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Nuclear Power Plant Reactivation in Japan: An Analysis of Administrative Discretion

*Yuichiro Tsuji**

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INTRODUCTION

After the Great East Japan Earthquake took place in Fukushima in 2011, Japan abandoned nuclear power plants. However, it now plans to reactivate them.

The Ministry of Economy, Trade and Industry (METI) establishes regulations via ministerial ordinances to achieve statutory goals. Cases before several district courts seek to know whether the government's grant of permission to reactivate nuclear power plants is arbitrary and capricious.

This Article examines issues pertaining to the grant of permission for the establishment of nuclear power plants and considers cases on the matter, because administrative discretion results in important developments in environmental law from a comparative law perspective.

It is important to examine the decisions of the Japanese Supreme Court on administrative discretion in Japan, U.S. environmental law, and several cases concerning the establishment of nuclear power plants in Japan.

I. NUCLEAR POWER PLANT CASE IN JAPAN

Most recently, the judiciary reviewed the reactivation of the nuclear power plant in 2017. Accordingly, this section looks at the decision of the High Court in the 2017 case. The Osaka High Court¹ rejected the request for a temporary injunction against the operation of a nuclear power plant that the government had closed down after the Great East Japan Earthquake. A newspaper reported this case dramatically, which shows the influence of this case on decisions of other inferior Courts.²

A. Takahama Nuclear Power Plant Case in 2017

The Takahama Nuclear Power Plant started operations in 1985 after the government granted permission to operate it in 1980. The Great Earthquake caused the release of a massive radioactive substance in 2012, after the nuclear power plant melted down and a hydrogen explosion occurred. This incident caused nuclear power plants to stop operations one by one. Unit 4 of the Takahama nuclear power plant stopped in July 2011,

1. Osaka Koto Saibansho [Osaka High Ct.] March 28, 2017, Heisei 28 (ra) no. 677, 2334 HANREI TAIMUZU [HANTA] 4 (Japan).

2. FUKUI SHIMBUN ONLINE, Genpatsu sashitome soshō [Injunction case of nuclear power reactor] (Sept. 25, 2018), <https://perma.cc/H9DX-8H37>. See also *Takahama reactors may soon restart after court overturns injunction*, JAPAN TIMES (May 27, 2017), <https://perma.cc/R3KT-GQUN>.

followed by Unit 3 in February 2012. In 2012, the Japanese parliament amended the Act on the Regulation of Nuclear Source Materials, Nuclear Fuel Materials, and Reactors.³ In order to reactivate the nuclear power plant, an applicant must submit a request for permission to the Nuclear Regulation Authority (NRA) to see if it meets safety standards and to make an application to modify facilities to meet the new standards.

In July 2013, the Kansai Electric Power Co. submitted an application to modify the facility and sought permission to plan the construction and correction of the nuclear plant according to the safety regulations for Units 3 and 4.⁴

In December 2014, local residents brought an action to seek a temporary injunction against the operation of Units 3 and 4. They argued that their interests were based on personal rights in Article 13 of the Constitution and sought the exclusion of interference because nuclear contamination would cause damage to the lives and health of local residents.⁵

The Fukui District Cour⁶ accepted and granted a temporary injunction. Units 3 and 4 stopped operations in February 2016. The Osaka High Court vacated it and focused on NRA safety standards. The Osaka High Court admitted that safety regulations should prevent a “remote” possibility of concrete danger, but noted that while reviewing a concrete risk of substantial danger, the reviewing Court would see if the danger is controlled well enough that it may be ignored by socially conventional wisdom. The Osaka High Court thought the NRA safety standards were reasonable enough to achieve the level of safety required for a nuclear power plant to operate.⁷

Although this case was considered civil litigation, its decision was similar to a decision in an administrative adjudication. In Japan, residents have two routes to seek an injunction against a nuclear power plant. As shown in the civil case, one way is for the local residents to pursue civil

3. Kakugenryo Bussitsu, *Kakunenryou Bussitsu oyobi Gensiro no kiseini kansuru Houritsu, Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors*, currently Law No. 42 of 2016. (Japan).

4. Takahama nuclear power plants are composed of four units. Unit 1 started in 1974, and Unit 2 started in 1975. Unit 3 and Unit 4 started in 1985. KANSAI ELECTRIC POWER, *Nuclear Power Information on Units 3 and 4 of Takahama Power Station (List of Topics)*, <https://perma.cc/2BR5-XWZM>.

5. The argument for personal rights includes the right to health, derived from their right to “life, liberty, and the pursuit of happiness.” NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], Nov. 3, 1946, art. 13 (Japan).

6. Fukui Chiho Saibansho [Fukui Dist. Ct.] April, 14, 2015, Heisei 26 (yo) no. 31, 2290 HANREIJIHO [HANJI] 13 (Japan).

7. Justin McCurry, *Fukushima operator can restart nuclear reactors at world's biggest plant*, THE GUARDIAN (Oct. 4, 2017), <https://perma.cc/MS4H-76B3>.

litigation alleging that permission granted to a nuclear power plant would infringe on their personal rights protected by the Constitution. The other method is administrative litigation, by which they can seek the revocation of permission granted to the nuclear power plant.

The civil case shows drastic reforms after the Great Earthquake in 2011 and followed the *Ikata* decision that is discussed in Section II(D), which alleviated the burden of proof on local residents in administrative litigation.

In the *Ikata* decision, the Supreme Court noted an imbalance of scientific knowledge between electric companies and residents. Thus, the *Ikata* decision noted that, in general, a plaintiff must prove administrative adjudication is unreasonable, but in this case, the Atomic Energy Commission is obligated to prove concrete standards for review and procedure by substantial proof and materials. If an administrative agency can't perform its duty, the unreasonableness of administrative adjudication is presumed. The Osaka High court followed the *Ikata* decision, and noted further: If an administrative agency meets its burden of proof, the burden shifts to plaintiffs to prove uncertainty.

Although the term “remote” in this decision means “just in case,” the Osaka High Court held that rather than a remote danger, a substantial and concrete danger was necessary. The decision led to the formation of the myth of absolute safety of the nuclear power plant. After 2011, this myth was discarded, and the government implemented detailed safety measures based on experiences of serious accidents. The judiciary can no longer focus on a “remote possibility.”⁸

Judicial control of administrative discretion is not confined to granting permission for the establishment or reactivation of nuclear power plants. Thus, before analyzing any further, it is necessary to review cases of administrative discretion in other fields. Section II illustrates that the development of administrative discretion in Japan is not as unique as non-Japanese researchers assume it to be.

