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CDAMS Discussion Paper
04/26E
November 2004

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REFORM OF JUDICIAL REVIEW IN JAPAN: AN AMERICAN PERSPECTIVE

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September 13, 2004

It is a genuine pleasure to be with you today. Your invitation to speak here is particularly gratifying in light of Kobe University's existing affiliation with my home institution, Washington University School of Law. Our student exchange program has not reached ambitious levels in the past, but I am hopeful that the ongoing evolution in your school's institutional structure will promote and facilitate many exchanges in the future.

My task in these brief remarks is to respond to Professor Takehisa Nakagawa's paper, "Judicial Review in the US and Japan: Implications of the 2004 Amendment of Japanese Administrative Case Litigation Act." The amendments mentioned in his title are designed to move Japan towards a more expansive judicial review regime C one that more closely resembles the American model. As I will explain, U.S. law does indeed have a more robust judicial review system, but it also contains significant limitations and boundaries. In that light, I can perhaps usefully predict, from an American perspective, some of the issues that may arise under your new system. Obviously, however, I do not mean to suggest that Japan will or should necessarily strike a balance among competing considerations in the same way that the U.S. system has.

I will first comment on three liberalizing developments in the 2004 amendments as described by Professor Nakagawa. Then I will make some remarks about some of the more theoretical aspects of Professor Nakagawa's paper.

I. RIPENESS

First, Professor Nakagawa says, the new law eliminates the "priority rule of nullification suits." I take it that this means that a challenger will now be able to seek judicial review without always having to wait until a "disposition" occurs in his or her particular case. It will now be possible, at least some of the time, to challenge a regulation as soon as it is promulgated.

Most U.S. lawyers would find such a system of "pre-enforcement review" to be familiar and attractive. Our Supreme Court took essentially this path almost forty years ago in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Such a system has a number of advantages. First, it enables a business to avoid making what may be huge capital investments to comply with a rule that might turn out to be invalid. Indeed, the agency might not get around to bringing an enforcement action for a long time. Moreover, a direct challenge to a rule may be the only opportunity for judicial review available to beneficiary groups that want to argue that the rule is not strong enough. Such groups are not in a position to wait for an enforcement action, because they usually will not be the kind of entities against whom the statute could ever be enforced.

Finally, pre-enforcement review is even beneficial in some ways to the agency itself. At least the agency will find out fairly soon whether its rule can withstand judicial review. When a court strikes down a rule that it has been in effect for many years, the judicial decision can be quite disruptive to the regulatory program.

Pre-enforcement review also has disadvantages. It has been argued that such review allows courts to interfere too readily with the orderly implementation of new rules. Many of these rules, it is pointed out, have been designed to protect the public from dangers in such areas as pharmaceuticals regulation (as in *Abbott Laboratories* itself), worker safety, and pollution control. This is a fair argument, but U.S. lawyers have generally concluded that the benefits of pre-enforcement review justify these costs.

Nevertheless, American law imposes some very real limitations in order to prevent premature judicial review. The "exhaustion of administrative remedies" principle provides that, generally speaking, a party to an enforcement action cannot seek judicial review by interrupting a pending adjudication, such as by filing a court action as soon as the agency has filed an enforcement action. Instead, the party normally must wait until the agency has issued a final order in the case. Otherwise, private litigants could severely disrupt the orderly development of an agency's enforcement proceedings, by filing court cases that would cause postponement of activity at the agency level.

Even more relevant to this discussion is the fact that *Abbott Laboratories* itself does not allow pre-enforcement review of rules under all circumstances. Instead, the Supreme Court created what is known as a "ripeness" test. The court is to determine on a discretionary basis whether to allow pre-enforcement review, after taking account of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Let me explain the thinking behind those mysterious phrases.

Without some limitations, regulated companies would frequently be able to seek judicial review at a very early stage of an agency's consideration of an issue. They would not need to wait until a rule had been formally issued. They could, for example, regularly seek review of positions stated in guidance documents. I have even seen cases in which a plaintiff seeks review after an administrative official has done nothing more than to send a letter explaining the agency's views. Actually, courts sometimes do allow such review to occur, but they cannot permit it to occur routinely. *Abbott Laboratories* recognizes that agency programs would suffer great disruption if companies were permitted to go to court whenever they were interested in finding out the scope of their legal obligations. Furthermore, without some limitations, a court would have to decide important questions in the abstract, before it had seen how the agency's position works out in practice. Possibly the consequences that the company fears would never actually occur. Perhaps the court would need to limit its holding or draw distinctions that cannot be foreseen in advance.

