



# Judicial Governance Through Resolution of Legal Disputes? A Japanese Perspective

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## Special Contribution

### Judicial Governance Through Resolution of Legal Disputes?—A Japanese Perspective

Narufumi Kadomatsu\*

#### ABSTRACT

*The questions regarding the judicial power that are most often raised include the scope of the judicial power and the role of the judiciary. The development of administrative litigation in Japan provides a good way to reflect on these issues.*

*Administrative litigation in Japan has always placed emphasis on resolving concrete “legal disputes” and stuck to a strict interpretation of the concept such as “administrative disposition” and standing. It has also centered upon “ex post” review of administrative activities.*

*This attitude seems to be changing since the 2004 amendment of the Administrative Case Litigation Act (ACLA). The judiciary is gradually widening the subject matter of administrative litigation, using so-called “confirmation litigation.” With respect to standing, it is moving towards a more flexible interpretation using the newly inserted Article 9, Paragraph 2, which was, ironically, drafted as a codification of existing case law. “Mandating litigation,” a new type of litigation introduced by the 2004 amendment, is coming into use. The judiciary has not only accepted the express mandate given by the legislator through the 2004 amendment, but also its general message for more effective relief and protection of rights and interests of citizens.*

**Keywords:** *Judicial Governance, Administrative Case Litigation Act, Legal Dispute, Administrative Disposition, Standing, Mandating Litigation*

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## CONTENTS

I. INTRODUCTION .....	144
II. SOME BASIC FEATURES OF THE JUDICIARY AND ADMINISTRATIVE LITIGATION IN JAPAN .....	144
A. <i>The Basic Structure of the Judiciary in Japan</i> .....	144
B. <i>Basic Features of Administrative Litigation in Japan</i> .....	145
C. <i>Adjudication of Administrative Litigation as Part of the Judicial         Power</i> .....	146
1. <i>A Brief History of Administrative Litigation in Japan and the             ACLA</i> .....	146
2. <i>Justifications of the Judiciary's Power over Administrative             Decisions</i> .....	147
III. SOME CLASSICAL FEATURES OF ADMINISTRATIVE LITIGATION IN JAPAN .....	149
A. <i>Legal Dispute</i> .....	149
B. <i>Administrative Dispositions</i> .....	149
C. <i>Standing</i> .....	150
D. <i>Ex Post Litigation</i> .....	150
E. <i>Deference to Administrative Discretion</i> .....	151
IV. DEFINITELY NOT POWERLESS JUDICIARY .....	152
A. <i>Judicial Activism in Private Law Disputes</i> .....	152
B. <i>Other Litigation Used to Control the Administration</i> .....	152
1. <i>State Liability Litigation</i> .....	152
2. <i>Civil Injunctions</i> .....	153
3. <i>Inhabitant Litigation</i> .....	154
4. <i>Incidental Review</i> .....	154
V. THE 2004 AMENDMENT TO THE ACLA .....	155
A. <i>The 2004 Amendment as Part of the Reform of the Justice         System</i> .....	155
B. <i>Contents of the 2004 Amendment</i> .....	155
1. <i>Subject Matter</i> .....	155
2. <i>Standing to Sue</i> .....	156
3. <i>New Types of Litigation and Remedies</i> .....	156

2009]	Judicial Governance Through Resolution of Legal Disputes?— A Japanese Perspective	143
	C. <i>Significant Outcomes of the “Lukewarm” Amendment</i> .....	156
	1. <i>Subject Matter</i> .....	157
	2. <i>Standing to Sue</i> .....	157
	3. <i>New Types of Litigation and Remedies</i> .....	158
	VI. REFLECTIONS .....	158
	REFERENCES .....	160

## I. INTRODUCTION

The questions regarding the judicial power that are most often raised include the scope of the judicial power and the role of the judiciary. What kinds of legal disputes fall into the authority of the judiciary? Do the courts have the power to judge on administrative acts? If administrative dispositions are subject to judicial review, how shall the courts make the decisions? Are the courts allowed to order the administrative agencies to issue a certain administrative act or are they only allowed to revoke administrative acts?

The development of administrative litigation in Japan provides a good way to reflect on these important issues. The fundamental rules concerning the judiciary are laid down in Article 76 to Article 82 of the Constitution of Japan, enacted in 1946 (hereinafter the Constitution).<sup>1</sup> Paragraph 1 of Article 76 of the Japanese Constitution reads that “The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.”<sup>2</sup> Nonetheless, the scope of the judicial power is not expressly stipulated in the Constitution, which has resulted in numerous debates concerning administrative litigation and its relationship with the judiciary. This article aims to discuss the abovementioned questions by presenting and analyzing the development and features of administrative litigation in Japan.

This article is divided into six parts. The first part gives a brief description of the judiciary and administrative litigation in Japan. The second part discusses the justification of the judiciary’s power over administrative litigation. The third part analyses some features of administrative litigation in Japan. The fourth part reflects on the judiciary’s role in Japanese society and some types of litigation other than administrative litigations which are used for controlling the administration. The fifth part talks about the 2004 reform of administrative litigation and the final part concludes with some reflections.