B. Missiles from North Korea

After the High Court decision, Units 3 and 4 were reactivated in May and June, 2017, respectively. Local residents persevered and sought an injunction by other means. In March 2018, the Osaka District Court dismissed complaints that missiles from North Korea were likely to attack

8. Shigenori Matsui, *T-Rex, Jurassic Park and Nuclear Power: Nuclear Power Plants and the Courts After the Fukushima Nuclear Accident*, 42 WILLIAM & MARY ENVTL. LAW & AND POLICY REV. 145, 182-183 (2017).

the Takahama nuclear power plant and cause serious, extensive radioactive contamination in Kansai. The judge explained that the danger was not so imminent that it was necessary to stop operations of Units 3 and 4 of the nuclear power plant.⁹ Local residents now seek temporary injunction orders by bringing different arguments.¹⁰

II. ADMINISTRATIVE DISCRETION IN JAPAN

Administrative discretion is an important part of the study of the nuclear power plant permission case. It also raises important issues from a comparative law perspective.¹¹

Much controversy surrounds administrative discretion to establish administrative standards and make administrative dispositions. In abstract cases, the legislature provides general language in the statutes regarding standards for disposition for the general public. The legislature has established administrative agencies with a limited power to create administrative regulations within their fields of expertise.¹² It is still unclear how administrative agencies interpret statutes through ministerial ordinances. It is also unclear how administrative dispositions should be rendered or if permission for applications should be granted in specific cases.

Before World War II, German law greatly influenced Japanese law. At that time, administrative law focused on limiting the governmental power that infringed upon the interests and freedoms of the people. There were two mainstream theories used to recognize administrative discretion in Japan. The first theory focused on administrative discretion where administrative agencies interpreted the text of the statutes in concrete cases.¹³ The second theory focused on the choices of administrative agencies from several administrative dispositions provided by statute.¹⁴

9. Osaka Chiho Saibansho [Osaka Dist. Ct.] March, 30, 2018. *Kanden Takahama Genpatsu 4 gouki ga saikadou, Restart Takahama nuclear reactor Kansai Electric Power Co.*, NIKKEI SHIMBUN (May 17, 2017), <https://perma.cc/JZ4U-PFHF>.

10. *Utility eyes NRA screening nod for new nuclear reactor in Shimane*, THE ASAHI SHIMBUN (Feb. 17, 2018), <https://perma.cc/77W5-BPT3>.

11. UGA KATSUYA, GYOSEIHO TEKISUTO [ADMINISTRATIVE LAW TEXT] 161 (Yuhikaku 2012); Y. SHIBAIKE, GYOSEIHO [ADMINISTRATIVE LAW] 63 (Yuhikaku 2016); HASHIMOTO HIROYUKI & SAKURAI KEIKO, GYOSEIHO [ADMINISTRATIVE LAW] 151-52 (Kobundo 2016).

12. UGA KATSUYA, GYOSEIHO TEKISUTO [ADMINISTRATIVE LAW TEXT] 141-46 (Yuhikaku 2012).

13. *Id.*

14. *Id.* at 163-64.

After World War II, administrative law was influenced by U.S. theories. Japanese administrative law mixed U.S. and German administrative law theories.

This Article examines the decisions of the Japanese Supreme Court in terms of important environmental law doctrines in combination with U.S. theories of environmental law.

A. Rule-making and Lawmaking Power in Japan

Unlike the presidential veto power in the U.S., the Japanese Prime Minister has no legal power to reject a bill submitted by the parliament upon his signature. The parliament cannot give the administrative agency *carte blanche* in lawmaking power because Article 41 of the Japanese Constitution gives sole lawmaking power to the Diet.¹⁵ When the Diet leaves a gap in a statute, the administrative agency is expected to fill the gap.¹⁶ The grounds for the Diet to delegate its lawmaking power to an administrative agency are found in Article 73(6), which empowers the agency to “enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law.”¹⁷ Accordingly, Article 73(6) authorizes the Diet to delegate provided that its purpose is clear, the standard is fixed, and the scope of delegation is clearly limited.¹⁸ The Constitution considers the discretion limited if the Diet has the ability to withdraw or modify the delegation at any time.

In a famous administrative regulatory case involving a Japanese sword, one citizen filed for permission to register a western style sword to have in his home.¹⁹ A Japanese statute prohibits people from having guns and swords in their home unless applicant registers them as “beautiful museum objects.”²⁰ The administrative regulations provide an exception for Japanese swords but not for western style sabers.

The Japanese Supreme Court held that its delegation was constitutional.²¹ Some swords may have cultural value as museum objects. Japanese people cannot own swords, but the statute provided an exception

15. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41 (Japan).

16. UGA, *supra* note 12, at 143.

17. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 73(6) (Japan).

18. TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI, & KATSUTOSHI TAKAMI, KENPŌ II [CONSTITUTION II] 76–78, 418 (Yuhikaku 2012) (Japan) [hereinafter NONAKA ET AL. II].

19. Saikō Saibansho [Supreme Court] Feb. 1, 1990, Showa 63 (Gyo tsu) no. 163, 44(2) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 369 (Japan).

20. *Id.*

21. *Id.*

in the register system for the reservation of swords. The Japanese Court reviewed the purpose and the meaning of the statute and held that the Director General of the Agency for Cultural Affairs had regulation authority. In doing so, the Director's authority was limited to the appraisal standards for Japanese swords and what is considered valuable as registered beautiful museum objects.

In another case, the Japanese Supreme Court weighed in on a statute involving child-rearing allowance.²² The statute states that the Government provides support for children whose parents are divorced or whose father passes away.²³ Administrative regulations support the mother who bears a child without legal marriage unless there is legal acknowledgement by the father.²⁴ Under the Japanese Civil Code, legitimacy of a child is legally presumed when there is a married couple or when there is an unmarried mother who bears a child.²⁵ However, legitimacy is not presumed in circumstances involving an unmarried father and a child. The statute for child-rearing allowance only provides support for children of divorce, not for children of an unmarried couple.

The government denied the application for a child who was legally acknowledged by the father. The Japanese Supreme Court determined the administrative agency regulations that excluded children who were legally acknowledged by their fathers were illegal. Further, the Court found the distinction between married but divorced mothers and unmarried mothers to be unreasonable.²⁶

B. Definition of Administrative Discretion in Japan

Administrative discretion is the authority of an administrative agency to set regulatory standards or make administrative decisions within the scope set forth in its enabling legislation or other statutes. The grounds for administrative discretionary power are agency expertise and policy judgment. Discretion is exercised in administrative rule-making and administrative planning. There are two types of administrative planning: One is legally binding, such as land readjustment projects, and the other

22. Saikō Saibansho [Sup. Ct.] Jan. 31, 2002, Heisei 8 (Gyo tsu) no. 42, 56(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 246 (Japan).

