*, Supreme Court, 30 June 2020, 74(4) *Minshū* 800<https://www.courts.go.jp/english/Judgments/search/1770/>.

[98] *Furusato Nōzei* (Hometown Tax Donation) is a scheme under which taxpayers may make donations to a municipality of their choice—including one other than their place of residence—and receive deductions from their income and resident taxes, as well as return gifts provided by the recipient municipality. Although the scheme has faced strong criticism as a distortion introduced under political pressure, it has nevertheless been widely used, and intense competition among municipalities in offering lavish return gifts has developed into a social concern.

[99] Local Tax Act (地方税法), Act No 226 of 1950.

4. Reservation of Statute

4.1. Introduction

Another dimension of the Principle of Legality is what is commonly referred to in Japanese law as the *reservation of statute* (法律の留保). This concept requires that certain types of administrative action may be undertaken only where they have a basis in statute; put differently, such action is 'reserved to the legislature'.

The term is a direct translation of the German concept of the *Vorbehalt des Gesetzes*. For this reason, the English expression 'reservation of statute' may sound somewhat awkward or unfamiliar to native speakers.

Nevertheless, there is no exact equivalent for this expression either in ordinary English usage or in the legal terminology of the common law. The notion of *statutory authorization* comes close, but *reservation of statute* implies more than the mere existence of statutory authority; it signifies that administrative action may not be taken in the absence of such authority. For this reason, this article retains the literal translation 'reservation of statute'.

4.2. Organizational Basis and Substantive Basis

Every Ministry is established by statute, which defines its duties and specifies the affairs falling within its jurisdiction (National Government Organization Act, art 4). A Ministry may not act outside the scope of the duties and affairs thus assigned to it. In this sense, all administrative activity rests upon a statutory foundation. However, in such cases the statutory basis derives merely from the statute establishing the administrative body—that is, the **organizational** or founding statute.

By contrast, when reference is made to a statutory basis in the context of the reservation of statute, what is required is not merely an organizational basis, but a **substantive** one. In other words, the statutory basis refers to statutory authorization for exercising power over private persons as the objects of administrative action. The relevant statute must therefore expressly authorize the particular type of administrative action in question, not merely establish the agency that performs it.

For example, the Act for Establishment of the Ministry of Land, Infrastructure, Transport and Tourism[100] lists, among the Ministry's functions, 'matters relating to the use and expropriation of land' (art 4(1)(vi)). However, as this is merely an organizational provision, it does not in itself authorize the compulsory expropriation of private land. In order for expropriation to be carried out, there must be a substantive statute that specifies, vis-à-vis the landowner, the competent agency, the conditions for expropriation, and the relevant procedures. In Japan, these matters are set out in the Expropriation of Land Act.[101]

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[100] Act for Establishment of the Ministry of Land, Infrastructure, Transport and Tourism (国土交通省設置法), Act No 100 of 1999.

[101] See above n 34.

4.3. Principle of Reservation for Adverse Action (Adverse Principle)

There is broad agreement that a substantive statutory basis is required, at a minimum, for a particular category of administrative action: **adverse administrative action**. This term refers to measures by which an administrative agency imposes obligations upon private persons or restricts their rights—that is, any governmental act that places individuals at a disadvantage.

Under this principle, the government may not, on its own authority, impose duties or curtail rights; such action must be explicitly authorized by statute. This represents the minimal core of the reservation of statute and is commonly referred to as the 'principle of reservation for adverse action'. This expression is likewise an unnatural literal translation. For short, the term 'Adverse Principle' will also be used throughout this article.

The Adverse Principle is not expressly provided in the text of the Japanese Constitution. Nevertheless, its underlying logic is reflected in a number of constitutional provisions.