## II. SOME BASIC FEATURES OF THE JUDICIARY AND ADMINISTRATIVE LITIGATION IN JAPAN

A. *The Basic Structure of the Judiciary in Japan*

As mentioned above, Article 76, Paragraph 1 of the Constitution vests “the whole judicial power” in the Supreme Court and inferior courts.<sup>3</sup> Paragraph 2 of the same article reads that “No extraordinary tribunal shall be

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1. KENPŌ, arts. 76-82.

2. KENPŌ, art. 76, para. 1.

3. *Id.*

established, nor shall any organ or agency of the Executive be given final judicial power.”<sup>4</sup> Accordingly, the final judicial power over all cases is vested in the Supreme Court and establishing a special “supreme administrative tribunal” is prohibited by the Constitution. Establishing inferior administrative courts by law is allowed, and yet such is not the practice in Japan. There was once a discussion concerning whether to establish such courts as part of the judicial reform at the end of the 1990s and the beginning of the 2000s, but the idea was abandoned. In sum, all cases, including criminal, civil and administrative cases, are adjudicated by ordinary inferior courts (district and high courts) and the Supreme Court.

Article 81 of the Constitution further provides that “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”<sup>5</sup> The power of constitutional review is conferred to the judicial branch on the basis of this article. Two important things about the jurisdictions of constitutional review should be added here.

First, the Constitution adopts the system of “decentralized constitutional review” which is similar to the model of the U.S. Although Article 81 mentions only the Supreme Court, the inferior courts, as well as the Supreme Court, are all endowed with the power to review the constitutionality of acts of political branches. Their decisions are, however, naturally subject to the reverse judgments of higher courts and it is the Supreme Court that has the final say about constitutional issues. Another feature of Japanese constitutional review is that the constitutionality is determined incidentally with the case judgment (incidental review). Challenging the constitutionality of any law, ordinance, regulation or official act is only possible within the context of a concrete dispute.

#### B. *Basic Features of Administrative Litigation in Japan*

Administrative litigation in Japan is governed by a special law, namely the Administrative Case Litigation Act (hereinafter “ACLA”),<sup>6</sup> which was first promulgated in 1962 and later amended in 2004.<sup>7</sup> The nature of this law and administrative litigation is somewhat disputed. Some scholars regard administrative litigation as part of civil procedure. The majority of scholars, however, view administrative litigation as a special type of litigation, just as civil litigation and criminal litigation. Article 7 of the ACLA provides that

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4. KENPŌ, art. 76, para. 2.

5. KENPŌ, art. 81.

6. Gyōseijiken Soshōhō [Administrative Case Litigation Act] [hereinafter ACLA], Law No. 139 of 1962 (Japan).

7. Gyōseijiken Soshōhō No Ichibu Wo Kaiseisuru Hōritsu [Act for Partial Revision of the Administrative Case Litigation Act], Law No. 84 of 2004 (Japan).

the Civil Procedure Code shall be applied *mutatis mutandis* for matters not provided in the ACLA.<sup>8</sup> “*Mutatis mutandis*” implies that administrative litigation is itself not civil litigation. However, it cannot be denied that administrative litigation has a close relationship with civil procedure. The Supreme Court publishes its decisions on administrative cases in its official gazette named “Supreme Court Reports (civil cases)” (*Minshū*). Instead of being put in a special collection, decisions on administrative litigation are included in the collection of civil decisions. The ACLA, moreover, is not a self-contained codified set of procedural rules for administrative litigation. As mentioned, the Civil Procedure Code is applied *mutatis mutandis*.

C. *Adjudication of Administrative Litigation as Part of the Judicial Power*

1. *A Brief History of Administrative Litigation in Japan and the ACLA*

As mentioned earlier in the article, administrative litigation in Japan is presently not handled by any special court. However, this was not the practice before World War Two. There was indeed one administrative court in Tokyo according to the Meiji Constitution,<sup>9</sup> and yet the experiences of this court were rather miserable.<sup>10</sup> Not all administrative dispositions but only those enumerated in statutory law could be reviewed by the tribunal. Therefore, it is fair to say that the judicialization of administrative litigation was not necessarily a result of the post-war Constitution. In fact, even before the General Headquarters of the Supreme Commander of the Allied Powers (the American occupation army) drafted the Constitution, leading lawyers and scholars had abandoned the idea of maintaining the system of an administrative court under the Meiji Constitution.

After the Meiji Constitution ceased to be valid, there were indeed some discussions about making a special and comprehensive law for administrative litigation, but the law was not made in time, namely by 1947, when the new constitution was implemented. Therefore, the Code of Civil Procedure was applied by the courts to adjudicate administrative affairs, except that a law named “Law on the Temporary Amendment of Civil Procedure Code” was enacted, which merely set a limitation period for administrative litigation.<sup>11</sup>

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8. ACLA, art. 7.

9. MEIJI KENPŌ, art. 61. The Meiji Constitution was the fundamental law of the Empire of Japan from Nov. 1890 until the end of the World War II. It was substituted by the post-war constitution promulgated in 1946.

10. On view of the framers of the Meiji Constitution about the administrative court, see Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT’L J. CONST. L. 308, 313-14 (2007).

11. Nihonkoku Kenpō No Sekō Ni Tomonau Minjisoshōho No Oukyutekisoti Ni Kansuru Hōritsu [Law on the Temporary Amendment of Civil Procedure Code], Law No. 75 of 1947 (Japan).

