THE RULE OF LAW IN JAPAN

by

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I. The Old and the New Constitution and the Legal State Principle Therein

The principle of 'legal state' or "government by law" in Japan dates back to 1889 when the Imperial Constitution of Japan, or the Meiji Constitution as it is now commonly called, was established. The said principle under this Constitution, however, was to be distinguished from the Anglo-American 'rule of law' in several respects.

Firstly, the legal state principle under the Meiji Constitution was seriously limited by another constitutional principle of Tennoism (Emperor sovereignty). It was a form of monarchism peculiar to Japan. The balance between the two rival principles was in favor of the latter, so that the legal state principle had to give way before undue encroachments of the monarchist principle. Thus the Imperial Diet heald a week position in the process of legislation, its only function being to assist the Emperor in exercising his legislative prerogative. Moreover, the Emperor (the Executive) could go the length of excluding the intervention of the Diet by independently making ordinances affecting the rights and duties of his 'subjects' (Meiji Constitution, Art. 9). This Imperial power was termed the independent ordinance-making prerogative. Insofar as one and the same body was empowered both to make law and administer it, the presence of this prerogative was tantamount to a downright denial of the legal state principle.

Secondly, the legal state principle, even if it had remained undisturbed by any other principle, would nonetheless

have presented some features alien to the 'rule of law'. Those features may be traced back to the German prototype on which the Meiji Constitution was modelled, the 'legal state principle' being a literal version of **der Rechsstaatsprinzip.** At any rate, this principle as it operated in Japan presented a sharp contrast to the 'rule of law' in the way it viewed the relations between the administrative and the judicial power. The rule of law presupposes that any person- -so, too, any person or body of persons invested with administrative power--is 'subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunal' (Dicey). The legal state principle, on the other hand, was based on the assumption that the judicial and the administrative power should be on an equal footing with each other, and that these two powers should be independent of each other. The logical consequence of this position was that any judicial review and judicial check imposed by ordinary courts of law on any act of an administrative agency would amount to an infringement of the administrative power by the judicial power, and that a special court of administrative justice must necessarily be set up to have jurisdiction over administrative cases.

By no means is it meant that the establishment of an administrative court led simply to a division of labor between the private law (ordinary or judicial) and the public (extraordinary or administrative) tribunals. The underlying philosophy of this dual system was that the administrative power had a capacity and a qualification for guaranteeing the legality of its own functions. Dr. Minobe, for instance, took his ground on this theory when he said that since an administrative agency as an organ of the State was charged with the duty of carrying on administration in a lawful manner and of safeguarding the rights of the people, it afforded a tentative safeguard of civil rights in its own action before judicial relief was sought (Tatsukichi Minobe, **A Commentary on the Constitution of Japan**, 1927, p. 612). If all administrative legal relations thus carried with them, as he claimed, a tentative safeguard of civil rights before resort being had to legal pro-

ceedings, it followed as a necessary consequence that the administrative court was nothing but a means of redoubling that safeguard, and that its jurisdiction need not cover all administrative controversies. And indeed matters subject to administrative jurisdiction were extremely limited by statutes under the Meiji Constitution.

Here we can draw a very clear line of distinction between the legal state principle and the 'rule of law'. The theory of the former was not only that legal controversies between an administrative authority and citizens fell within the jurisdiction of an administrative court instead of a judicial tribunal, but also that it was not the rule, but the exception, that cognizance was taken of such controversies by any court at all, whether ordinary or extraordinary. In spite of its insistence upon 'administration according to Law,' the legal state principle provided no guarantee against unlawful administrative action anywhere else than in the pleasure of an administrative authority itself. How could we then speak of citizens as having rights as against the administrative authorities or of administrative law as a body of legal norms in the true sense of the term?

The above philosophy underlying the legal state principle will throw light upon a series of cases in which liability on the part of the administrative authorities was denied for any damage caused to citizens by an unlawful exercise of administrative power. The Supreme court said that the law of torts in the Civil Code applied to the State's acts performed for purposes of private economy, but not to its acts performed in exercise of administrative power, and that, therefore, the State was exempt from liability for damages arising out of torts of the latter category unless otherwise provided for by special legislation, which was seldom the case (e.g., Supreme Court Decision, 1910, in an action of damages arising from the explosion of a military powder plant; Sup. Ct. Dec., 1935, in an action of damages brought by the surviving family of a pedestrian killed by a fire engine during a test run).