A first example is Article 84, which embodies the principle of statutory taxation, requiring that the imposition and collection of taxes be founded upon statute. Since taxation constitutes a form of administrative action, the principle of statutory taxation may be regarded as a specific manifestation of the Adverse Principle in the fiscal context. This understanding has also been affirmed by the Supreme Court in 2006.[102]

A second example is the principle of legality in criminal law, encapsulated in the Latin maxim *nullum crimen, nulla poena sine lege* (no crime and no punishment without law). Although this principle does not directly regulate administrative activity, it rests on the same normative premise as the Adverse Principle—namely, that the exercise of coercive state power to the detriment of individuals must be grounded in statute. This criminal principle is understood to be secured by Article 31 of the Constitution.

4.4. Exceptions to and Limits of the Adverse Principle

4.4.1. Exceptions for Actions Based on Consent

An important exception to the Adverse Principle arises where an adverse measure is taken with the consent of the individual concerned. In such cases, no statutory basis is required, even if the outcome is disadvantageous to that individual.

(1) **Contracts.** Consider the situation where the government seeks land for a road construction project. If the land is expropriated without the owner's consent, this constitutes adverse administrative action and therefore requires statutory authorization. Accordingly, compulsory expropriation is governed by the

[102] *Asahikawa National Health Insurance Premium Case*, Supreme Court [Grand Bench], 1 March 2006, 60(2) *Minshū* 587<https://www.courts.go.jp/english/Judgments/search/825/>.

Expropriation of Land Act, which provides the necessary legal basis (see above 4.2.).

However, if the government negotiates with the landowner and acquires the property through a mutually agreed sale contract—just as in an ordinary private transaction—the transfer is voluntary rather than coercive. In that case, no special statutory basis is needed to authorize the acquisition.

(2) **Administrative Guidance**. Another type is to seek the voluntary cooperation of individuals. An illustration may be drawn from the field of building regulation.

An order requiring the demolition of an unlawful structure imposes a legal obligation on the owner without consent and therefore constitutes adverse administrative action. Such a measure accordingly demands a statutory authorization, which in this instance is provided by the Building Standards Act.[103]

By contrast, if the agency merely advises the owner—for example, by recommending that the structure be removed—and the owner voluntarily complies, the measure does not amount to a compulsory order. In such circumstances, the administrative agency acts through guidance rather than coercion, and the response of the individual remains voluntary. No statutory authorization is therefore required.

Such non-binding guidance, recommendations, and advice issued by administrative agencies are collectively referred to as *gyōsei-shidō* (行政指導), or administrative guidance. It constitutes a major theme in Japanese administrative law. A detailed examination of administrative guidance will be provided in Part II.

4.4.2. Limits for Beneficiary Measures

(1) Leaving aside voluntary administrative measures, attention must next be directed to beneficiary administrative actions—that is, measures which confer benefits upon individuals rather than impose burdens upon them. A frequently cited example is the granting of subsidies.

A subsidy consists in the provision of public funds to support the activities of individuals or corporations—for instance, to facilitate business creation or the transition to clean energy. Since the recipient is neither compelled to act nor subjected to any restriction of rights, the granting of subsidies does not constitute adverse administrative action. Accordingly, such measures fall outside the scope of the Adverse Principle.

It does not follow, however, that subsidies may be distributed at will. Budgetary resources must first be allocated, and those allocations must in turn be approved by the parliament. Yet this does not mean that a specific statutory provision is required to authorize each subsidy scheme. In administrative practice, it is widely accepted that the reservation of statute does not apply to the granting

[103] Building Standards Act (建築基準法), Act No 201 of 1950<https://www.japaneselawtranslation.go.jp/en/laws/view/4024>.

of subsidies, and in fact most subsidies are distributed without any explicit statutory basis.[104]

(2) There are, however, influential academic arguments that criticize the prevailing practice. Subsidies do not merely provide financial assistance to individuals or businesses; in most cases, they function as instruments for achieving **specific policy objectives**. For example, when the government seeks to induce structural changes—such as encouraging a shift from coal to clean energy—it may allocate substantial sums to particular industries in order to steer the national economy in a desired direction.