23. Jidou Fuyou Teate Hou [Child Rearing Allowance Law], Law No. 238 of 1961 (Japan), art. 4(1)V.

24. Jidou Fuyou Teate Hou Sikou Rei [Enforcement Order of the Child Rearing Allowance Law], Ordinance No. 405 of 1961, art. 1-2(3) (rev. 2008).

25. MINPO [CIVIL CODE] Law No. 89 of 1896 (Japan), art. 772.

26. Saikō Saibansho [Sup. Ct.] Jan. 31, 2002, Heisei 8 (Gyo tsu) no. 42, 56(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 246 (Japan).

type serves only as a guideline with no legally binding power, such as a highway improvement project. If administrative plans restrict rights or establish duties of a citizen, they are legally binding and need to be established by statute. If not, they do not have legal binding power.

The scope of such discretion is subject to the terms set forth in the agency's enabling statutes and, in some cases, leads to judicial review because of intentional or unintentional "uncertainty" in the term.

For example, in 1997, Japan's Supreme Court reviewed the term "reasonable price," which was referenced in Article 71 of the Compulsory Purchase of Land Act.²⁷ In this case, the Land Expropriation Committee decided upon the compulsory purchase of a particular parcel of privately owned land. The land had some uncertainty with regards to the existence of a lease tenant contract and the ratio of leasehold tenant rights, and the committee ultimately decided upon a 40% leasehold tenant right. The Court stated the following:

[The Court] should not examine or judge whether or not the Expropriation Committee has abused its discretionary power when making a determination on compensation, but rather, the Court should determine a fair amount of compensation as of the time of the committee's determination, objectively, and if there is any difference between the amount of compensation determined by the Court and that determined by the committee, the Court should declare the committee's determination to be illegal and fix a fair amount of compensation.²⁸

The Court held that the "reasonable price" of the compulsory purchase should be objectively fixed and appropriately determined based on the experience of reasonable people and socially accepted ideas.²⁹ Accordingly, the Court determined that the term "reasonable price," as set forth in the agency's regulations authorizing the committee's work, did not give such broad discretion to the Land Expropriation Committee. Not reviewing whether administrative adjudication is arbitrary and capricious, the Court invalidated the Land Expropriation Committee's price of compensation.

27. Tochi Shuyo hou [The Compulsory Purchase of Land Act], Law No. 219 of 1951.

28. Saikō Saibansho [Sup. Ct.] Jan. 28, 1997, Heisei 11 (Gyo tsu) no. 11, 51(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 147 (Japan).

29. *Id.*

C. Classic Theories of Administrative Discretionary Power in Japan

In Japan, the legislature authorizes an administrative agency to exercise its power through statutes. In some cases, the terms of the statute are unclear. The ambiguity in the statutory authority includes how and when administrative discretionary power is legally exercised. Generally, the notion of discretion has been characterized by its requirements (*Youken*). Accordingly, the effects of discretion (*Kouka*) have been related to the level of judicial review. There are also concepts of reviewable and non-reviewable discretionary power.³⁰

To clarify this distinction, Kyoto University Professor Souichi Sasaki argued that administrative discretionary power was permitted in cases where an agency's interpretation involves an element or requirement as provided by statute.³¹ Simply put, the agency is granted discretionary power to apply a condition or requirement to a fact (referred to as *Youken Sairyō* in Japanese). For example, the legislature provided general text in public servant law that prohibits the delinquency of public officials; however, it is unclear what kind of action by a public official would constitute "delinquency." The administrative agency has the discretion to determine when a public official's statement is "certain" and in doing so, may determine the grounds for discipline.

On the other hand, Professor Tatsukichi Minobe of Tokyo University stated that administrative agencies had broad discretionary power to either select the procedure for such a disposition or not to decide at all. This theory is referred to as *Kouka (Sentaku) Sairyō* in Japanese. For example, in a public official's disciplinary case, the agency would have discretionary power to choose between punitive dismissal, pay cuts, suspension, or a warning as punishment.

The theories of these two professors may differ in some cases and lead to similar conclusions in others. These ideas reflect the German public law theories at a time when public law focused on how to restrict the government's infringement on the rights and protect freedoms of the people.³²

Prior to World War II, Japanese public law scholars such as Sasaki and Minobe did not consider social rights in Japan. Thus, Minobe approved of the unfettered discretionary power of an agency's disposition as an independent power to provide for the beneficial interests of the

30. UGA, *supra* note 11, at 163; SHIBAIKE, *supra* note 11, at 65-66; SAKURAI & HASHIMOTO, *supra* note 11, at 105-114.

31. *Id.*

32. Yuichiro Tsuji, *Administrative Action and the Succession of Illegality*, 67 TSUKUBA J. L. & POL. 11, 14-19 (2016).

people but rejected invasive administrative dispositions that restricted the freedom of the people.³³

A 1961 Supreme Court decision shows that the distinction between the views of Sasaki and Minobe were blurred after the new Constitution was established in 1947.³⁴ Here, the Supreme Court reviewed the disciplinary dismissal of a teacher in a public junior high school. The educational committee in the locale ordered him to move to a different school. The teacher argued that the committee's disposition was illegal and chose to remain at the original school. This resulted in an order for disciplinary dismissal. The teacher brought suit to revoke the dismissal.

In this case, the educational committee convened for the disciplinary dismissal with only 30 minutes' notice and did not open it to the public. The old Article 34(4) of the Educational Committee Act stated that venue, date, and agenda should be provided at least three days beforehand, except in an emergency. The issue was whether convening the committee for the disciplinary dismissal in this context constituted an "emergency."

The Supreme Court supported the committee's discretionary power to interpret this provision and determined that convening the committee was an emergency that did not require the three-day prior notice.³⁵

Another illustrative case is the Alan McLean decision of 1978 in which John Alan McLean entered Japan as an English teacher on a one-year visa in May 1969.³⁶ During his stay, he participated in a demonstration of a Japanese citizens' group against the Vietnam War. After one year, he applied for an extension of stay for 120 days in May 1970, but the Ministry of Justice denied his request.

The statute provided that the Ministry "can" permit the extension of a visa if it thinks it is appropriate and there is a valid reason. The Supreme Court held that the rights provided in Chapter 3 of the Japanese Constitution³⁷ are guaranteed for non-Japanese people to whatever extent possible. The Ministry possesses the prerogative power to make decisions to approve visas and grant visa extensions, taking into account the subject's political activities in Japan. The Ministry, therefore, retains broad discretion, and the Court will hold its decisions to be illegal only if

33. UGA, *supra* note 11, at 164; SHIBAIKE, *supra* note 11, at 69-73; SAKURAI & HASHIMOTO, *supra* note 11, at 105-106.

34. Saikō Saibansho [Sup. Ct.] April 27, 1961, Showa 34 (o) no. 851, 15(4) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 928 (Japan).