The above theory will also account for the wide scope allowed to administrative self-execution under the Meiji Constitution. In private law relations no creditor could resort to self-help against a defaulting debtor, but must always seek judicial relief. An administrative agency, on the other hand, could, on its own authority and without judicial intervention, force any defaulting people to perform their duties imposed by administrative law. The idea that the authority to use coercion belongs as a rule exclusively to judicial power and, save in exceptional cases, cannot be exercised by an administrative agency without its due authorization, does not seem to have ever obtained in Japan. It is true that it was provided that a public procurator had to be judicially authorized before he could use coercion in criminal investigations (Code of Criminal Procedure, 1922, §255). Nevertheless in practice there was virtually no judicial check upon such compulsory investigations conducted by an administrative agency. This may be attributed to the notion that national or public interests can always justify an administrative authority in impairing private rights or interests unchecked by other branches of state power.

Thirdly, attention must be called to the fact that the legal state principle was distorted by the impact of the too hasty introduction of heterogeneous legal and other institutions from the West. If the law is the outcome of a successful struggle of the people for their rights and liberties, the law will be a weapon, and the Courts a bulwark, for defending such rights and liberties. But in Japan where the ruling classes rushed the borrowing of Western institutions in order to speedily modernize the country and save it from the danger of being colonized by Western powers, the law was rather a tool in their hands for controlling the people. Japanese bureaucracy that monopolized legal knowledge made law and administered it, while the people who had no such knowledge even shunned and feared the law. The tradition of trial by jury has never existed in Japan, nor have the Japanese people ever thought of access to the courts in terms of legal rights. The term "legal state" formed a good pretext for the Tennoist Govern-

ment's bringing pressure to bear upon democratic movements against itself. Due partly to this state of things and partly to the absence of judicial control over administration, the law, far from binding the bureaucracy, became a powerful and fearful means of bureaucratic subjugation and control of the people. Although we may, thus, admit that the Meiji Constitution played a progressive role in Japan by introducing constitutionalism there, yet we must not overlook the fact that, instead of the 'rule of law,' a monarchic - bureaucratic 'rule **by** law' was going on under this Constitution.

None of the above mentioned attributes of the legal state principle under the old Constitution have escaped the far-reaching influence of drastic reforms initiated under the new Constitution which was established after the World War II (The Constitution of Japan, 1946).

First of all, one may observe the post-war reforms of distortions hitherto inflicted on the legal state principle in the name of national polity. Under the new Constitution the Diet, as a body of representatives of the sovereign people, has attained supremacy and is the sole law-making organ of the State (Art. 41). The Executive has no independent rule-making power; there is no longer any room for despotic power that can make law and at the same time administer it. The new Constitution has made up for a serious defect in the principle of responsible administration by incorporating an express provision as to the liability of the State or a public entity to any person who has suffered damage through illegal act of any public official (Art. 17).

A second post-war reform may be characterized as a shift 'from an administrative state to a judicial state.' With the abolition of the Administrative Court which constituted the institutional prop and stay of the administrative state, all administrative cases are now placed under the jurisdiction of ordinary courts exercising judicial power. The New Constitution provides, "The whole judicial power is vested in a Supreme Court and in such inferior courts... No extraordinary tribunal shall be established, nor shall any organ or agency of

the Executive be given final judicial power" (Art. 76, Paras. 1 & 2), though there is a split of opinion as regards the interpretation of this provision. The old restriction on material jurisdiction has also been removed, and judicial cognizance is now guaranteed of all disputes over legal rights and duties by the Court Organization Law which provides: "The courts will exercise jurisdiction over all legal controversies..." (§ 3). Express constitutional provisions have also been inserted to declare the principle of judicial restraint on force used by an administrative agency, especially by one conducting, criminal investigations (Arts. 33 & 35).

Thus ended the political doctrine of administrative supremacy which kept the administrative power beyond the reach of judicial control and gave it a free hand in interpreting and administering all rules of administrative law. The administrative power is, from an institutional point of view, now almost completely subjected to the rule of law both before and after any of its actions, for it must act only upon prior legislative authorization and it must submit to subsequent supervision in the form of judicial review of its legality. It is another story, however, how far the real state of things has been affected by such institutional reforms- -a far more important question. Let us, then, approach this problem from two points of view- -what changes have taken place in the administrative process hemmed in by legislative authorization and judicial review, and how judicial review is actually going on under the new system.

II. Administrative Procedure with Particular Reference to Hearings

Before the cessation of hostilities, the exercise of administrative power was as a rule entirely arbitrary and subject to little or no control, with a few exceptions. When legal scholars relied on the legal state principle to urge the necessity of exercising legal control over administrative power, all they advocated was to extend the availability of **subsequent** remedies to all cases where the rights of the people were adversely

affected by anillegal exercise of administrative power. But it never occurred to the minds of these scholars to question the practice of creating administrative legal relations in an arbitrary way, or, in other words, without any participation on the part of those affected thereby.