On this basis, it has been argued that subsidies of such magnitude ought to require a statutory foundation, so as to ensure democratic control over policy choices.[105] In other words, where the government commits significant public funds in support of particular industries or sectors, the decision should not be left solely to administrative discretion. Rather, explicit authorization by statute—enacted through parliamentary deliberation—should be required, thereby ensuring that the expenditure of public resources reflects the will of the electorate.

A further line of argument focuses on the impact of subsidies on **market competition**. If the government grants financial support only to certain firms within a particular industry—for example, subsidizing a limited number of solar panel manufacturers while excluding others—it affords those recipients a competitive advantage. They may lower prices or expand investment in ways that competitors cannot match.

Accordingly, it can be argued that where subsidies have such differential effects on market competition, a clear statutory framework should be required to govern their allocation. This would serve to secure transparency, equality, and fairness, and render governmental decisions subject to public justification and review.[106]

Although these views are intellectually compelling, they have not yet produced any substantial shift in administrative practice.

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[104] For subsidies granted by national administrative agencies, the Act on Regulation of Execution of Budget Pertaining to Subsidies (補助金等に係る予算の執行の適正化に関する法律) (Act No 179 of 1955) provides the statutory framework for procedural matters. However, this Act does not itself establish the substantive legal basis for individual subsidy programmes.

[105] Some scholars advancing this view draw on the German doctrine of *Wesentlichkeitstheorie* (essential matters doctrine), according to which fundamental political or policy decisions must be made by the legislature through statute, even where no adverse action is involved. While this doctrine has gained support among many Japanese administrative and constitutional law scholars—and has even been followed in practice by certain local governments, such as Yokosuka City, Kanagawa—it has not, to date, been adopted in national legislative or administrative practice.

[106] Discriminatory grants of subsidies can be controlled by the principle of equality even in the absence of statutory grounds. However, without a statutory framework, the administrative agency responsible for distribution will tend to be afforded broad discretion, making effective judicial or democratic control difficult. A telling example is the COVID-19 relief subsidy programme for small and medium-sized enterprises (*jizokuka kyūfukin* 持続化給付金), from which sex-related businesses were excluded not by statute but under non-legal administrative guidelines. The Supreme Court nevertheless held this exclusion lawful, finding no violation of equality under Article 14(1) of the Constitution (with four male Judges forming the majority and the sole female Judge dissenting). Jizokuka Kyūfukin *Case*, Supreme Court, 16 June 2025, 2024 (Gyō-Tsu) 21.

4.5. Case Law: The *Strong Life Case*

(1) The Adverse Principle can also be observed in judicial reasoning. Indeed, elements of the principle were already evident in some of the cases discussed earlier in the context of delegated legislation. In the *Online Sale of Pharmaceuticals Case* (see above 3.3.2.), for example, the Supreme Court's reasoning rested on the premise that the freedom to conduct business may not be restricted without a statutory authorization—an application of the Adverse Principle in its most basic form. Conversely, in the *Sabre Registration Refusal Case* (see above 3.3.3.), the absence of any constitutional right to possess arms in Japan appears to have led the Court to consider that a strict application of the principle was unnecessary in this context.

An application of the Adverse Principle to an individual administrative decision can be found in the *Strong Life Case* (1981).[107]

(2) **Facts**. Strong Life was the brand name of a type of tear-gas spray manufactured in then–West Germany. A Japanese company sought to import the product into Japan and sell it as a self-defence device.

The active ingredients of Strong Life (bromoacetone) fell within the scope of deleterious substances regulated under the Poisonous and Deleterious Substances Control Act.[108] Under that Act (art 4), any person wishing to import and distribute such substances must obtain approval in the form of registration as an importer from the then–Minister of Health and Welfare. The company duly applied for such registration.