35. *Id.*

36. Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, Showa 50 (Gyo tsu) no. 120, 32(7) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 1223 (Japan).

37. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], Nov. 3, 1946, Ch. 3 (Japan) (List of fundamental rights).

the disposition is based on clearly erroneous and unreasonable findings of fact that lack validity under socially accepted common sense.

Following the Minobe theory, the Court denied discretionary power when an administrative disposition restricts rights or freedoms of the people. The Court decided, however, that the right to enter Japan or extend one's visa is not a protected right for non-Japanese people.³⁸

The Minobe and Sasaki theories illustrate extreme positions for administrative discretionary power. Today, mandatory discretion refers to what a reasonable person would decide based on common sense and socially acceptable values, subject to judicial review. The legality of unfettered discretionary power is subject to judicial review, while its validity for administrative disposition is not.³⁹

D. Article 30 of the Japanese Administrative Case Litigation Act

Today, Article 30 of the Japanese Administrative Case Litigation Act (JACLA or *Gyousei Jiken Soshouhou* in Japanese) does not distinguish between these theories.⁴⁰ Article 30 gives the court power to vacate administrative adjudication when it is arbitrary and capricious. The Courts can revoke an original administrative disposition when it is made beyond the agency's discretionary power or when there is an abuse of such power.

Japanese environmental law studies focus on cases in which administrative dispositions have been determined by the Courts to be beyond the limits of discretionary power or an abuse of such power. It is very similar to U.S. environmental law studies, where U.S. Courts review agency action under the arbitrary or capricious standard or review the fact-finding of an administrative agency under the Administrative Procedure Act (APA). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the United States Supreme Court reviewed whether an administrative agency decision made a clear error of judgment through all relevant factors.⁴¹

In Japan, administrative agencies exercise the following powers to make a disposition: (1) fact-finding, (2) interpretation of the requirements of disposition, (3) selection of procedures, and (4) timing.⁴² The Courts review only the legality, not the validity, of an administrative disposition.

38. Saikō Saibansho [Sup. Ct.] Oct. 4, 1961, Showa 50 (Gyo tsu) no. 120, 32(7) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 1223 (Japan).

39. UGA, *supra* note 11, at 165.

40. Gyousei Jiken Soshouhou [Administrative Case Litigation Act], Law No. 59 of 2015, art. 30 (Japan).

41. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

42. UGA, *supra* note 11, at 161-168; *see also* SHIBAIKE, *supra* note 11, at 78-83; *see also* SAKURAI & HASHIMOTO, *supra* note 11, at 105-113.

Administrative discretion, therefore, depends on the administrative agency's flexible disposition based on its special expertise.⁴³

In a 1982 decision, the Japanese Supreme Court reviewed Article 30 of the JACLA.⁴⁴ In this case, a real estate agent entered into a building contract with a contractor. The contractor asked the business entity of a specially equipped car to deliver building materials to the building location. The Vehicle Restriction Ordinance mandated that permission was needed before a specially equipped car could drive on the road to the construction site. Although the Nakano ward of Tokyo accepted the application to use the road, travel was not permitted for six months because residents living near the building formed a group opposing the construction, resulting in a conflict. The Nakano ward advised the applicants to bring the issue before the dispute mediation committee. The real estate agent brought action against the Nakano ward for damages caused by delayed permission to travel under the State Redress Act (*Kokka Baishou hou*).⁴⁵

The Court analyzed the permission requirement in the Vehicle Restriction Ordinance for traveling on the road with a specially equipped car and held that such permission was merely an act of confirmation with no discretionary power of the ward.⁴⁶ The Court stated that this permission was allowed to include conditions for individual cases. This decision shows that administrative agencies may exercise their dispositions based on objective standards. The agency can exercise administrative discretionary power unless the Court finds the exercise to be arbitrary and capricious or so beyond the scope of such power that it is an abuse of power. The factors relevant to judicial review are violations of purpose, principles of equality, proportionality, and the infringement of the rights of citizens.

In a 1972 decision, the Supreme Court issued a ruling on Prime Minister Kakuei Tanaka's economic policy for prices.⁴⁷ The plaintiffs, residents of Osaka City, deposited money in a postal saving service. Because the consumer price index increased twenty-six percent from 1972 to 1974, they argued that the value of their deposit decreased as a result of

43. UGA, *supra* note 11, at 165; *see also* SHIBAIKE, *supra* note 11, at 82-83; *see also* SAKURAI & HASHIMOTO, *supra* note 11, at 111.

44. Saikō Saibansho [Sup. Ct.] Apr. 23, 1982, Showa 55 (o) no. 255, 36(4) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 727 (Japan).

45. Kokka Baishou Hou [State Redress Act], Law No. 22 of 1947(Japan).

46. Saikō Saibansho [Sup. Ct.] Apr. 23, 1982, Showa 55 (o) no. 255, 36(4) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 727 (Japan).

47. Saikō Saibansho [Sup. Ct.] July 15, 1982, Showa 54 (o) no. 579, 136 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 571 (Japan).

the actions of the Fair Trade Commission under the Prime Minister's economic policy. The Court denied government responsibility under the State Redress Act, holding that the way economic policy is drafted and implemented is within the discretionary power and that political responsibility can be evaluated through elections.⁴⁸

Administrative agencies exercise their discretionary power not only through policy-making but also through their expertise. In the case of nuclear energy plants, discretionary power might be more narrowly limited; on the other hand, it is possible to regard such power as part of a judgment of future energy policy.

The Japanese judiciary may review an administrative disposition from the perspective of the administrative agency. It is similar to the approach under U.S. environmental law using the arbitrary and capricious standard, which is also called the "hard look approach."⁴⁹ The judiciary uses scrutiny to review administrative dispositions, but still defers to its judgment because of a certain expertise of the agency.⁵⁰

In the *Minamata disease* decision, a notorious pollution case in Japan, the Chisso factory polluted a river with a compound called methyl mercury, causing disease via the food chain.⁵¹ Here, the government did not exercise its delegated power until the victims cried out. In 2004, the Japanese Supreme Court found the government liable under the State Redress Act. The Japanese Court explained that, based on the severe symptoms of the residents, the agency should have promptly acted to mitigate the pollution. It issued a temporary injunction to stop further pollution. The victims in this case suffered from severe diseases and, as a result, were eligible to receive damages according to a decision made by the Pollution-Related Health Damage Certification Council (the Council).⁵²

In 2013, one woman applied for damages utilizing the Minamata disease case findings, but the Council denied her request.⁵³ The Japanese Court limited the discretionary power of the administrative agency to

48. *Id.*

49. Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1419, 1420 (1992); see also Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEXAS L. REV. 483, 514 (1997).

50. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001); see also UGA, *supra* note 11, at 325; see also SHIBAIKE, *supra* note 11, at 82-83; see also SAKURAI & HASHIMOTO, *supra* note 11, at 111.

51. Saikō Saibansho [Sup. Ct.] April 15, 1982, Hei 24 (Gyo hi) no. 202, 243 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 329 (Japan).

52. *Id.*

53. *Id.*

confirm a pollution disease diagnosis under the Act on Compensation, etc. of Pollution-Related Health Damage.⁵⁴ The Court permitted taking public health and safety into consideration in reviewing an administrative disposition.

The Court took a similar approach in the 1992 decision regarding the Ikata nuclear plant.⁵⁵ In the *Ikata* decision, the Shikoku Electric Power Company planned to construct a nuclear power reactor plant in Ikata cho, part of the Ehime Prefecture. Shikoku applied to the Prime Minister for a permit under Article 23⁵⁶ of the ex-Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material, and Reactors from May of 1972.

The government granted permission for construction in November of 1972. In 1973, the plaintiffs sought revocation of the administrative disposition that had granted permission to build nuclear reactors under JACLA. They argued that such permission was substantively and procedurally illegal and therefore infringed upon public health and property rights.⁵⁷

In 1992, the Japanese Supreme Court rejected the local resident's arguments.⁵⁸ The *Ikata* decision explained that the power of an administrative agency could be free and discretionary but not unfettered, since it is still under judicial review. Further, when disposition based on discretionary power infringes upon human health and safety, the judiciary will strictly review the disposition. The Court noted that it would respect the expertise of the administrative agency.⁵⁹

In supporting its deference to the agency, the Court explained that the administrative agency examines the safety of reactor facilities including the technical capabilities as follows:

54. Kougai Kenko Higai no Hoshou tou ni kansuru houritsu [Act on Compensation, etc. of Pollution-related Health Damage], Law No. 111 of 1973 (Japan).

55. Saikō Saibansho [Supreme Court] Oct. 29, 1992, Showa 60 (Gyo tsu) no. 133, 46(7) SAIBANSHO MINJI HANREISHU [MINSHŪ] 1174 (Japan). [hereinafter *Ikata* decision].

56. Kakugenryo Bussitsu, Kakunenryou Bussitsu oyobi Gensiro no kiseini kansuru Houritsu [Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors], currently Law No. 42 of 2016. (Japan).

57. Saikō Saibansho [Supreme Court] Oct. 29, 1992, Showa 60 (gyo tsu) no. 133, 46(7) SAIKŌ SAIBANSHŌ MINJI HANREISHŪ [MINSHŪ] 1174 (Japan).

58. Saikō Saibansho [Supreme Court] Oct. 29, 1992, Showa 60 (gyo tsu) no. 133, 46(7) SAIKŌ SAIBANSHŌ MINJI HANREISHŪ [MINSHŪ] 1174 (Japan). During litigation in 1978, the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material, and Reactors was revised. The power to grant permission for the construction of a nuclear power plant was transferred from the Prime Minister to the Minister of International Trade and Industry.

59. *Id.*

[Safety is examined from] a multifaceted and comprehensive perspective, considering matters such as the engineering safety of the reactor facilities themselves, the radiation effect on the workers, neighboring residents and surrounding environment when the reactors are in normal operation, and the effect on the neighboring areas in the event of an accident, in connection with natural conditions of the planned site of reactors (e.g. the land features, nature of the soil, and weather), social conditions (e.g. population distribution), and the abovementioned technological capabilities of the person who is to install the reactors. This examination also covers matters concerning future forecasts.⁶⁰

The Court continued:

[The examination] requires comprehensive assessment based on the latest scientific, expert, and technical knowledge of a considerably high level, not only in the field of nuclear engineering but also across a wide range of fields. Article 24 of the Regulation Act provides that in granting permission for the installation of reactors, the Prime Minister must hear in advance the opinion of the Atomic Energy Commission with respect to the application of the criteria provided in paragraph (1), item (iii) of said Article (limited to the part concerning technical capabilities) and in item (iv) of said paragraph, and respect such an opinion.⁶¹

The Court emphasized that the Prime Minister had respected the expert, scientific, and technical knowledge of the Atomic Energy Commission. In the meantime, the Court narrowed its discretion based on scientific expert perspectives in cases where nuclear reactor accidents occur and public health and safety are endangered. The judiciary still substantively analyzes commission review processes regarding specific safety standards. It also procedurally monitors the investigation, deliberation, and judgment processes of the commissions utilizing the latest scientific technologies.⁶²

The *Ikata* decision of 1992 established a framework for the review of cases involving the safety of nuclear power reactors in Japan. The judiciary did not use the term scientific “discretion” in its decision,

60. *Id.* (summarized and translated by author).

61. *Id.* (summarized and translated by author).

62. SHIBAIKE, *supra* note 11, at 82-83; SAKURAI & HASHIMOTO, *supra* note 11, at 110-111, 119; Yishiaki Yamashita, *Scientific technology and judicial review*, in Katsuya, Koketsu, et al. *Gyoseihou Hanrei Hyakusen*, 156-157, Jurist no. 235 (Yuhikaku 2017).

probably because it was attempting to distinguish discretion based on policy from that based on expertise.

Some Japanese environmental law studies regard the *Ikata* decision as a matter of policy-making discretion for future energy policy and as a decision-making process involving a third, independent, non-bureaucratic committee. In such cases, the judiciary does not make determinations from the perspective of the administrative agency.⁶³

The Court also noted a burden of proof problem in the 1992 *Ikata* decision. Typically, the plaintiff has the burden to prove that an administrative disposition related to the granting of permission should be revoked. This was a heavy burden for residents living near the power plant.⁶⁴

Thus, the Court asked the administrative agency to prove the reasonableness of “the specific examination criteria employed in the investigation and deliberation by the Atomic Energy Commission, the Reactor Safety Examination Committee, the investigation, deliberation and assessment process, etc.” Thus, an administrative agency can be required to submit substantial evidence and materials. If it fails, the Court will presume that the agency assessment lacked reasonableness.⁶⁵

The Court gave no indication in the *Ikata* case of whether the administrative agency *did* submit substantial evidence and materials, and it is still unclear whether or not its judgment was reasonable. The Court may deny administrative dispositions that are determined to be unreasonable but may uphold the dispositions of an administrative agency, in general, based on the scientific knowledge required for judicial review.⁶⁶

The *Ienaga textbook* decision of 1993 reviewed the procedural aspects of administrative discretionary power.⁶⁷ The Ministry of Education, Culture, Sports, Science, and Technology, the Textbook Authorization Research Council (the “Textbook Council”), review textbooks for Japanese elementary and junior high schools for students aged seven to fifteen, according to the Articles of the School Education Act (*Gakkou Kyouiku hou*).⁶⁸

63. UGA, *supra* note 11, at 165-167; SHIBAIKE, *supra* note 11, at 82-83; SAKURAI & HASHIMOTO, *supra* note 11, at 118-119.