In post-war legislation, on the other hand, it is not infrequently provided that an administrative agency should give opportunity for public hearing or defense (hereinafter referred to together simply as 'hearing') before taking any administrative action. This requirement of prior participation of parties concerned and other persons interested is, of course, meant to curb the administrative power that has hitherto had a free rein. We may speak of this innovation as one of the 'due process of law' elements introduced into our administrative process. The statutory hearing requirement has a variety of patterns, a few examples of which follow :

(1) It is often required by law that opportunity to be heard be given to interested persons to adjust conflicting interests before some administrative action is taken for the benefit of the parties concerned but to the prejudice of other persons directly or indirectly. This is the case, for instance, where building restrictions in residential, commercial or other quarters are lifted in favor of specified persons (Building Standard Law, § 54), or where the owner of a mining right is licensed to use another person's land (Mining Law, § 106).

(2) There are many instances of legislation requiring opportunity for hearing before licensing an enterprise with a tendency toward monopoly so that an administrative agency may find its way through entangled interests to arrive at a just and proper decision. This procedure is followed, for instance, before licensing a motor vehicle transportation enterprise (Road Transportation Law, § 122-2), authorizing the digging of a hot spring (Hot Spring Law, § 10), or giving a fishing license (Fishery Law, §§ 10, 11).

(3) It is becoming the rule to provide that hearings be granted before revoking or restricting licenses (especially bu-

siness licenses) so that the licensees may have opportunity to defend themselves. This is true of revocation or suspension, for instance, of a license to drive an automobile (Road Traffic Control Act, § 9), or of a license to run a business affecting public morals (Law Regulating Businesses Affecting Public Morals, § 4).

(4) Administrative agency is often required by law to give affected interests opportunity for hearing or public hearing before making orders, rules, regulations and the like in exercise of its quasi-legislative power, as where the Minister of Welfare makes certain orders relating to pharmaceutical affairs (Pharmaceutical Affairs Law, § 3), or where the Minister of Postal Services makes certain orders relating to radio enterprises (Radio Law, § 99-2). These hearings largely partake of the character of public hearings such as the Diet holds during its legislative process.

(5) We may close our list by mentioning the quasi-judicial process as a hearing in the broad sense of the term. The Fair Trade Commission, for instance, when it finds that an act is violative of the Anti-Monopoly Act, may by a decision order certain action to be taken, but before rendering such decision the Commission must hold a hearing where it deems it in public interests to refer the case to a hearing (Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, § 49). Formerly an administrative agency would arbitrarily issue orders to give effect to legal provisions and inflict punishments upon violations of the same. Under the present system, on the other hand, an administrative commission, in order to carry out legislative intent, resorts to hearings as a new executive device in which affected persons can participate.

Now that the hearing system is established as a condition of exercising administrative power, this procedural requirement must needs be fulfilled before any administrative act can be legal and valid. This may be illustrated by a judicial decision, though one rendered by an inferior court, which invali-

dated an order for removal of a structure from a municipal road on grounds of lack of a hearing (Saga District Court Decision, April 23, 1955), seeing that a public road controlling agency can order the removal of a structure from a road only after giving affected parties opportunity to be heard (Road Act, § 71. 91 - 1). In support of this judicial opinion some of our jurists say that a failure to meet the statutory requirement of hearing will generally be fatal to the validity of an administrative act (Jiro Tanaka, **General Principles of Administrative Law,** 1957, p. 352).

No doubt, the transplanting of the hearing system into Japan means a step forward towards the rule of law; a procedural requirement so vitally important to valid administrative acts has thus been imposed on the administrative process hitherto left entirely free from legal control. But we also notice some indications to the contrary, if we scrutinize the system as it is in action.

(1) Our hearing system as it actually is leaves something to be desired from the point of view of 'due process of law'. Although our administrative hearings follow no single pattern, most enactments give only one section to prescribe grounds, requirements and procedure for hearings. Hearings of the simplest type will have only a few features like (a) personal and public notice of the grounds, times and places for hearings given before a certain period of time, (b) appearance of parties in person or by proxy, and (c) hearings open to the public (e.g., Law Regulating Businesses Affecting Public Morals, § 5). A more formal type will have, in addition, (d) parties' right to state opinion and present evidence (Road Traffic Control Law, § 7), (e) appearence and examination of witnesses besides parties (Radio Law, § 91), (f) making of records by the administrative agency (Radio Law, § 93). The most elaborate type that can only be found in a limited number of enactments like the Radio Law (§ 87, 90, 91), the Anti-Monopoly Law (§ 52) and the Marine Disasters Inquiry Law (Chap. III) will present additional features such as (g) examiners or other expert officers specially assigned for hearings,

(h) parties' privilege of counsel, and (i) parties' righ of cross-examination.