The Minister, however, rejected the application. The stated reason for refusal was that, although Strong Life was marketed as a self-defence product, it could easily be misused for criminal purposes and therefore posed a risk to public safety.

The company brought an action before the courts, claiming that the refusal was unlawful because it lacked statutory basis. This argument rested on the wording of the Act. The Poisonous and Deleterious Substances Control Act did not empower the Minister to refuse registration on the ground that the product might be dangerous or misused. Rather, the statutory requirements for registration concerned only the adequacy of the applicant's storage facilities, which had to meet specified safety standards—for example, prevention of leakage or theft (art 5, and the Enforcement Regulation of the Act). In other words, so long as the substance could be stored securely, the Minister was not authorized to assess its potential use or social risk when deciding whether to grant registration.

(3) **Decision of the Court**. The Supreme Court examined the wording of the Act and concluded that the Minister was not authorized to refuse registration merely on the ground that the product might be misused. It therefore held the refusal to be unlawful.

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[107] *Strong Life Case*, Supreme Court, 26 February 1981, 35(1) *Minshū* 117.

[108] Poisonous and Deleterious Substances Control Act (毒物及び劇物取締法), Act No 303 of 1950<https://www.japaneselawtranslation.go.jp/en/laws/view/3387>.

Although the Court did not expressly invoke the Adverse Principle, its reasoning likely reflects it. Refusal of registration constituted an interference with the company's freedom to conduct business, and such an adverse measure requires a clear statutory basis. Since no such basis could be found in, or reasonably inferred from, the statute, the refusal was deemed unjustified.

Article 1 of the Poisonous and Deleterious Substances Control Act states that the purpose of the Act is to regulate relevant substances 'from the viewpoint of *health and hygiene*' (emphasis added). Relying on this provision, the Minister argued that refusal of registration on the ground of potential risks for the public health was permissible. The Supreme Court rejected this argument. Article 1 merely sets out the purpose of the entire Act; it does not confer regulatory powers or specify the conditions for registration.[109] Accordingly, it could not serve as a legal basis for refusing the application.

The Supreme Court acknowledged that there was indeed a need to regulate dangerous uses of deleterious substances. However, it observed that such regulation could be achieved under other statutes, and that it was therefore unnecessary to rely on the Poisonous and Deleterious Substances Control Act for that purpose. Although the Court did not expressly state so, in cases of urgent need, the authorities could resort to non-binding administrative guidance (see above 4.4.1.(2)), requesting voluntary suspension of sales or product recalls from businesses.

5. Local Ordinances

5.1. Basic Structure of the Local Government System[110]

Japan is a unitary, rather than a federal, state. Nevertheless, a series of decentralization reforms undertaken since the late 20th century has, at least in principle, increased the autonomy of local governments.

(1) **Two-tier System.** The system is organized on two levels. At the first level, the country is divided into 47 prefectures (*to-dō-fu-ken* 都道府県). Each prefecture is then subdivided into municipalities, comprising cities, towns, and villages (*shi-chō-son* 市町村). As of October 2024, there are more than 1,700 municipalities nationwide.

The central area of Tokyo constitutes an anomaly: it is divided, not into municipalities in the ordinary sense, but into 23 special wards. However, these wards are treated in law as equivalent to cities.

Although prefectures and municipalities differ in scale and function, they are legally equal and mutually independent. Municipalities are not subordinate to

[109] For a discussion of this point with reference to the Pharmaceuticals and Medical Devices Act, see Okitsu (n 28) 716.

[110] For an overview of the local government system in Japan, see Satoru Ohsugi, 'Local Governments and Public Administration' in Agata and others (eds) (n 3) ch 7.

prefectures. Both prefectures and municipalities possess legislative competence; each may enact local ordinances.

(2) **Dual Representation System**. The institutional structure of local government is based on a dual representation system, meaning that both the local assembly and the chief executive—namely, the governor of prefectures and the mayor of municipalities—are directly elected by residents. Each local government thus has two representative organs.