64. UGA, *supra* note 11, at 325.

65. *Id.*

66. *Id.*

67. Saikō Saibansho [Sup. Ct.] Mar. 16, 1993, SHOWA 61 (o) no. 1428, 47(5) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3483 (Japan).

68. Gakko Kyoiku Hou [School Education Act] (prior to the amendment by Act No. 48 of 1970), Art. 21(1), and 51 Former Textbook Authorization Ordinance (Ordinance of the Ministry of Education, Ordinance no. 4 of 1948), and the Former

The Court found clear error in the decision-making process of the Textbook Council through its investigation, deliberation, and judgment processes. In the process of authorizing textbooks, certain reasonable discretionary power is given to the Ministry of Education due to its academic educational expertise.

In holding the administrative decision to be unlawful, the Court stated that clear mistakes could not be ignored.⁶⁹ The Court reviewed the Textbook Council's screening process, which was based on the academic theories at that time, and overruled the decision rejecting the descriptions of the textbook. If the Minister of Education made its decision based on an error, it would be illegal under the State Redress Act.

E. Judicial Review of Administrative Discretion in Japan Today

A 1972 decision centered around a professional cleaner of septic tanks whose application for permission to operate a business for sewage treatment was denied.⁷⁰ The applicant brought an action to revoke the administrative disposition denying the application. The Japanese Supreme Court vacated the Tokyo High Court's decision and remanded the case for further proceedings.

The Court explained that the power to approve sewage treatment businesses was in the hands of the mayor, who had authority to approve them under the provisions of the Clean Act and the Clean Plan of the municipality. Sewage plans are the responsibility of municipalities, and approval of such a business is reviewed to ensure that sewage treatment is well managed. The Supreme Court recognized the power of the mayor to interpret the text of the Clean Act for permission purposes.

In a 1954 decision, the Court reviewed the disposition of a matter involving a student.⁷¹ A student in a public university entered a faculty meeting disputing the layoff of a particular professor. Although the student was told to leave, he stayed, disrupting the meeting. The president of the university subsequently expelled him. The Court explained that the president had discretionary power to choose what type of disposition would apply to this student.

Textbook Authorization Standards (Public Notice of the Ministry of Education no. 86 of 1958).

69. Saikō Saibansho [Sup. Ct.] Mar. 16, 1993, SHOWA 61 (o) no. 1428, 47(5) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3483 (Japan).

70. Saikō Saibansho [Sup. Ct.] Oct. 12, 1972, SHOWA 43 (Gyot tsu) no. 17, 26(8) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1410 (Japan).

71. Saikō Saibansho [Sup. Ct.] July 30, 1954, SHOWA 28 (o) no. 525, 8(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1501 (Japan).

In a 1977 decision, the Court held that the customs through the ordinary course of business enabled the business to use discretionary power to render administrative dispositions.⁷² Further, these customs allowed the business to select procedures for disciplinary dismissals. In this case, three plaintiffs took on the role of leading the labor union activities and, in doing so, disrupted the ordinary course of business of the customs. Their case was dismissed.⁷³

The Court has not chosen between the *Kouka Sairyō* and *Youken Sairyō* theories. Unlike the U.S., Japanese environmental law went through legal reform after World War II. These decisions may have been based on mainstream theory prior to the current Constitution known as the “special power relationship theory.”⁷⁴ Under this theory, without legislation to support it, the government can restrict the freedom or rights of a person under a special power relationship such as in the case of public schools or jails, and a remedy from the judiciary is unavailable. Although it is true that, in the name of discretionary power, these decisions may have denied or limited the scope of judicial review, a certain kind of special power relationship may have existed.

F. Purpose Review

The judiciary holds the arbitrary and capricious exercise of discretionary power of administrative agencies to be illegal. There are several standards for judicial review of administrative discretion. One such standard is “purpose review.” These standards are similar to those in the U.S.

The Court used purpose review in 1978.⁷⁵ In this case, the plaintiff applied to Yamagata Prefecture for permission to build private rooms with baths under the Public Bath Act.⁷⁶ At the time, there were business entities that operated this kind of bath facility for sexual service purposes.⁷⁷ In May 1968, citizens initiated a movement against the construction of these

72. Saikō Saibansho [Sup. Ct.] Dec. 20, 1977, SHOWA 47 (Gyo tsu) no. 52, 31(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1101 (Japan).

73. *Id.*

74. Toshiyuki Nonaka, Mutsuo Nakamura et al., Kenpo I [Constitution I] 236 (Yuhikaku, 2012). Yuichiro Tsuji, *Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment*, 46 DENVER J. INT’L. L. & POL’Y 159 (2018).

75. Saikō Saibansho [Supreme Court] June 16, 1978, Showa 50 (a) no. 24, 32(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 504 (Japan).

76. Koshu Yokujou hou [Public Bath Houses Act], Law No. 139 of 1948.

77. SHIBAIKE, *supra* note 11, at 82-83; SAKURAI & HASHIMOTO, *supra* note 11, at 66.

types of buildings.⁷⁸ Yome City in Yamagata Prefecture preferred to establish a public park for children near this site and the Entertainment and Amusement Trades Control Act⁷⁹ prohibited private rooms with baths within 200 metres of such parks. The prefecture approved the city's application for a public park within 134 metres from the private rooms in June 1968. In August, the plaintiff started the business, and in February 1969, the management was suspended and the business was prosecuted.

The Japanese Supreme Court held for the plaintiff.⁸⁰ The purpose of the Child Welfare Act was to promote children's welfare by providing opportunities for safe and healthy play in a park. The hidden motivation of the government was to prevent the management of a business for private rooms with baths. In this case, because there was no necessity in granting permission for a public children's park, the plaintiff was entitled to operate the business.⁸¹

III. NUCLEAR POWER PLANTS IN JAPAN AFTER 2011

Nuclear power plant cases illustrate how Japanese Courts review an administrative agency's actions, especially when reviewing public health and safety. People outside Japan might wonder why Japan reactivated its nuclear power plants after the disaster in 2011.

Prior to the Great East Japan Earthquake in 2010, the Basic Energy Plan aimed at promoting nuclear power plants from a ratio of 31.3% to around 50%. As of February 2011, fifty-four nuclear power plants were working to generate electricity. On the date of the Great East Japan Earthquake, Units 1–3 of the nuclear power plants were stopped, and Unit 4 experienced a hydrogen explosion, damaging buildings and housing reactors around it. After the earthquake, Japanese nuclear power plants were reviewed once every thirteen months. In May 2012, every nuclear power plant stopped operating at least once in Japan.