In 1952, the Council on Administration, which was called upon to advise the Prime Minister as to possible improvements in administrative operations, made a report including a draft National Administrative Operations Law. In this report the Council recommended that a standard be set up for hearings, but it paid little heed to such important safeguards for due process of law as (g) to (i) above. Even this mild reform plan did not materialize in legislation due chiefly to opposition on the part of our bureaucracy.

(2) Hearings tend to become a mere matter of form in cases where administrative power has a tight grip on economic and social life. It is said that a hearing held before revoking a business license will, as a matter of fact, last only a few minutes before it is concluded, because the licensee cares to offer no defense. The explanation is simple. He dare not resist and hurt the feelings of the supervising authorities in any degree at the expense of all hope of getting a license again in the future. It is really much wiser of him to secure the possibility of getting it back after a period of time by readily admitting their charge now than paying too dearly for speaking up against them. This may be taken to be a sign that there is room for prejudice stealing in at the time of granting a business license. If there remains any room for the 'rule of men' instead of 'rule of law' in any part of the administrative process, the 'rule of law' doctrine introduced with its institutional aspects into that process would never perform its proper functions, but only become a sad mockery of its Anglo-American original.

(3) It is often witnessed, too- -a phenomenon that at first sight appears to be contrary to that mentioned above--that, when confronted with a sharp conflict of interest asserting themselves at a hearing, an administrative agency simply looks on with folded arms and seeks to evade its administrative responsibility. This is especially true where the licensing of businesses involving a comparatively large capital and a

tendency to monopoly is at issue (See 2, p. 7, **supra**), such as those businesses regulated by the Mining Law and the Road Transportation Law. Avowedly a hearing in such a case is provided for by the law for no other purpose than to have diverse interests asserted and the public interest determined. Unfortunately, it is not infrequent that the hearing in the instances above referred to reflect only the pressure used by the large financial interests immediately involved. It is matter for serious concern that this sort of thing should stand in the way of proper administrative operations.

(4) We have no clear objective criteria on which to test the necessity of granting hearings. In similar types of cases some statutes say one way, while others say the other. It is impossible to define in exact terms objective standards capable of uniform application. A hearing procedure if adopted by statute will become a check upon administration, to be sure, but the legislators are given entirely free hand in adopting it, there being no criteria deriving directly from a constitutional principle binding upon the legislators themselves as well, like the American due process clause, and here lies a fundamental difference.

Our new Constituton patterned after American constitution is not without a provision that reminds us of the 'due process of law' clause. Article 31 reads: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." Here 'procedure' is not qualified by the adjective 'due'. It then may be questioned whether we can use any mode of procedure if only it is established by law. If 'nor shall any **other** criminal penalty be imposed,' it will necessarily be questioned whether it is allowable to limit liberty without violating this provision, so long as it is not by way of punishment. As to the first question, it is the majority opinion of legal scholars that the word 'due' is understood. As to the second, however, the view is predominant in acedemic circles that it is a procedural safeguard only against punishments involving loss of life or liberty (Toshiyoshi Miyasawa, **The Constitution**

of Japan, 1955, p. 286; **contra, A Seriatim Commentary on the Constitution of Japan, 1953**, Vol. 1, 1953, p. 586.).

As to the interpretation of the constitutional provision above quoted, no opinion has as yet been proclaimed from the Supreme Bench. There was indeed a case which had some bearing on this subject and in which the Supreme Court might have declared itself upon it (July 6, 1956). The case involved a town policeman who was disciplined in contravention of the town police basic regulations. It was provided in the said regulations that no disciplinary action be taken against a police officer unless he is served with a copy of the written accusation at least 15 days before the date fixed for a hearing. The Supreme Court invalidated the disciplinary action on the ground that the requirement was not satisfied. But the Court did not invoke Article 31 of the Constitution. The question might have been raised whether the disputed disciplinary action, had it been taken in conformity to the regulations, would have been supported even if the regulations themselves had been against 'due process of law.' The Court was silent on the question, one reason being that it was not a real, but just a hypothetical one. According to the majority scholarly opinion given above, disciplinary action would have been valid even in such case, since it was not 'criminal penalty' within the meaning of the constitutional provision. In an extreme hypothetical case where the disciplinary action had been taken without so much as giving any opportunity for defense, any direct invocation of Article 31 of the Constitution would still have been of no avail to have the action declared void, so long as the procedure through which the action was taken had the sanction of law.