This contrasts with the national government, which operates under a parliamentary system. At the national level, only members of the Diet are directly elected, and the Prime Minister is chosen not by the electorate but by the Diet. In this respect, the Diet is the sole representative organ of the State. By contrast, the local system—with both legislative and executive branches elected separately—resembles a presidential model in structural terms.

5.2. Local Ordinances and the Constitution

5.2.1. Constitutional Foundation for Local Ordinances

The power to enact local ordinances has its constitutional foundation in Article 94 of the Constitution, which provides: 'Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.'[111]

The key question concerns the meaning of the phrase 'within law'. It does not require that an ordinance be issued pursuant to a specific delegation from a national statute although there are local ordinances that are enacted based on statutory delegation (see below 5.3.2.). Rather, it means only that a local ordinance must not contradict national legislation.

This marks a crucial distinction from delegated legislation. In the case of administrative regulations, a specific statutory provision is required to delegate rule-making authority to the administrative agency concerned. By contrast, local governments may enact ordinances even in the absence of an explicit statutory authorization, provided that the ordinance does not conflict with any existing statute. In this respect, local ordinances constitute independent sources of law based on a direct constitutional foundation.

5.2.2. Constitutional Limits on Local Ordinances

Under the Constitution, certain matters must be regulated not by local ordinances but by statutes enacted by the national legislature. These include provisions concerning the organs of the State—such as the Diet, the Cabinet, and the courts—as well as matters that require nationwide uniformity, such as nationality (art 10) and state liability (art 17).

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[111] The term 'regulations' in this English translation corresponds to the Japanese term *jōrei* (条例), which in this article is translated as 'local ordinances'. Local public entities are synonymous with local governments.

Furthermore, in earlier scholarship, it was sometimes argued that where a constitutional provision requires a matter to be regulated by 'law', the term 'law' should be interpreted as referring exclusively to Diet-enacted statutes, thereby excluding prescription by local ordinances. This category included Article 29 on property rights, Article 31 on criminal penalties, and Article 84 on taxation.

Today, however, the prevailing view—followed also in practice—is that regulation by local ordinance is permissible in such cases. The reasoning is that ordinances possess democratic legitimacy comparable to that of national statutes, as they are adopted by resolution of local assemblies elected by the residents. With respect to criminal penalties, Article 14(3) of the Local Autonomy Act explicitly authorizes ordinances to prescribe penal provisions, while setting upper limits (custodial sentences of up to 2 years, fines of up to one million yen, detention, minor fines, confiscation, and administrative fines of up to 50,000 yen). As for taxation, the Supreme Court has recognized that local governments possess a constitutionally guaranteed power to levy taxes.[112]

5.3. The Relationship Between Local Ordinances and Statutes

5.3.1. Classification

Local governments may enact ordinances even in the absence of a specific statutory delegation. However, in practice, a considerable number of local ordinances are adopted pursuant to explicit authorization contained in national legislation.

For analytical purposes, local ordinances are often classified into two categories:

- **Delegated local ordinances**, which are enacted on the basis of a statutory delegation. In such cases, the statute establishes the general framework and entrusts the determination of detailed rules to the local government.
- **Independent local ordinances**, which are enacted without statutory delegation and rest solely on the local government's constitutional authority under Article 94.

This distinction clarifies the different modes through which local governments exercise their legislative competence.

5.3.2. Delegated Ordinances

Delegated ordinances are commonly used where national legislation provides a general framework but leaves detailed regulatory standards to be determined by local governments in light of regional conditions. An example is found in the Public Bathhouses Act.[113]

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[112] *Kanagawa Prefecture Temporary Special Corporate Tax Case*, Supreme Court, 21 March 2013, 67(3) *Minshū* 438<https://www.courts.go.jp/english/Judgments/search/1190/>.