The idea of enacting a special law governing administrative adjudication was initiated by the Japanese bureaucrats. General Headquarters (hereinafter “GHQ”) was quite skeptical about the Japanese government’s attempt to establish special rules for administrative litigation and reacted reluctantly when the government expressed its intention to enact such rules. The so-called “Hirano Incident” changed the situation. Hirano, Rikizo, a Diet member, was purged from his official post by GHQ order. However, the order was temporarily suspended by a ruling of the Tokyo District Court through a civil procedure. GHQ, probably because it feared its reform project would be stopped by the judicial bureaucrats, and the reform project would not be carried out as expected, somehow changed their position, and promoted special rules on administrative litigation. The government finally enacted the “Special Law on Administrative Litigation” in 1948.<sup>12</sup> This law later served as the basis for the present Administrative Case Litigation Act, enacted in 1962.

Chart 1 shows the number of newly initiated administrative litigations at the first instance. Administrative litigation was very frequent from 1948 to the beginning of the 1950s due to many reforms initiated by GHQ, the most important one being the agricultural reform.

From 1951 to 1990, the number of administrative litigations remained rather stable, except in the years 1968, 1972 and 1976. In each of these years, there was a special reason for the increase. From 1990 until present, there is a gradual, albeit not dramatic, increase. There was an amendment to the administrative law in 2004, but whether or not the amendment has dramatically accelerated the increase is open to question.

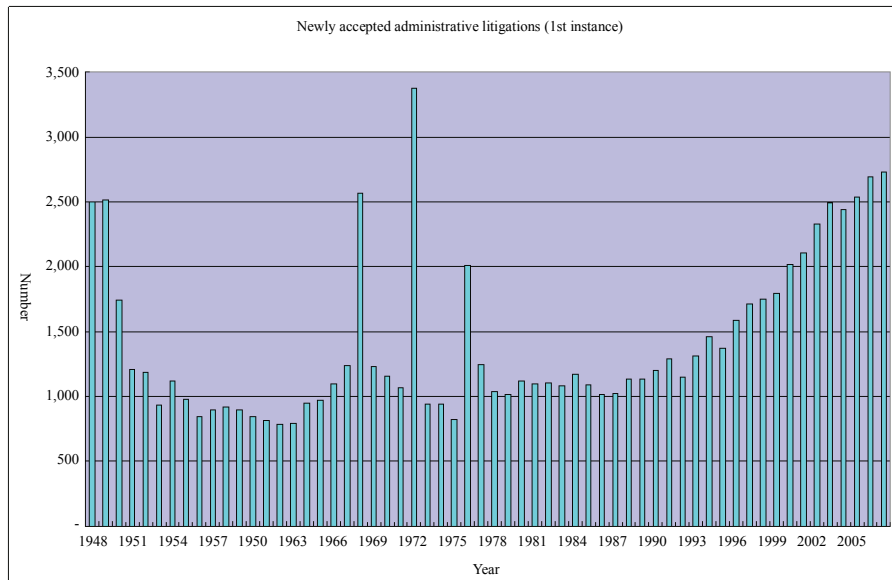
## 2. *Justifications of the Judiciary’s Power over Administrative Decisions*

In the early stage of the development of post-war administrative litigation, two professors at University of Tokyo shaped the basic framework of discussion. Tanaka, Jiro, professor of administrative law and Kaneko, Hajime, professor of civil procedure law.<sup>13</sup> Since the views of the two

12. Gyōseijiken Soshō Tokurei Hō [Special Law on Administrative Litigation], Law No. 81 of 1948, *repealed by* Gyōseijiken Soshōhō [Administrative Case Litigation Act], Law No. 139 of 1962 (Japan). Detailed description of this history of “judicialization” of administrative litigation is documented in the following articles by Shinichi Takayanagi, *Gyosei Soshō Hosei No Kaikaku [Reform of Administrative Litigation]*, in 4 SENGOKA KAKU [POSTWAR REFORMS] 291 (Tokyo Daigaku Shakai Kagaku Kenkyūjo ed., 1975); Shinichi Takayanagi, *Gyosei Kokkasei Kara Shiho Kokkasei He [From an administrative state to a judicial state]*, in 2 KOHO NO RIRON GE [PUBLIC LAW THEORY] 2193 (Ichirō Ogawa ed., 1977); Shinichi Takayanagi, *Sengo Shoki No Gyoseisoshō Hosei Kaikaku Ron [Discussions on Administrative Litigation Reform in Early Postwar Years]*, 31(1) SHAKAIKAGAKU KENKYU [JOURNAL OF SOCIAL SCIENCE] 1 (1979).

13. Narufumi Kadomatsu, *Kenpo Kaisei Doukou Wo Dou Uketomeru Ka: Gyosei Ho To No*



**Chart 1**

The chart is compiled by the author from “Gyoseijiken Ni Kansuru Tokeishiryō [Statistics related to administrative cases],” by General Secretariat of the Supreme Court, Administrative Affairs Bureau, conference material distributed at the 3<sup>rd</sup> session (April 8, 2002) of the Administrative Litigation Commission, retrieved August 15, 2009, from the Office for Promotion of Justice System Reform Web site: <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/gyouseisoyou/dai3/5siryō.pdf> and from “Heisei Jyūkyū Nendo Gyoseijiken No Gaikō [General situation of administrative cases for 2007],” by General Secretariat of the Supreme Court, Administrative Affairs Bureau, 2008, *Hosō Jihō*, 60(9), p. 2795.