Such is the case even with disciplinary penalty that affects civil rights no less seriously than criminal penalty; much more so with the rest of administrative actions. It is only for the judicial process, but not for the administrative process, that the Japanese legal way of thinking requires a procedure of adversary hearing between parties concerned The principle of arbitrary exercise of administrative power in forming

administrative legal relations seems to remain fundamentally unchanged nonetheless for the introduction of hearing procedure. No such principle can be justified except by the old idea that the administrative power is qualified to guarantee the legality of its own functions. It is true this idea is no longer powerful enough to support any argument for denying or limiting judicial review of administrative acts. But it still retains vitality enough to produce a derivative idea that administrative acts as acts of the State carry with them public authority, to which all citizens are bound to submit. Hence it follows as a corollary that any citizen, even if convinced of the illegality of an administrative act, must yield tentative obedience to it, and that he can only challenge it in court in the form of 'objections' to an administrative act which has a presumption of legality. Thus public law cases and private law cases have differents form of action to distinguish them. The 'judicial state' principle under the new Constitution has not obliterated the sharp line between public and private law. Against this background we can perhaps well explain the marked contrast between the Anglo-American rule of law and its Japanese counterpart.

III. Judicial Review

The shift from administrative to judicial review, and from limited to plenary review, of the legality of administrative functions has given rise to many new questions. Let us examine a few of them which have a relatively close bearing upon the present subject.

(1) The principle of exhaustion of administrative remedies. Under the old system administrative justice, or more precisely justice dispansed by the Administrative Court, was one of the means of safeguarding the legality of administration. But what was calculated to be a chief means of achieving that end was rather self-restraint of the administrative power- -administrative supervision. Despite its procedural defects discussed below, administrative protestation in the widest sense of the word (inclusive of filing objections, applying for

reconsiderations or rehearings, presenting administrative appeals and the like) played an important part as a device by which a citizen could take the initiative in invoking that power of administrative supervision. The relations between protestation against the administrative authorities and litigation before the Administrative Court, though they varied with enabling acts, could be classified into two or three patterns. In any case, the Administrative Court was not accessible before exhausting protestation procedure according to a provision of the old Administrative Court Law.

A large question under the new Constitution which has revolutionalized administrative jurisdiction and its significance is how to reform the old protestation system. An argument has been advenced- -and there appears to be good ground for it- -that the judicial state principle demands the principle of the judicial courts being directly accessible in all administrative cases. But the rule of exhaustion of administrative remedies under the old Administrative Court Law has been preserved by the Special Administrative Procedure Law which has been passed to make the minimum of exceptions to civil procedure for the handling of administrative cases by judicial courts (§ 2). No doubt this principle has its rational basis in the possibility of an illegal act being corrected through summary procedure or by reconsideration on the part of the administrative agency that is responsible for the mistake. Indeed the greater part of tax disputes are solved at the stage of protestation. But the principle of prior resort to protestation as a general requirement for all types of administrative cases will be attended with undesirable results. For example, we may point to 'the law's delay' caused by one or two stages of protestation preceding two or three stages of litigation. It also happens very frequently that too short time limits cause otherwise sustainable claims to be dismissed on mere technical grounds.

But the greatest weakness of the system is that protestation procedure leaves so much to be desired. Since its enactment in 1890 the Administrative Protestation Law has

remained unmodified and has in the meantime become considerably out-moded. An attacked administrative action is to be passed upon by the administrative authority that performed it or by a superior authority that is supervising it- -by an authority in either case which is in no position to make any decision without prejudice. Besides, a protestor has no right to be heard, but the adjudicating authority may in its discretion conduct an oral examination. Nor has the protestor the right to representation by counsel.

Only some post-war legislation has introduced into our protestation procedure some elements of quasi-judicial such as oral examinations or public hearings. This is the case, for instance, where an official challenging disciplinary or other unfavorable action taken against his will petitions for a review under the National Public Service Law, or where objections are filed to administrative acts under the Mining Law. In such cases a protestor generally has also the rights to be heard, to present evidence, to be represented by counsel, to cross-examine adverse witnesses, and so forth. But what was said of hearings in the preceding section applies as well to these new elements; their adoption depends upon the 'legislators' pleasure and indeed has only gone to a very limited extent at the present moment. The principle of exhaustion of administrative remedies requiring prior resort to protestation procedure seriously handicapped by such imperfections is sharply criticized- -not without reason- -as a substantial obstacle to administrative relief (Jiro Tanaka, "Real Obstacles to Administrative Relief," **The Jurist**, No. 7, 1952).