[113] Public Bathhouses Act (公衆浴場法), Act No 139 of 1948.

Public bathhouses (*sentō* 銭湯) were historically widespread in Japan at a time when most households lacked private bathing facilities. Although their number has declined with the near-universal spread of household bathtubs, some continue to operate today, often as leisure facilities. Their operation is regulated under the Public Bathhouses Act.

The Act requires any person wishing to operate a public bathhouse to obtain a permit from the prefectural governor. One of the statutory requirements for obtaining such a permit is that the location of the bathhouse be 'appropriate', in the sense that it does not disrupt the proper distribution of facilities in the area. However, the Act does not define the criteria for determining appropriateness. Instead, it delegates the task of specifying such standards to prefectural ordinances.

Consequently, each prefecture has enacted its own delegated ordinance under the Act. Most ordinances require that a new bathhouse be located at a certain distance—for example, 100 or 200 metres—away from an existing one.[114] This system reflects the view that the suitability of location should be determined in accordance with local factors such as urban structure, population density, and public health needs.

5.3.3. Independent Ordinances

Independent ordinances are enacted by local governments on the basis of their own constitutional authority, even in matters not governed by national legislation. A well-known example is an ordinance prohibiting smoking on the street, which many municipalities have enacted. This ordinance was not founded on any statutory delegation; there is no national law in Japan prohibiting smoking on public streets.[115]

A municipality adopts such an ordinance in response to local concerns associated with unregulated street smoking, including health risks from passive smoking, littering caused by discarded cigarette butts, and safety hazards arising from smoking while walking, particularly the risk of burns to children. The ordinance thus functioned as an independent policy measure designed to protect public welfare within the municipality, irrespective of national policy.

In relation to the Adverse Principle (see above 4.3.), independent ordinances substitute for statutes. Administrative agencies of local governments

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[114] The Supreme Court has upheld the constitutionality of such distance regulations on public bathhouses. In its earlier judgement, it justified the restriction on the ground of preventing deterioration of sanitary conditions due to excessive competition (Supreme Court [Grand Bench], 26 January 1955, 9(1) *Keishū* 89<https://www.courts.go.jp/english/Judgments/search/1989/>). In a later decision, however, the Court also began to emphasize the protection of existing bathhouse operators (Supreme Court, 20 January 1989, 43(1) *Keishū* 1<https://www.courts.go.jp/english/Judgments/search/1778/>).

[115] Since 2020, the Health Promotion Act (健康増進法) (Act No 103 of 2002) <https://www.japaneselawtranslation.go.jp/en/laws/view/3727>has prohibited smoking indoors at public facilities such as schools, hospitals, offices, restaurants, and government buildings for the purpose of preventing passive smoking. However, smoking on the street is not regulated. Some have pointed out that the ban on indoor smoking under the Act has led to an increase in smoking on the streets.

may impose obligations on individuals or restrict their rights on the basis of an ordinance. This is confirmed by Article 14(2) of the Local Autonomy Act. Ordinances possess a degree of democratic legitimacy comparable to that of statutes, insofar as they are enacted by resolution of the local assembly, whose members are elected as representatives of the residents.

5.4. Judicial Review of Local Ordinances

5.4.1. Introduction

The framework for judicial review of local ordinances varies depending on the type of ordinance in question.

For delegated ordinances, the applicable standard is essentially the same as that applied to delegated legislation at the national level. An ordinance will be deemed unlawful where its provisions deviate from the purpose of the statutory delegation or exceed the scope thereof.

However, the very fact that the legislature has delegated rule-making power to local ordinances rather than to national administrative regulations suggests an intention to respect the autonomy of local governments and to allow adaptation to local circumstances. On this view, some authors argue that the discretion accorded to local governments should be regarded as broader than that granted to national administrative agencies, and that judicial review should accordingly be more deferential.

The following discussion will focus on independent local ordinances.