Professors on the nature of the judiciary have far more similarities than differences, only Kaneko’s arguments will be described below.

The issue was how to legitimize judicial oversight over administrative affairs. The traditional role of judges had been limited to adjudicating civil or criminal disputes. Kaneko argues, however, that the “judicial power” which Article 76 of the Constitution of Japan gives to the courts, should not be limited to their historical role. The realm of “judicial power” should be defined according to the theoretical nature of the activity. The nature of judicial power is, according to Kaneko, to render impassive judgments on legality/illegality or rights/duties by application of law. Judges render such “impassive legal judgments” not only in civil or criminal litigation, but also in administrative litigation, because administrative litigation is adjudicated through concrete judgments by application of law. Therefore, administrative litigation belongs to the realm of “judicial power” and the judiciary’s control

*Kankei-Gyosei Sosho Seido Wo Megutte [What Should We Make of the Trend Toward Constitutional Amendment: Its Relation to Administrative Law-Focused on Administrative Litigation System]*, 612 HOGAKU SEMINAR [LAW SEMINAR] 33, 34-37 (2005).

over administrative litigation is legitimized.

There is, however, another implication of Kaneko's theory. Kaneko defines the judiciary's task as rendering "impassive judgment on legality/illegality or rights/duties," which contrasts with the nature of the administration, which is to take positive actions in order to realize public purposes or policies. Therefore, the judiciary, in adjudicating administrative litigation, is only permitted to revoke or overrule administrative dispositions and cannot take positive actions, such as mandating administrative agencies to issue certain dispositions, let alone issuing administrative dispositions by itself.

Kaneko's theory is reflected in the fundamental features of administrative litigation before 2004, which centered upon revocation litigation and basically rejected the possibility of mandating litigation, i.e. litigation that would lead to a judgment in which the court mandates an administrative agency to issue a certain disposition.

### III. SOME CLASSICAL FEATURES OF ADMINISTRATIVE LITIGATION IN JAPAN

The following sections will elaborate on some classical features of administrative litigation in Japan that were dominant before 2004.

#### A. *Legal Dispute*

Article 3 of the Court Act provides that courts have the power to decide all legal disputes.<sup>14</sup> Legal disputes are defined as disputes "which relate to the existence of concrete rights and duties or legal relations between the parties and which can be finally settled by the application of law."<sup>15</sup> Since administrative litigation is part of the judiciary, it follows naturally that courts have the authority to handle such legal disputes.

#### B. *Administrative Dispositions*

The central concept in administrative litigation in Japan is the administrative disposition. According to the ACLA, administrative litigation is divided into two categories: complaint litigation (*kōkoku appeal*) and party litigation. The term "complaint litigation" is used for cases where there are complaints against administrative dispositions.<sup>16</sup> "Party litigation" is about judgment over legal relationships.<sup>17</sup>

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14. Saibanshohō [Court Act], Law No. 59 of 1947, art. 3 (Japan).

15. 35 MINSHŪ 1369, 1369 (Sup. Ct., Dec. 16, 1981).

16. ACLA, Law No. 139 of 1962, art. 3, paras. 1-2 (Japan).

17. ACLA, art. 4.

Complaint litigation is further divided into several categories, one of them being “revocation litigation” which is used to revoke existing administrative dispositions.<sup>18</sup> The term “administrative dispositions” referred to here, as defined by the Supreme Court, does not include all administrative activities, but is limited to those administrative activities that “have direct and particular legal effects on the rights and duties of individuals.”<sup>19</sup> Whether a particular administrative activity has the characteristics of an administrative disposition is determined based on statutory laws.

Some examples of administrative activities that were not considered administrative dispositions include: city planning zoning decisions,<sup>20</sup> a local ordinance on a new tax<sup>21</sup> (because it is an abstract rather than a concrete act), a shooting exercise at SDF bases<sup>22</sup> (because it is a factual rather than a legal act), the indication as extramarital child in the residence registry<sup>23</sup> (because there is no legal effect) and administrative circulars<sup>24</sup> (because they are internal acts within the administrative departments and do not have any legal effect).

### C. *Standing*

The keyword to standing is “legal interests.” The term is used in Article 9 of the ACLA but without any definition or explanation. Legal interests, as defined by the Supreme Court, must first of all be interests affected by administrative dispositions. Secondly, legal interests must be within the protected scope of the legal requirements of administrative dispositions. Finally, legal interests must be “specific interests.” Interests totally absorbed and incorporated into the public interest cannot be a ground upon which to file a suit.<sup>25</sup>

### D. *Ex Post Litigation*

A third characteristic of administrative litigation in Japan is that it centers upon *ex post* litigation. The focus of administrative litigation has always been on revocation litigation. The administrative authority should

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18. ACLA, art. 3, para. 2.

19. 18 MINSHŪ 1809, 1809 (Sup. Ct., Oct. 29, 1964).

20. 36 MINSHŪ 705 (Sup. Ct., Apr. 22, 1982).

21. 1814 HANREI JIHŌ 44 (Tokyo High Ct., Jan. 30, 2003).