78. *Id.*

79. Fuzoku Eigyou tou no Kisei oyobi Gyoumu no Tekiseika tou ni kansuru Houritsu [Act on Control and Improvement of Amusement Business, etc], Law No. 122 of 1948, art. 4 no. 4(1) [art. 28(1) of current revised act].

80. Saikō Saibansho [Supreme Court] June 16, 1978, Showa 50 (a) no. 24, 32(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 504 (Japan).

81. *Id.*

A. Government Policy Changes after the Great East Japan Earthquake

In 2012, the parliament amended the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors.⁸² The amendment to the Act restricted the operational terms of nuclear power plants to forty years. In September 2012, the Conference on Energy and Environmental Issues held by the cabinet published a report formulating the strategy on revolutionary energy and environment.⁸³ It clearly announced that in the future, society would not depend on nuclear power plants; specifically, operations limited to forty years should be observed rigidly, and only those passing the approval of the Nuclear Regulation Authority may be allowed to be activated again.⁸⁴ Applicants seeking permission to extend operational terms would be required to submit reports to the nuclear regulatory authority.

The industrial world strongly criticized the report.⁸⁵ Accordingly, the cabinet could not conclude that it was a cabinet decision but left it as an advisory report.⁸⁶ In December 2012, the election of the House of the Representatives was held, and the Liberal Democratic Party (LDP) gained power.

The Shinzo Abe cabinet took another look at the agenda of the former administration's policy. The LDP changed the previous policy for nuclear power plant operations. The Ministry of Economy, Trade, and Industry initiated discussions on basic energy plans and established a new committee consisting of experts.

The Abe cabinet announced a Basic Energy Plan in 2014. The plan minimized dependence on nuclear power but did not abolish it because nuclear energy was the base of electric power for Japan. The nuclear power plant, with new safety regulations, would be reactivated.⁸⁷ The reference

82. Kakugenryo Bussitsu, Kakunenryou Bussitsu oyobi Gensiro no kiseini kansuru Houritsu [Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors], currently Law No. 42 of 2016. (Japan).

83. CABINET SECRETARIAT, *Strategy on revolutionary energy and environment* (Sept. 14, 2012), <https://perma.cc/9JH7-9E22> (last visited Feb. 1, 2017).

84. *Id.*

85. Nikkei Shimbun, Mikiri hassha no genpatu zero [Starting an action without any consideration for nuclear power plant] (Sept. 19, 2012).

86. Asahi Shimbun, Editorial: Seifu no Dengen rongi [Discussion on power supply] (Feb. 8, 2015). Nikkei Shimbun, Genpatsu Shinzousetu to meiki [Providing new nuclear power plant] (June 9, 2017).

87. Genkai and Ikata nuclear plants were scheduled to be reactivated by the end of 2016.

goal establishes the ratio of renewable power to grow up to twenty percent by 2030.

The fast-breeder nuclear reactor, Monju, was to be reactivated as a center of international research. In 2013, around 10,000 defects were found, and testing was prohibited. In 2016, the Japanese government decided to abolish this reactor.

B. Monju and Ikata Decisions to Reboot Nuclear Power Plants

The *Monju* decision is one of the leading cases of nuclear reactor permission.⁸⁸ In 1980, the Power Reactor and Nuclear Fuel Development Corporation applied to the Prime Minister seeking permission for the establishment of the Monju reactor, which the Prime Minister granted. The local residents brought an administrative action to revoke the administrative disposition and also brought a civil action to seek an injunction against the building and operation of the Monju reactor. In 1992, the Japanese Supreme Court approved standing of the local residents and remanded the case to the lower court. In 2005, the Supreme Court heard the case again and vacated the lower court decision supporting the illegality of the grant of permission for the Monju reactor.⁸⁹

The Japanese Supreme Court reviewed several issues, first deciding that local residents were permitted to bring a suit seeking the revocation of administrative disposition under Article 9 of JACLA.⁹⁰ The Court explained that the statute provided standing for the revocation of administrative disposition. Specifically, the term “legal interest” requires the Court to review purpose, which includes the content and character of which the statute at issue aims to protect. Further, the Court is required to examine whether or not the statute at issue protects the concrete interest of the general public, as well as individual interests.

The Court also decided that a plaintiff may bring a civil suit to seek an injunction in the interest of a personal right. If the plaintiff brings a civil suit, administrative litigation is still available. Article 37⁹¹ of JACLA provides standing to sue in an action for the declaration of nullity, etc. The Court explained that in this case, the local residents brought a civil action to seek an injunction; thereby, their civil action was not the equivalent of

88. Saikō Saibansho [Supreme Court] Sept. 22, 1992, Heisei 11(Gyo tsu) no. 130 and 131, 46(6) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 571 (Japan) [hereinafter *Monju*].

89. *Id.*

90. *Id.*

91. Gyousei Jiken Soshouhou [Administrative Case Litigation Act], Law No. 59 of 2015, art. 37 (Japan).

an administrative litigation under Article 36⁹² of JACLA. The Court explained that it would ask which avenue, civil litigation or administrative litigation, was direct and appropriate.⁹³ Although a local resident brought civil action, it did not prohibit administrative litigation.

The Court analyzed the safety review of an administrative agency for the permission of a nuclear reactor.⁹⁴ The Court followed the *Ikata* decision of 1992 and decided it was unreasonable to determine all safety review items.⁹⁵ Further, the Court should respect the reasonable decision of its Ministry based on the expert opinions of the Nuclear Safety Commission (NSC). The Act authorizes the Ministry to give permission and provide judgment because they consider the advisory opinion of the NSC. The Court defers to the Ministry unless a decision is rendered unreasonable based on clear, erroneous deliberation and processes within the NSC.

The justices respected the Ministry's judgment based on the expert opinions from professionals in the fields of science and technology. With respect to safety reviews, the advisory committee reviewed the measurements for dose reduction in order to avoid potential risks of nuclear substances emitted by the regular operation of a nuclear plant.⁹⁶ Further, precautionary measurements were enacted in order to avoid potential risks of nuclear substances and natural disasters.⁹⁷ Nonetheless, the Japanese Supreme Court did not relinquish control over reviewing the Ministry.

Of utmost concern in this case is how much the Court defers in its judgment to administrative agency discretion. The answer as to why judges defer to this source may be expert and democratic accountability.⁹⁸ In the parliamentary system, the Prime Minister is selected from the members of the Diet under Article 67(1)⁹⁹ and then certified by the

92. *Id.* at art. 36.