5.4.2. Infringement on Fundamental Rights

If a local ordinance infringes a fundamental right or freedom guaranteed by the Constitution, it will be held unconstitutional and thus invalid. There are cases in which ordinances were challenged as unconstitutional.

Compared with national statutes, local ordinances often suffer from inferior legislative drafting. Their provisions may lack sufficient refinement, leading to frequent arguments that the scope of regulation is too vague or excessively broad. Courts sometimes respond to such challenges by adopting a constitutional saving construction (see above 2.2.1.(a)(2)(iv)) of the ordinance so as to preserve its constitutionality.[116]

However, insofar as the framework of judicial review is the same as that applied to statutes, no further discussion will be undertaken in this article.

5.4.3. Conflict with Statutes

[116] Cases in which the Supreme Court upheld the constitutionality of a local ordinance through a constitutional saving construction are the following. *Fukuoka Prefecture Juvenile Protection Ordinance Case*, Supreme Court [Grand Bench], 23 October 1985, 39(6) *Keishū* 413<https://www.courts.go.jp/english/Judgments/search/1799/>; *Hiroshima City Anti*-Bōsōzoku *(Motorcycle Gang) Ordinance Case*, Supreme Court, 18 September 2007, 61(6) *Keishū* 601<https://www.courts.go.jp/english/Judgments/search/911/>.

(a) The Framework

When is an independent ordinance rendered invalid for being inconsistent with a statute? The leading case is the *Tokushima City Public Safety Ordinance Case* (1975),[117] which established the following analytical framework:

I. **Where no statutory provision exists concerning the matter regulated by the ordinance**, the intention behind the absence of legislation must be examined:

(1) If the absence of statutory regulation is to be understood as reflecting an intention to leave the matter entirely to individual freedom without any regulation, the ordinance is unlawful.

(2) If it is to be understood as reflecting an intention to leave the matter to the autonomous policy of local governments, the ordinance is lawful.

II. **Where a statutory provision exists that overlaps with the matter regulated by the ordinance**, the respective purposes of the statute and the ordinance must be compared:

(1) If the ordinance pursues a purpose different from that of the statute and does not undermine the purpose or effect of the statute, it is lawful.

(2) If the ordinance shares the same purpose as the statute, the purpose of the statute must be examined:

(i) If the purpose of the statute is understood to allow regulation adapted to local circumstances, the ordinance is lawful.

(ii) If the purpose of the statute is understood to require uniform regulation of the same content nationwide, the ordinance is unlawful.

(b) Applications

(1) Applying this framework, the Supreme Court examined the legality of the **Tokushima City Public Safety Ordinance** (徳島市公安条例),[118] which regulated protest marches. Although the ordinance overlapped in purpose with the Road Traffic Act[119]—which likewise regulates demonstrations conducted on public roads—the Court held that the ordinance possessed its own distinctive significance, effect, and rationality. On that basis, the Court upheld its validity.

(2) Although there is no precedent, a **street smoking ban ordinance** (see above 5.3.3.) is considered lawful. At present, there is no national statute regulating smoking on public streets; this absence cannot reasonably be interpreted as reflecting an intention to leave street smoking entirely unregulated or to guarantee individuals a freedom to smoke in public spaces.

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[117] *Tokushima City Public Safety Ordinance Case*, Supreme Court [Grand Bench], 10 September 1975, 29(8) *Keishū* 489<https://www.courts.go.jp/english/Judgments/search/44/>.

[118] The full title is the Tokushima City Ordinance on Group Marches and Demonstrations (徳島市集団行進及び集団示威運動に関する条例) (Tokushima City Ordinance No 3 of 1952).

[119] Road Traffic Act (道路交通法), Act No 105 of 1960<https://www.japaneselawtranslation.go.jp/en/laws/view/2962>.