(2) Administrative discretion. A second question is how the exercise of discretionary power by an administrative agency is subjected to judicial control. Under the Meiji Constitution discretionary acts were not within the judisdiction of the Administrative Court. There was no statutory provision to that effect (such as the Austrian discretion clause), but that was a conclusion deduced through the following reasoning. If an administrative agency errs in the exercise of its discretionary power, discretionary action thus taken is not

illegal so long as that action is within the limits of that power, but merely inappropriate from the point of view of the public interest (Tatsukichi Minobe, **Japanese Administrative Law,** Vol. 1, 1936, p. 930).

This theory is still maintained under the new system. We certainly cannot deny that there are some discretionary acts of an administrative agency that do not lend themselves to judicial review .But it is only natural that under a different juridical system with judicial power having a different function and capacity the concrete scope of administrative discretion should change. Let us review recent trends in judicial opinion on this subject.

(a) A glance at the changing legislative attitude is a necessary prerequisite to understanding the changing judicial attitude. Our legislature has lately come to specify in detail requirements for licensing, especially for business licensing, in its statutory provisions which have hitherto been left almost blank .Before the War, all that our legislature used to require was that a license be taken out from a competent authority before doing a certain act (or business, but it did not set up any standard for licensing except in some special cases. In no way, of course, did it mean that an administrative organ had an absolute power in granting or denying licenses; it was held both in judicial and juristic opinion that when the case was one of police regulation the authority was bound to grant a license so long as it saw nothing against public interests. But the absence of a statutory standard in such case made judicial control practically inoperative. Moreover, licensing a privately owned public utility was considered to be a completely discretionary act amenable to no judicial review, because licensing a public enterprise was an act creating a right in favor of private persons in the sense that a public enterprise was to be construed to be not a business regulated for police reasons, but an enterprise of which the State reserved the right of management for reasons of public policy to the exclusion of private persons except those specially authorized.

Post-war legislation, on the other hand, besides establishing a standard for police licensing, has gone on to fix a comparatively well-defined standard for the licensing of public enterprises hitherto left entirely to the mercy of the administrative authorities. It is true that for all that, they are still exerting different influences in a questionable manner as above stated (p. 9), but it is worthy of special notice that the scope of administrative discretion shows a tendency to become limited by statutes. The reverse side of the coin is that it is becoming easier for the courts to exercise control to keep administrative discretion within its proper bounds on the strength of the doctrine of **ultra vires.**

(b) Let us now revert to the attitude of the courts. In the first place, it is remarkable that the courts tend to construe the scope of administrative discretion as narrowly as possible. This is best evidenced by their interpretation of so-called blank provisions and general clauses. For instance, an agricultural land statute (which was later superseded) provided that, on application of a prospective owner-farmer, the Government might purchase, in addition to agricultural land, the residential land and building he was holding on lease where a city, town or village agricultural land commission **deemed it appropriate** (Law concerning Special Measures for Establishment of Owner-Farmers, § 15), and that the Government might purchase uncultivated land **where it was necessary** in order to establish owner - farmers... (**Ibid.,** § 30). It looked as if the administrative authorities had absolute discretionary power under the statute, because there was no provision for a standard for its exercise, but most courts held to the contrary (e.g., Supreme Court Decision, July 13, 1950; Takamatsu High Court Decision, May 27, 1950). The court would try to read law into blank provisions and general clauses.

Another Supreme Court decision which was rendered upon the denial of permission to use the Outer Gardens of the Imperial Palace merits special attention from the same point of view (December 23, 1953). The General Council of the Japanese Labor Unions, in order to hold a central May Day

meeting, applied for a leave to use the gardens which were property to be used for the public welfare, but the Minister of Welfare, who was in control of the property, rejected the application. Thereupon the Council brought an action against the said Minister to have his denial set aside. The Supreme Court decided the case against the plaintiff on the technical ground that in an action to have set aside the denial of leave to use a public garden for a meeting to be held on a specified date the plaintiff's interest in judicial relief lapsed with the passage of that date. But the Court went out of its way to add its opinion on the merits of the case probably with a view to prevent annual recurrence of cases of this sort. Rejecting the defendant's contention that administrative authorization to use the public welfare property was discretionary as an exercise of power to control public property, the Supreme Court held that the defendant was bound to exercise his controlling power in a just and proper manner so that the said gardens might fulfil their mission as public welfare property. The Court further said that, although the National Park Control Regulations declared no particular policy to be followed in authorizing the use of the Imperial Palace Outer Gardens, such authorization or its denial was not discretionary action on the part of the controlling agency at all, and that, therefore, if the Minister of Welfare should make a wrong exercise of his controlling power with resultant interference with the use and enjoyment of them by the people, his action would be held illegal. This view is remarkable in that it denies the position that it is entirely left to the discretion of the State to determine whether whom to authorize to use state property (although in this particular case the Court upheld the denial of the Minister of Welfare as not amounting to an illegal misuse of his controlling power).