The *Abbott Laboratories* test of whether a case is "ripe" for review responds to these concerns in a practical way: As I mentioned, the court considers whether the issue raised by the plaintiff is "fit" for judicial decision. It will not be "fit" if the agency has not reached a definitive

position on the precise issue raised. Moreover, the issue may not be "fit" for resolution if the reviewing court thinks that it could make a more informed decision by waiting to see how the rule is applied in practice. (In *Abbott Laboratories* itself, these considerations did not militate against review, because the agency had made a final decision, expressed in a formal regulation, and the only question at issue concerned congressional intent, not the practical effects of the regulation.)

The court also considers whether the plaintiff would suffer hardship if review were postponed. If compliance with the rule will cause the plaintiff to incur great expense, or noncompliance would expose it to severe punishment, the court is likely to proceed to the merits. But the court may dismiss the case as unripe if the adoption of the rule will not affect the plaintiff's business very much.

Even if the issue in controversy would otherwise be considered ripe for review, *Abbott Laboratories* indicates that the court has discretion to dismiss a declaratory judgment action if the plaintiff is using the review action in order to harass the agency. Similarly, the court can dismiss if the final ruling would bind only a few members of the industry (making the suit a poor use of the agency's finite litigation resources).

Japan may prefer to draw its lines differently, but it will need to take account of the above considerations as it decides on principles to replace the priority rule of nullification suits.

II. STANDING

The 2004 amendments also revise Japan's law of standing to sue. According to Professor Nakagawa, they contain new statutory interpretation principles that courts are to apply in this area, such as "consider all the relevant statutes," "do not limit consideration to the text of statutes," and "consider the purpose of relevant statutes along with the nature of interests to be considered by the agency." This reform strikes me as quite modest. It does not disturb in a fundamental way the "legal interest" test that has prevailed for many years in Japan. It simply says that statutes should be construed generously. That mandate may have some impact, depending on how restrictively the courts have been construing administrative statutes up to now. Nevertheless, any future court that wants to find standing will apparently still have to find a "legal interest," within the boundaries of your legal system's prevailing norms of statutory construction.

An American lawyer would say that this is a step in the right direction, if measured against our own prevailing legal norms. For years, a test like the legal interest test prevailed in our country, and the general feeling was that it was much too restrictive. When government acts illegally, there will often be people who deserve a chance to court, even if the legislature did not directly intend to benefit them when it passed the underlying legislation.

Your country, of course, has a different political culture. Perhaps the limited 2004 reforms of standing law will be considered sufficient, when coupled with the opportunities for anticipatory relief created by abolition of the priority rule of nullification suits. (The latter reform is relevant, because standing and ripeness concepts often overlap. Liberalization of pre-enforcement relief

can benefit persons who have not suffered legal injury *yet* but are likely to suffer it in the future.) However, if experience persuades you that the 2004 amendments did not go far enough, U.S. experience suggests some possibilities about what the next step could potentially be.

On its face, our Administrative Procedure Act (APA) seems to codify a legal interest test, too. The statutory language itself says that a person who has suffered Alegal wrong@ or was adversely affected or aggrieved Awithin the meaning of a relevant statute@ is entitled to judicial review. However, the Supreme Court has interpreted the APA to mean something entirely different from what its words seem to say. In *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150 (1970), the Court construed the relevant provision of the Act as imposing two requirements for standing under the APA. First, the plaintiff must have suffered "injury in fact." Second, the plaintiff must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." In a later case, the Court clarified the "zone of interests" part of this test by saying that it is "not meant to be especially demanding." It prevents standing only when "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987).)

If administrative lawyers in your country continue to believe that Japan needs a more generous law of standing, the U.S. experience suggests several options for you to consider. One option would be to adopt a pure injury in fact test. This would create a state of affairs in which a court could find standing by merely showing that the plaintiff has suffered some injury. Under that principle, the court could avoid giving any consideration at all to the relationship between the plaintiff's interests and the underlying regulatory statute. A second option to consider would be to follow the prevailing American rule by adopting the zone of interests test, as formulated in *Clarke*. That test is similar to your traditional legal interest test, but in a much diluted form. Many administrative law scholars in the U.S. would probably endorse the first option. However, the second option may be the more politically acceptable choice in light of your history. What I would like to suggest today is that the second option would be a reasonably satisfactory compromise solution, if compromise proves necessary.