(3) At the lower court level, disputes have arisen over ordinances enacted by municipalities to regulate certain types of businesses—such as **pachinko parlours** or so-called '**love hotels**'—on the ground that they disrupt local public morals. However, such businesses are already regulated by national legislation, including the Act on Control and Improvement of Amusement Business[120] in respect of business operations, the Building Standards Act in relation to land use, and, in the case of love hotels, the Hotel Business Act.[121] Accordingly, the issue arises as to whether a municipal ordinance may impose additional restrictions without contravening these statutes. Some ordinances have been upheld,[122] while others have been struck down.[123]

(4) There is also a case in which an ordinance imposing a stricter level of regulation than national law has been struck down by applying the **principle of proportionality** (above 2.2.3.(b)(3))—specifically, by examining both the necessity of the regulation and the appropriateness of the means employed.[124]

(c) Other Supreme Court Cases

There are other Supreme Court cases addressing the relationship between local ordinances and national statutes, in which the above framework was not expressly employed.

(1) *Kochi City Ordinary River Management Ordinance Case* (1978).[125] Designation of land as part of a river management facility (such as embankments or revetments) restricts its use. The River Act (art 3(2)),[126] which applies to large rivers, therefore requires the consent of landowners before such designation. By contrast, the Kochi City Ordinary River Management Ordinance,[127] applying to smaller rivers outside the scope of the Act, imposed no such consent requirement. The Supreme Court held that this omission ran counter to the underlying purpose of the River Act of protecting property rights. It then construed the ordinance in conformity with the Act, holding that landowner consent was likewise required under the ordinance.

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[120] Act on Control and Improvement of Amusement Business (風俗営業等の規制及び業務の適正化等に関する法律), Act No 122 of 1948<https://www.japaneselawtranslation.go.jp/en/laws/view/4234>.
[121] Hotel Business Act（旅館業法), Act No 138 of 1948<https://www.japaneselawtranslation.go.jp/en/laws/view/3272>.
[122] *Tōgō Town Love Hotel Regulation Ordinance Case*, Nagoya District Court, 26 May 2005, 1275 *Hanrei Taimuzu* 144.
[123] *Takarazuka City Pachinko Parlour Regulation Ordinance Case*, Kobe District Court, 28 April 1997, 48(4) *Gyōshū* 293; Osaka High Court, 2 June 1998, 986 *Hanrei Taimuzu* 197. However, the Supreme Court ultimately dismissed the case on entirely different procedural grounds. Supreme Court, 9 July 2002, 56(6) *Minshū* 1134 <https://www.courts.go.jp/english/Judgments/search/617/>.
[124] *Iimori Town Hotel Construction Regulation Ordinance Case*, Fukuoka High Court, 7 March 1983, 34(3) *Gyōshū* 394.
[125] *Kochi City Ordinary River Management Ordinance Case*, Supreme Court, 21 December 1978, 32(9) *Minshū* 1723.
[126] River Act (河川法), Act No 167 of 1964.
[127] Kochi City Ordinary River Management Ordinance (高知市普通河川等管理条例), Kochi City Ordinance No 1 of 1967. It was abolished in 2005.

(2) *Kanagawa Prefecture Temporary Special Corporate Tax Case* (2013).[128] The case concerned the treatment of loss carry-forward deductions (欠損金の繰越控除) in corporate taxation. A loss carry-forward allows a corporation to offset profits in subsequent years with losses incurred in previous years, thereby reducing its tax burden. This scheme was expressly authorized under the Local Tax Act.[129] Kanagawa Prefecture enacted an ordinance that imposed tax directly on the amount corresponding to losses that would be deducted under the loss carry-forward—that is, on an amount which would otherwise remain non-taxable. The Supreme Court held the ordinance invalid, ruling that the loss carry-forward constituted a mandatory rule under the Local Tax Act and could not be overridden by local ordinance.

[128] *Kanagawa Prefecture Temporary Special Corporate Tax Case*, see above n 112.
[129] Local Tax Act (地方税法), Act No 226 of 1950.