(c) Another striking change has taken place in the form of judicial decisions. Under the Meiji Constitution it was a rule with the (Administrative) Court to dismiss an action for setting aside a discretionary act as an unlawful one on the technical ground that it had no jurisdiction given by law over

such administrative acts. Nowadays, on the other hand, the courts of law will admit that sort of action as lawful and cognizable, but dismiss it on the merits when it is brought to challenge an act performed within the bounds of administrative discretion. They do not hold a discretionary act to be essentially outside their jurisdiction, for, in their opinion, even a discretionary act may be illegal when evidently beyond the limits of administrative discretion or against the object of law (Fukuoka District Court Decision, June 2, 1954).

In parallel with this change in form lies a change in substance. There used to be a categorical distinction between ministerial (non-discretionary) and discretionary action, the latter of which, in the majority view, was entirely beyond the jurisdiction of the courts. It is now maintained with increasing force that what was supposed to be a difference in kind is, in the final analysis, a difference in degree, and that all administrative acts consist of ministerial and discretionary parts. If, therefore, an administrative agency in exercising its power oversteps that discretionary part of a administrative act which is recognized by statute, the whole act in question is vitiated and becomes illegal. In illustration of this we may cite a couple of decisions of the Supreme Court. In one of them the Court held that it yielded as a rule to the disciplinary power vested in a public university president to determine whether to discipline a student for his misconduct and to choose among possible measures of punishment, but that whether such disciplinary action is grounded on facts at all is properly subject to court review (July 30, 1954). In the other case, the Court, while admitting that the act at issue to decide the delivery quota is one left to administrative discretion, recognized the principle of equality worked as an implied limitation upon it, saying, "An administrative agency is not free to discriminate without reason against a particular individual to his prejudice" (June 24, 1955).

(d) But the attitude of the courts (especially of inferior courts) as to the discretion problem vary with a pretty wide range. On the one hand, some courts seem to go too far. We

may cite again case of disciplinary action taken against a student of a public university. The court of first instance held that the choice of disciplinary measures is not subject to the discretion of the disciplining authority. The facts of the case were as follows: Some students, opposed to the demotion of a professor and demanding a reform in the educational policy, went to the faculty in session and demanded their meeting be opened to them, but were refused. In defiance of orders to quit the place, one of them stayed and interfered with the proceedings of the faculty meeting, and on this charge he got his name struck of the register by way of disciplinary punishment. The court, after probing into detail in its finding, held that the conduct of the student was not pernicious enough to deserve expulsion, and set aside the disciplinary action taken against him (Kyoto District Court Decision, July 19, 1950).

On the other hand, we have some cases to the contrary. A Diet member of a non-government party who was going to attend an international conference (Asia-Pacific Area Peace Conference) to be held in Communist China, filed an application for issue of a passport, and upon its rejection brought an action against the Foreign Minister. The court was called upon to determine whether the person so denied a passport fell under the category of "persons who may be suspected with good reason as likely to commit acts materially and directly subversive of the interest or peace of Japan" (Passport Law, § 13, π 1, II 5). In this case, the court, blindly swollowing the finding of the Foreign Minister, appears to have unduly given up its own power of judicial review (Tokyo District Court Decision, September 27, 1952). It seems to be one of the most important duties resting now with the judicial power to properly determine such areas as are unfit for determination by the judicial process characterized by adversary practice, while discharging the function of safeguarding the just application of law.

(3) Acts of state or political questions. The Meiji Constitution left practically no room at all for discussing political questions because of the limited jurisdiction of the Adminis-

trative Court. Under the new system where the courts have expanded their jurisdiction to hear and determine all legal cases and controversies, political questions have forthwith come to the front, both in theory and practice. A beginning was made with a suit brought by a Diet member to recover his salary which would have been paid to him if he had not lost his seat in the House of Representatives by the allegedly void dissolution of the House by the Administration. His real motive was to dispute the validity of the dissolution of the House, but lest a suit to that effect should be dismissed on procedural grounds as it most probably would have been, his case assumed the form of a claim for his unpaid salary.