22. 1246 HANREI JIHŌ 80 (Sup. Ct., May 28, 1987).

23. 1675 HANREI JIHŌ 48 (Sup. Ct., Jan. 21, 1999).

24. 22 MINSHŪ 3147 (Sup. Ct., Dec. 24, 1968).

25. See Mitsuo Kobayakawa, *Kokokusosho To Horitsujo No Rieki-Oboegaki* [Memorandum on Legal Interests in Complaint Litigations], in SEISAKU JITSUGEN TO GYOSEIHO 43, 47 (Tsuyoshi Nishitani et al. eds., 1998).

first make an administrative disposition, the legality of which would be later reviewed by the court if litigated.

*Ex ante* litigation, by contrast, had generally not been accepted and admitted. To be sure, theoretical possibilities for such types of *ex ante* litigation, such as mandating litigation and suspension litigation, were admitted, but there were few actual cases. In mandating litigation, the court orders the administration to issue a disposition. In suspension litigation where it is expected that the administration will issue some particular disposition, the court stops the administration from doing so.

The rationale for *ex post* litigation as opposed to *ex ante* litigation was given by Professor Tanaka, Jiro, whose name already appeared in this article. Tanaka argued that the administration should always have priority competence to make decisions, namely “preceding decision competence.”<sup>26</sup> Tanaka’s rationale was in conformity with Kaneko’s argument that the judiciary shall make passive rather than active judgments.

The court’s passive role in the classical administrative litigation also manifested itself in the types of remedies the courts could grant. The possibility of granting interim relief or an interim injunction (suspension of execution/legal effect of administrative dispositions) was quite restricted under the ACLA. Interim relief could only be granted against administrative dispositions with adverse effects, such as a suspension order to a restaurant. By contrast, interim relief could not be granted in cases where the administrative agencies reject a person’s application, such as in case of a refusal to issue a business permit. Even if the court were to suspend the execution or legal effect of a refusal to issue a business permit, it would not mean that the applicant can open the business, therefore such relief would not have merits.

#### E. *Deference to Administrative Discretion*

The judges’ attitude towards administrative discretion is also noteworthy. It is said that the Supreme Court has a tendency to defer to administrative activities. A broad range of administrative discretion is admitted. The Court, without doubt, has the power to determine whether there was an excess or abuse of such discretion.<sup>27</sup> Nonetheless, the practice shows that an act of an administrative agency will be “regarded as unlawful as excess or abuse of discretion only when it totally lacks factual basis or it is evident that it significantly lacks appropriateness in the light of socially

26. JIRO TANAKA, SHINPAN GYOSEIHO JO [ADMINISTRATIVE LAW, NEW EDITION I] 294-96 (2d ed. 1974).

27. ACLA, Law No. 139 of 1962, art. 30.

accepted views.”<sup>28</sup>

#### IV. DEFINITELY NOT POWERLESS JUDICIARY

The above discussion may have generated the impression that the judiciary in Japan has basically been powerless. In fact, this is not the case. The following sections will first review the judiciary’s active role in certain private law disputes that affected society and introduce some types of litigation other than those stipulated in the ACLA, which are more effectively used by the courts to hold the administration in check.

##### A. *Judicial Activism in Private Law Disputes*

Professor Upham argues that Japanese courts have been rather active in certain types of conflicts in private law, even compared with U.S. courts.<sup>29</sup> The Japanese courts frequently use general clauses in laws and regulations, such as the public order and morals clause,<sup>30</sup> for example in ruling on gender equality issues, such as “retirement age discrimination” or “forced retirement owing to marriage” clauses in contracts. They have also been highly active in cases concerning industrial pollution. Those rulings with a fundamentally significant social impact show that the role of the judiciary in shaping Japanese society and politics should never be underestimated.

Notwithstanding, in administrative litigation, the courts show much more restraint in using general clauses in the way they use them in private law suits. Here the court is rather true to statutory law positivism. There seems to be no decisive theory that can effectively explain this difference in the courts’ attitude and one can only speculate about it.<sup>31</sup>

##### B. *Other Litigation Used to Control the Administration*

###### 1. *State Liability Litigation*

First of all, the judiciary may control the legality of administrative

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28. 32 MINSHŪ 1233 (Sup. Ct., Oct. 4, 1978).

29. Frank K. Upham, *Nichi Bei Ni Okeru Seiji To Shiho No Kino* [Politics and functions of the judiciary in Japan and the U.S.], in IWANAMI KOZA KENPŌ [IWANAMI SEMINAR CONSTITUTION] 4, 319 (Yasuo Hasebe et al. eds., 2007).