First, the *Clarke* standard, at least as implemented in the United States, is a fairly lenient test. Most plaintiffs can easily satisfy it. For example, there is virtually never any question about whether an environmental organization can meet this test when they bring suit to enforce an environmental statute, because they obviously are asserting interests that are at least generally compatible with the concerns that prompted Congress to pass such a statute. Only a weak correspondence between the plaintiff's interests and the statute's objectives is required.

Second, when a plaintiff does fail to meet the *Clarke* test, the reason must be that, in the court's view, he or she is relying on an interest that has nothing at all to do with the considerations that caused Congress to pass the statute that underlies the case. That actually is a fairly rational ground for concluding that the plaintiff is not a proper person to question the validity of the act that is under challenge. Consider some examples from our case law. A union of postal workers challenged a plan by the postal service to permit more competition by overnight delivery services.

It relied on a statute that was designed to protect the "postal monopoly." Our Supreme Court said that the union lacked standing, because the statute was intended to preserve mail services and was in no way intended to help postal workers. In another case, a copper industry association sued because the government was planning to decrease the copper content of the penny (a coin worth about one yen). According to the court, the association lacked standing, because it was relying on a statute that was designed to prevent hoarding in the face of rising copper prices. The statute was not intended to protect the interests of the copper industry in any way. The courts' reasoning in these cases seems plausible to me. In contrast, the "injury in fact" test really has nothing to do with promoting the purposes that led the legislature to create the regulatory scheme.

Third, the injury in fact test is, in practice, difficult to administer. Even though a plaintiff has clearly suffered some sort of harm, it may have trouble demonstrating, as U.S. courts require, that the government's policy is a cause of that harm and that the harm would be alleviated if the government changed its policy. Exploration of these issues in a court case often requires discovery proceedings and evidentiary findings by the court. These tasks are often a source of delay and expense. In contrast, the zone of interests test is easier to litigate, because it turns on a purely legal issue that the court can decide on the basis of briefs. Furthermore, once the court does decide that issue, it will have established a precedent that will make the next case in the same subject area easier to resolve.

III. REMEDIES

The 2004 amendments also empower the court to enter injunctive and declaratory relief against an agency. Once again, American lawyers would tend to approve of this step. As I have discussed above, courts need to display a degree of restraint when asked to entertain pre-enforcement suits, because some of the issues they present may turn out to be unripe for immediate judicial consideration. This is particularly true of suits for declaratory relief, which by their nature are often commenced before the agency has taken any tangible action against the private litigant. Nevertheless, when a pre-enforcement suit is ripe for decision, a court should have the authority to grant effective relief.

Once again, however, American law has developed limitations to circumscribe the use of this authority. These limitations may or may not have counterparts in Japanese law, but they suggest a need for caution in the use of injunctive and declaratory relief.

The United States has a well developed body of law that prescribes *limited* judicial review of the merits of agency actions. Many matters, although reviewable, are primarily for the agency to decide. The reviewing court's role is to determine whether the agency exceeded the authority that was conferred by the legislature, and also whether the agency abused its discretion. The latter determination turns on such questions as whether the agency lacked factual support for its assertions, acted inconsistently with its precedents, failed to respond to reasonable criticisms of its proposal, or wrote a poorly reasoned opinion. In addition, the court considers whether the agency committed a violation of the APA or other procedural mandates.

These principles of limited review carry implications for the relief stage of the judicial review proceeding. When a court holds that an agency action is invalid, the usual remedy is to remand the action to the agency for reconsideration. The agency normally gets another chance to use its discretion in a more responsible fashion, either by changing its action or by explaining it in a more convincing fashion. (I note that, according to Professor Nakagawa's paper, the 2004 amendments expressly authorize Japanese courts to order defendant agencies, if necessary, to explain their actions more fully. This authority suggests that Japanese and American law may be similar in this respect.) The court is not permitted to declare what discretionary choice the agency should have made.

Without such principles of restraint, the remedies of injunction and declaratory judgment would not work well. The court would become a "super-regulator," defeating the legislature's purposes for vesting authority in an administrative agency in the first place. Legislatures normally create regulatory schemes in order to take advantage of the expertise or experience that an agency can develop, or to ensure that decisions will be made by politically accountable actors. A court would defeat these purposes if it made the administrative decision itself. This problem would be especially severe in review of agency rules, which typically are more dependent on policy considerations than are the "dispositions" that Japanese courts have traditionally reviewed.

I must add, however, that I am painting with broad strokes here. A full account of the U.S. law of remedies would be more complex and elaborate. Sometimes, despite the general principles that I have just explained, a court vacates or enjoins an agency action without remanding it for reconsideration. This is most likely to occur when the court finds that the entire legal theory underlying the agency's decision is wrong, so that the agency could never take a valid action of the kind that it had attempted.