The real issue in this case was, **inter alia,** the constitutionality of the advice and approval given by the Cabinet to the dissolution in question which was as a matter of form an act of the Emperor. But, before going into this main issue, discussions revolved about a preliminary question whether the courts had power to review the validity of the dissolution of the House of Representatives, or, in other words, whether the dissolution as an 'act of state' should not be unamenable to their jurisdiction. Instead of looking upon the dissolution as an act of state, the court of first instance held that the act was capable of being judged in terms of law. The court stated that the courts had power and duty to pass on the legality of all acts so far as by so doing they could solve real disputes over the rights and duties of any individual, and that since the dissolution of the House affected the real rights and duties of a Diet member, there was no reason why the courts should not exercise its power to review the legality of the act (Tokyo District Court Decision, October 19, 1953). On appeal this decision was upheld by the court of second instance (Tokyo High Court Decision, September 23, 1954) (although in this case the court gave judgment against the plaintiff, rejecting his argument as to the main or substantial issue).

Juristic opinion is almost equally divided for and against the view these courts took of the dissolution problem. On the one hand, some of our scholars who accept the French doctri-

ne of **actes de gouvernement** support the act of state theory, while, on the other hand, others reject it as a survival of absolutism. Between the two extremes still others regard a political question as a matter of political discretion and try to find a constructive limitation so as to reduce the scope of discretion to a minimum.

(4) Administrative finality (binding force of the fact-finding of an administrative commission). This question arose with the post-war grafting of the American administrative commission system upon Japanese administrative tradition. We may cite below a few of the statutes furnishing a positive law basis for such administrative commissions. The Land Adjustment Commission Law has set up a Land Adjustment Commission charged with the duty of making adjustments between the mining industry and the general public interest or other industries. The Commission passes upon objections to the grant, denial or revocation of a mining right. When its decision comes up before the court for review, its finding is binding upon the court if supported by substantial evidence; but it is for the court to determine whether its finding is so supported (§ 52). The Anti-Monopoly Law also sets up a Fair Trade Commission against whose decision an action lies for court review, and has similar provisions as to the binding force of the Commission's finding and the court's power to pass upon the substantial evidence problem (§ 80).

There are a few judicial decisions on this point, but the writer must content himself with commenting on one of them. It is a case in which the court, while supporting the conclusion of the Fair Trade Commission's decision, made its own fact-finding on the basis of evidence (Tokyo High Court Decision, September 19, 1951). Here are the facts of the case. The Tôhô Motion Picture Company, one of the Big Five in Japan, entered into a contract for joint management of two big movie theatres situated in the amusement center in the heart of Tokyo with a show enterpriser who owns those theatres, and reported about the contract to the Commission. Thereupon the Commission condemned the contract as a lease of business

that comes under 'substantial restraints on competition in a certain business field by means of lease,' and prohibited the lease under the said contract. The Company thereupon brought an action to have the Commission's decision set aside. One issue, among others, was whether the contract would prove to be a substantial restraint on competition in a certain business field, and what particular area is so understood in the case of the movie show enterprise.

The Commission held that 'a certain business field' meant 'a sphere of competition' which was in the present case the A area where the two movie theatres were located, or the somewhat larger B area including A, and referred its finding of the A area to the 'common sense of the general public' and that of the B area to the testimony of witnesses. The court accused the Commission of arbitrariness in isolating the A area as an independent one, and upheld the secondary finding of the B area being 'a certain business area' in the movie show enterprise as well supported as a whole by the testimony of witnesses, evidence presented by the Commission, and other facts of which judicial notice was taken.

This case attracted attention as an instance of lack of faith in the findings of administrative commissions on the part of the law courts. This attitude of the courts has been criticized as being against the legislative intent that an administrative commission has an exclusive power to make fact-findings--to determine what facts may be deduced from certain evidende- -and that such findings should be respected by the courts unless based on considerably unreasonable proof. But the fault lies as well with the commission which relied on such things as 'the common sense of the general public.' Its finding may well be rejected as founded on something falling far short of 'substantial evidence.'

It is no easy thing to make a correct evaluation of the significance that attaches to administrative finality (the substantial evidence rule) in Japan. If we trace the development of the Anglo-American administrative commission system, we shall find that the high complexity of the modern industrial

system has rendered the judiciary as a remedial device inadequate to meet the needs of the new age and demanded in its place an administrative intervention as a means of substantially safeguarding the interests of the consuming public. In order to discharge regulatory functions to achieve that end, adminitrative commissions have been called into being. Japan has so far been laboring under administrative supremacy and unsatisfactory judicial processes, two factors in excessive bureaucratic control. Nothing would then be more urgent for us than to obviate defects in our judicial review system and to establish the rule of law on a sound basis. But, on the other hand, there is no denying that Japan also has the same modern problems that called for administrative finality in the English-speaking world. These two needs are often hard to reconcile. It is incumbent on Japanese administrative law as a branch of law and as a branch of legal science to find a solution for this difficult twofold problem.