30. MINPŌ, art. 90.

31. The fact that the Japanese legal training system focuses on civil and criminal law might partly explain this. It may also be doubtful whether the courts are truly positivistic. Hiroyuki Hashimoto argues that the courts often actually derive decision out of “balancing of interest,” which is typically “civil-law way of thinking.” Statutory law grounds are only brought up as a means of justification. HIROYUKI HASHIMOTO, *GYOSEI HANREI TO SHIKUMI KAISHAKU* [CASE LAW ON ADMINISTRATIVE LAW AND SYSTEMATIC INTERPRETATION OF STATUTORY LAWS] 3 (2009).

action through state liability litigation. This type of liability, based on Kokka Baisho Hō (State Redress Law) is regarded as a special type of tort liability which arises as a result of illegal and negligent “exercise of public authority” by national/local public officials. State liability litigation is therefore treated as a special type of civil litigation and not as administrative litigation. Courts’ judgments over legality or illegality of administrative activities do sometimes set standards for future cases.<sup>32</sup>

## 2. *Civil Injunctions*

Second, civil injunctions against the operation of public facilities may also be considered as a way to control administrative action, when the facilities are run by the government. If the management of public facilities does not constitute “exercise of public authority,” it can be the target of civil litigation. In the abovementioned Tokyo Waste Disposal Facility Case,<sup>33</sup> the leading case for the definition of “administrative disposition,” the disposition character of the decision to build a waste disposal facility was denied. However, parties may be able to obtain a civil injunction against such facilities<sup>34</sup> when they suffer damages beyond the tolerable limit.

In a decision in 1995, the Supreme Court clearly acknowledged that people living near a road can seek a civil injunction against operation of a national road. Residents alongside National Road 43 connecting Osaka and Kobe had applied for an injunction and sought compensation based on state liability. The Court did not grant the injunction but it did hold the state liable, finding that that the road caused damage to the plaintiffs beyond the tolerable limit.<sup>35</sup> However, it should be noted that the Supreme Court has held that civil injunctions cannot be used against national airports,<sup>36</sup> which seems rather incongruent.

When private companies operate public facilities such as power plants

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32. For example, a famous case in which the Supreme Court set limits to administrative guidance was a state liability case. 39 MINSHŪ 989 (Sup. Ct., July 16, 1985). About this decision, see Takehisa Nakagawa, *Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization*, 52 AD. L. REV. 175 (2000).

33. 18 MINSHŪ 1809 (Sup. Ct., Oct. 29, 1964).

34. There are many such cases, although the success ratio of the plaintiffs may not be so high. In a ruling of the Nagoya District Court on Apr. 6, 1984, the suspension of the operation of a waste incineration plant by Komaki and Iwakura city was ordered. 1115 HANREI JIHŌ 27 (Nagoya D. Ct., Apr. 6, 1984). The ruling was, however, reversed by the Nagoya High Court on Feb. 27, 1986. 1195 HANREI JIHŌ 24 (Nagoya High Ct., Feb. 27, 1986).

35. 49 MINSHŪ 1870 (Sup. Ct., July 7, 1995) and 49 MINSHŪ 2599 (Sup. Ct., July 7, 1995). In a decision of Kobe District Court on Jan. 31, 2000, the injunction against a part of the same road is also granted.

36. 35 MINSHŪ 1369 (Sup. Ct., Dec. 16, 1981). The Court finds the civil injunction illegal because such injunction will affect the “exercise of public authority” by the aviation administration at the same time.

or industrial waste facilities, they obtain permission from administrative authorities based on relevant statutes. Such permissions do not preclude private parties from seeking a civil injunction. In such cases, neighborhood residents can seek a civil injunction against the private company and, at the same time, file revocation litigation against the permission.<sup>37</sup>

### 3. *Inhabitant Litigation*

Another kind of litigation through which judicial control over administrative activities is possible is inhabitant litigation. Any of the residents or inhabitants living in a particular local prefecture or municipality can challenge the illegal use of public funds by using a special type of litigation. In the *Ehime Gokoku Shrine Offering Case*,<sup>38</sup> the Supreme Court ruled that paying public money for offering Tamagushi (a branch of the sacred tree to a god) to a Gokoku Shrine (a prefectural branch of the controversial Yasukuni Shrine) violates Paragraph 3, Article 20 of the Constitution.<sup>39</sup> The decision naturally had a great social impact.

As mentioned above, in Japan, the judiciary's power is limited to handling concrete legal disputes. Hence, from a theoretical point of view, it is intriguing that courts have the competence to adjudicate cases which any person may file. How can this competence be justified? The majority view explains that those cases are surely not legal disputes, but belong to the courts' competence as "other powers as are specifically provided for by law" as also stipulated by Article 3 of the Court Act.<sup>40</sup> The statutory basis is Article 242-2 of the Local Autonomy Law.<sup>41</sup>

### 4. *Incidental Review*

As mentioned, the chief subject of administrative litigation is the administrative disposition. However, the courts also have the power to review the legality or constitutionality of the statute or administrative regulation on which the administrative disposition reviewed is based. If the courts find those laws or regulations unconstitutional or illegal, the courts can declare them void and therefore revoke the administrative disposition. Two examples may be mentioned here. The first one is the *Case of the*

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37. The standing to sue should naturally be examined, but it is relatively easily admitted in these cases. In a Supreme Court decision, the standing of residents against the permission of an APP is admitted. 46 MINSHŪ 571 (Sup. Ct., Sept. 22, 1922).

38. 51 MINSHŪ 1673 (Sup. Ct., July 13, 1977).

39. KENPŌ, art. 20, para. 3.

40. There still remains a theoretical problem, however, whether it is congruent with the definition of "judicial power" under KENPŌ art. 76. See *supra* note 2 and accompanying text.

41. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, art. 242-2 (Japan).