On the other hand, sometimes a court will remand an action for reconsideration without vacating or enjoining the action. This is a relatively new development, which I mention here because I have recently written at length about it. [53 Duke Law Journal 291 (2003).] My article was based on guidelines proposed by the American Bar Association. The guidelines suggest that this form of relief can be appropriate where immediate vacation of an agency rule would cause disruption or undermine protection for the public. The choice is similar to the one a court makes in deciding whether to grant a stay while judicial review is pending. As yet, however, the contours of this form of relief have not yet been fully determined in U.S. law.

IV. A NEW MODEL OF JUDICIAL REVIEW

Finally, I will comment on the theoretical argument of Professor Nakagawa's paper. He suggests that the 2004 amendments point the way toward a new model of judicial review. He challenges the prevailing assumption that the traditional system of nullification suits (Kokoku-Sosho) should be the only method of challenging exercises of administrative power in court. He suggests that this exclusivity is not required by the ACLA. He calls for a new philosophy that would see the ordinary system of civil litigation (Tojisha-Sosho) as the basic method of

challenging administrative power in court, except in cases of administrative dispositions (because the ACLA does require nullification suits for such cases). In general, then, administrative suits would be viewed as "simply another type of regular civil suits."

I cannot assess all the implications of this model in the Japanese context, but I can offer a few reactions to the idea from an American perspective.

Looking at Professor Nakagawa's thesis with American eyes, I find myself sympathizing with his vision on several points. First, if it is true that in Japan "judicial intervention into administrative process" is "something to be avoided as far as possible," I can certainly share in his impulse to change that state of affairs. American lawyers tend to see judicial review as a normal part of the regulatory process, an opportunity that contributes to the legitimacy of the administrative state. Second, American lawyers would tend to agree that exercises of administrative power should normally be susceptible to judicial review even where the legislature did not specifically create a judicial remedy in the statute under which the agency acted. Third, if, as Professor Nakagawa contends, this new model would contribute to litigants' ability to resolve judicial review controversies through informal settlement, that would also be a virtue. Settlement is well accepted in American practice.

However, American law has not fully embraced the concept that administrative cases are simply an extension of civil litigation. Our limitations on that concept may suggest some corresponding difficulties with Professor Nakagawa's model. In the first place, our system does not make judicial review available to everyone who files a complaint. In addition to the limitations on ripeness and standing, which I mentioned earlier, American courts regard some types of administrative actions as simply unreviewable. For example, our courts would rarely if ever take jurisdiction over military operations of the Army, the diplomatic decisions of the State Department, or the interest rate-setting decisions of our banking authorities. These exceptions may seem obvious, but our courts also stay out of certain more mundane government decisions. For example, when an agency decides not to bring an enforcement action, or decides how to spend money from an unrestricted appropriation, judicial review will be limited or nonexistent.

Moreover, even where review of some kind is available, American administrative lawyers do not consider the model of ordinary civil litigation appropriate for all types of judicial review of administrative action. For example, the Administrative Conference of the United States recommended in the mid-1970s that direct review of rules or formal adjudication should usually occur in a federal court of appeals, not a federal district court (trial court). Congress has followed this recommendation in many subsequent statutes. The reasoning behind this recommendation is simple. When an agency action is reviewed on the basis of a record compiled at the administrative level, the fact finding capabilities of the trial court are not needed. Under these circumstances, direct court of appeals review is usually favored because it avoids the delay of an extra step in the review process. On the other hand, when the review takes place on a judicially created record, such as in a suit under the Freedom of Information Act, district court review is still desirable.

Also, under some regulatory statutes in the United States, such as some sections of the Clean Air Act, Congress has provided that a newly issued regulation *must* be challenged, if at all, within sixty days of its issuance, or it will become immune from review. This is an exceptional requirement. In most of American administrative law, rules can be challenged at the enforcement stage. That liberality is considered fair, because some citizens will not even know about a regulation until the agency shows up at their doors to enforce it. But in exceptional contexts such as the Clean Air Act, Congress has decided that the most important consideration is finality. Businesses need to know whether a rule will be effective, and the sixty-day limit affords them the desired certainty.

I do not say that these specific policies would necessarily carry over to the Japanese experience. For example, I am told that judicial review on an administratively compiled record is rare in this country. However, my more general point is that, in the United States, we do not assume that suits to contest administrative action should all fit a single pattern. It is often helpful to design review proceedings to fit the circumstances of individual programs.

That concludes my prepared presentation. Thank you for your attention, and I look forward to responding to your questions.