*Constitutionality of the Act to Regulate the Location of Pharmacies* in which the Supreme Court found the Pharmacy Law unconstitutional.<sup>42</sup> The other is the *Case of the Claim for the Revocation of the Decision on the Loss of Eligibility for Child Maintenance Benefits*<sup>43</sup> in which the Ministerial Order was found to contravene the Child Care Allowance Law on which the order was based.

## V. THE 2004 AMENDMENT TO THE ACLA

### A. *The 2004 Amendment as Part of the Reform of the Justice System*

The 2004 amendment of the ACLA was part of the Japanese government's judicial reform initiative. In 2001, the Justice System Reform Council proposed several recommendations aiming to "transform the excessive advance-control/adjustment type society to an after-the-fact review/remedy type society."<sup>44</sup>

After the recommendations were proposed, a commission for administrative litigation was established within the Office for Promotion of Justice System Reform. After three years of work, this commission made an outline for the amendment in January 2004, which was enacted as a law in June of the same year. Compared to the legislative discussions prior to the enactment of the ACLA, which lasted from 1955 to 1962, the 2004 amendment took less time and the discussions were more pragmatic and less theoretical.

### B. *Contents of the 2004 Amendment*

#### 1. *Subject Matter*

Traditionally, the subject of the administrative litigation is the administrative disposition as mentioned above, but the 2004 amendment made some changes to the subject matter. Instead of changing the target of complaint litigation (Article 3), the commission proposed a more active use of another type of litigation.

Prior to the amendment, the ACLA already acknowledged "litigation concerning legal relationships under public law" (party litigation) in Article 4, but the amendment inserted a passage on "confirmation litigation" as an

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42. 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975).

43. 56 MINSHŪ 246 (Sup. Ct., Jan. 31, 2002).

44. JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL (2001), [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html).



example of party litigation.<sup>45</sup>

## 2. *Standing to Sue*

A second change made by the 2004 amendment relates to “standing to sue.” The definition of “standing to sue” as “legal interests” was not changed by the 2004 amendment. The commission did, however, introduce the new concept of “consideration factors” by adding a second paragraph to Article 9 of the ACLA. This paragraph is a codification of Supreme Court case law and provides that the court shall not only rely on the language of the provisions when determining one’s standing, but consider the whole purport and purpose of the law as well as the contents and the nature of the interest which includes how and to what extent that it is likely to be injured.<sup>46</sup>

## 3. *New Types of Litigation and Remedies*

The 2004 amendment introduced some new types of litigation and remedies. Mandating litigation,<sup>47</sup> which was rejected by Kaneko’s and Tanaka’s theory, as well as injunction litigation<sup>48</sup> was added to the ACLA. The 2004 amendment also increased the possibilities for parties to obtain temporary relief, by including the preliminary mandate, the preliminary injunction and by loosening the requirements for the suspension of execution.<sup>49</sup>

## C. *Significant Outcomes of the “Lukewarm” Amendment*

From the above analysis of the contents of the 2004 amendment of the ACLA, it may be summarized that the 2004 amendment was a rather lukewarm reform. Professor Yasutaka Abe severely criticized the fact that judges also participated in the discussion as a member of the commission, contending that “it is as if to let thieves draft the criminal law.”<sup>50</sup> Many proponents of reform also expressed disappointment with the amendment, although they did not use such harsh words as Professor Abe. However, it may be interesting to know that this “lukewarm” amendment nonetheless

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45. Namely, the final part of Article 4 now provides: “confirmation litigation on legal relationships under public law or other litigations concerning legal relationships under public law.” ACLA, art. 4. The underlined part was inserted by the 2004 amendment.

46. ACLA, art. 9, para. 2.

47. ACLA, art. 3, para. 6, arts. 37-2 to 37-3.

48. ACLA, art. 3, para. 7, art. 37-4.

49. ACLA, art. 25, paras. 2-3.

50. Colloquy, *Gyosei Sosho Kentoukai No Kangaekata Wo Megutte* [On the “Outline” of Administrative Litigation Panel], 1263 JURISUTO [JURIST] 8 (2004).

produced significant outcomes.

### 1. *Subject Matter*

#### (a) More Flexible Interpretations of Administrative Dispositions

As mentioned above, the 2004 amendment did not revise the definition of administrative dispositions. Beginning shortly before the enactment of the amendment, however, the courts seem to have changed their attitude and have started interpreting it in a more flexible way. More and more administrative activities are included into the category of administrative dispositions, such as the general designation of a road,<sup>51</sup> the issuance of scholarship for worker accident compensation insurance,<sup>52</sup> the “notification” under the Food Sanitation Law<sup>53</sup> and the “recommendation” under the Medical Service Law.<sup>54</sup>

#### (b) Use of Confirmation Litigation

In addition, a number of confirmation litigations have been brought before the courts. There are two examples of cases in which this type of litigation was used by private parties to seek a judgment on the constitutionality of laws. In the *Overseas Residents Case*,<sup>55</sup> the court declared that the Japanese citizens living abroad shall have the right to vote in national elections not only for proportional representation but also for single-seat constituency. In the *Nationality Law Case*,<sup>56</sup> the court granted Japanese nationality to extramarital children born to a Japanese father and a Filipino mother.

### 2. *Standing to Sue*

The 2004 amendment has also resulted in a broadening of the concept of standing to sue. A recent watershed decision was rendered in the *Case to Revoke Project Approval of Consecutive Grade Separation for the Odakyū Line and Seek Revocation of Other Related Project Approvals*.<sup>57</sup> Odakyū, a private railway company in Tokyo, had a construction plan to enlarge the railway as part of a city development project of the Tokyo Metropolitan Government. The railside residents were against the plan and filed a

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51. 56 MINSHŪ 1 (Sup. Ct., Jan. 17, 2002).

52. 1841 HANREI JIHŌ 89 (Sup. Ct., Sept. 4, 2003).

53. 58 MINSHŪ 989 (Sup. Ct., Apr. 26, 2004).

54. 59 MINSHŪ 1661 (Sup. Ct., July 15, 2005). Recently, the Supreme Court also rendered an important judgment on September 10, 2008. It acknowledged the “administrative disposition” character of a project plan for a land readjustment project (62 MINSHŪ 2029), which was a reversal of its precedent.

55. 59 MINSHŪ 2087 (Sup. Ct., Sept. 14, 2005).

56. 62 MINSHŪ 1367 (Sup. Ct., June 8, 2007).

57. 59 MINSHŪ 2645 (Sup. Ct., Dec. 7, 2005).

revocation litigation against the Minister of Construction's approval of the development project. The Supreme Court expressly overturned precedent and affirmed standing of the residents. This case is considered as the leading case on the interpretation of the newly inserted Paragraph 2 of Article 9 of the ACLA.

### 3. *New Types of Litigation and Remedies*

After the introduction of some new types of litigation and remedies in the 2004 amendment, the courts began to handle such new types of cases and have granted the remedies introduced by the amendment. Two judgments rendered by the Tokyo District Court attracted social attention. In this case, a municipal government refused to let a five-year-old girl with throat disease enter its nursery schools. She and her parents filed a mandating litigation against the municipal government. The court issued a preliminary order in which it mandated the municipal government to accept her<sup>58</sup> and later rendered a decision mandating the municipal government to issue an administrative disposition to accept her in one of the nursery schools.<sup>59</sup>

## VI. REFLECTIONS

In administrative litigation in any country, the judiciary always has a dual role: supervising the legality of governmental activities on the one hand and resolving concrete disputes or protecting rights and interests of citizens on the other. Administrative litigation in Japan has always placed emphasis on the latter and stuck to the principle of "concrete dispute" and "subjective litigation" by a strict interpretation of the concept of "administrative disposition" or standing. This was not necessarily the result of a legislative decision but rather of self-restraint by the judiciary. A comparison with Korea makes this point clearer. Although there is no difference between the abstract definition of "administrative disposition" in the case law of the Japanese Supreme Court and its counterpart in Korea, the concrete applications by these two Courts are very different. The same can be said about the standing issue. It could safely be said that Japanese courts may have suffered from "self-fossilization," although the background and reason for that may be open to discussion.<sup>60</sup>

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58. 1931 HANREI JIHŌ 10 (Tokyo D. Ct., Jan. 25, 2006).

59. 1956 HANREI JIHŌ 62 (Tokyo D. Ct., Oct. 25, 2006).

60. See, e.g., John Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel Foote ed., 2007); MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003). Recent interesting analysis of Japanese judiciary can be found at David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *TEX. L. REV.* 1545 (2009).

As we have seen, this attitude seems to be changing since the 2004 amendment. It should be noted that some decisions have relaxed the “administrative disposition” concept although the relevant clause in the ACLA (Article 3) was not amended. With respect to standing, the court is moving towards a more flexible interpretation using the newly inserted Article 9, Paragraph 2, which was, ironically, drafted as a codification of existing case law. The court has not only accepted the express mandate given by the legislator through the 2004 amendment, but also its general message for more effective relief and protection of rights and interests of citizens. This is a trend to be welcomed, but we should remain vigilant so as to avoid a revival of any self-fossilization.

What legislative strategies can be taken to make judicial governance more effective? The first one may be to introduce more types of “objective litigation” in addition to existing systems such as inhabitant litigation.

This strategy is surely possible. The possibility of group litigation, for example, is currently being discussed in the field of environmental law. But there is also another strategy that is more in line with the “legal dispute” concept and the idea that resolving legal disputes is the natural task of the judiciary. The legislature can create a citizen’s “right” within a legal scheme that serves administrative governance. The right of access to public documents in the Information Disclosure Law is a good example.<sup>61</sup> The purpose of public access to administrative documents is to guarantee the accountability of the government to the people as the sovereign. The judicial control of such guarantee may be “intrinsically rather fit for objective litigation.”<sup>62</sup> However, the Information Disclosure Law/Local Ordinances created the people’s “right to request a document” to enable them to exercise effective control. When such subjective rights are created, complaint litigation will be possible. The administration’s rejection of a request for an administrative document will be considered as an administrative disposition and therefore fall into the target of the traditional judicial control.<sup>63</sup>

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61. Gyōseikikan No Hoyūsuru Jyohō No Kokai Ni Kansuru Hōritsu [Act on Access to Information Held by Administrative Organs] [hereinafter Information Disclosure Law], Law No. 42 of 1999 (Japan).

62. 1137 HANREI JIHŌ 29 (Tokyo High Ct., Dec. 20, 1984).

63. *Id.*

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