93. *Monju*, *supra* note 88.

94. *See id.* *Monju*, 61 MINSHŪ at 571.

95. *See Ikata*, 46(7) MINSHŪ at 1174.

96. *Monju*, 61 MINSHŪ at 571; *see also* UGA, *supra* note 11, at 162; *see also* SAKURAI & HASHIMOTO, *supra* note 11, at 110-111.

97. *Monju*, 61 MINSHŪ at 571; *see also* YASUTAKA ABE, GYOSEI HO(JOU), (Administrative law 1) 254-255 (Shinzansha 2015). (Abe strongly argued that judiciary should exercise strict review without respect of expert opinion of administrative agency decision.)

98. UGA, *supra* note 11, at 161-162; *see also* SAKURAI & HASHIMOTO, *supra* note 11, at 104; *see also* Toshiyuki Nonaka, Mutsuo Nakamura et al., *KENPO II (Constitution II)201* (Yuhikaku, 2012).

99. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], Nov. 3, 1946, art. 67 (Japan).

Emperor under Article 7¹⁰⁰ of the Japanese Constitution. The Prime Minister appoints the Ministry with certification of the Emperor under Articles 7 and 68(1).¹⁰¹ The certification of the Emperor is ceremonial.

C. Comparison with the Chevron Doctrine and Ikata Again

The U.S. court system and governmental structure significantly differs from the Japanese system.¹⁰² A simple comparison would not be prudent without addressing the substantial variations between governmental structures. Nonetheless, the U.S. and the Japanese Supreme Courts do not fully exercise substantial and procedural review of administrative agency decisions.

One famous U.S. Supreme Court decision, *Chevron, U.S.A. Inc. v. NRDC*, is based on deference to the interpretation of law by an administrative agency (the *Chevron* doctrine).¹⁰³ The *Chevron* doctrine employs two steps: (1) the Court reviews whether the statutory language is clear and, if it is, the Courts rejects the administrative agency interpretation; and (2) if the statute is ambiguous, the Court defers to administrative agencies' reasonable interpretation.¹⁰⁴

In recent cases, there have been some limitations in the *Chevron* doctrine. For example, in *Michigan v. Environmental Protection Agency*, the Court considered step two of the *Chevron* doctrine but rejected the administrative agency's interpretation.¹⁰⁵ It is more difficult to predict how the Roberts Court will utilize the *Chevron* doctrine rather than how the Rehnquist Court adjudicated in the past. There may be a need for future review of the steps in the *Chevron* doctrine as the Court reviews additional interpretations of administrative agencies. There is potential for the U.S. Supreme Court to modify steps of the *Chevron* doctrine. Otherwise, the doctrine might serve as a combination of traditional interpretative tools. In *Massachusetts v. EPA*, the interpretation of a statute by an administrative agency changed with a change in presidency.¹⁰⁶ The Court applied step one from the *Chevron* doctrine.

It appears that both Japanese and U.S. court systems reserve the power of judicial review, utilizing judicial power to announce what law is

100. *Id.* at art. 7.

101. *Id.* at art. 68(1).

102. Shigenori Matsui, *Nihonkoku Kenpo* [Constitution] 325–26 (Yuhikaku 2007) (Japan).

103. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

104. *Id.*

105. *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699 (2015).

106. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

conferred to the judiciary by the Constitution. In both countries, the concepts of expertise and democratic accountability are legitimized; and, in the U.S., the Court demonstrated this in the *Chevron* doctrine.

In the Roberts Court, the *Chevron* doctrine is seen as winding down in its development. Accordingly, the Japanese Court cannot solely depend on expertise and democratic accountability as a means to defer all judgments to an administrative agency. The judiciary is required to justify its decisions to the people as a way to secure their trust.

As demonstrated in the U.S. by the *Chevron* doctrine and the ruling in *Massachusetts v. EPA*, the interpretation of a statute by an administrative agency can change when a new president is elected into office. Similarly, in Japan, the energy policy changed from the Democratic Party to LDP in 2012; and its effects on the nuclear plant policy were seen by decisions made under the Abe cabinet.¹⁰⁷

In Japan, in terms of democratic legitimacy of the agency, the Diet established the Nuclear Regulation Authority by statute as an administrative agency where the cabinet appoints its committee.¹⁰⁸ There are four committee members. The Prime Minister selects the Chairman who represents the authority with the consent of both Houses of the Diet.¹⁰⁹ We may observe a similar process for the head of the administrative agency, explaining, in part, the democratic legitimacy of an administrative agency. Both U.S. and Japanese Courts might use a “hard look” approach, thereby not giving up judicial review that is granted by their respective Constitutions. As in *Massachusetts v. EPA*, judges face unfamiliar issues in areas requiring scientific expertise, with a probability of worst-case scenarios to determine how much the court defers in matters such as nuclear power reactor meltdowns.

As noted above, the Japanese Supreme Court hears administrative litigation where the plaintiff seeks to revoke permission for the construction of new coal power plants.¹¹⁰ Judicial review is required for the administrative disposition of whether permission is granted or not. For permission of coal or nuclear power plants, the electric company needs to go through an environment assessment for impact. Coal power plants are required to submit an environmental impact assessment that includes

107. Genshiryoku Kisei Iinkai Secchi hō [Act for Establishment of the Nuclear Regulation Authority], Act no. 47 of 2012.

108. *Id.* Art. 1 and 5.

109. *Id.* Art. 6 and 7.

110. Gyousei Jiken Soshouhou [Administrative Case Litigation Act], Law No. 59, 2015 (Japan), Art. 8.

alternative plans.¹¹¹ They must take into consideration the location, size, structure, and allocation of the building. The Ministry of Economy, Trade, and Industry (METI) considers the advice of the Ministry of Environment and reviews the assessment.¹¹² The ministerial ordinance mandates that the environmental impact assessment provide several alternative proposals in regards to location, assignment, structure, and scale of the plant. In the planning phase, factors that may cause significant impacts are to be selected. The guidelines¹¹³ under the administrative regulations exclude alternative plans for fuels on the ground; specifically, the government thinks that the fuels would be fixed into one from the perspective of energy security and management strategy.¹¹⁴

Thus, administrative regulations for coal power plants evaluate any significant environmental impacts, but not in the case of CO₂. By implementing the best available technology for thermal efficiency, the guideline of the METI explains that CO₂ is not considered in its evaluation.

Today, some nuclear power plants are going through reactivation reviews, or decisions are being made regarding decommissioning nuclear reactors. There are exceptions for a few working nuclear power plants, such as Kawauchi Unit 2 in Kyushu, and Units 3 and 4 of Takahama in Kansai.

Local citizens recently brought a civil action to seek a provisional injunction against the operation of nuclear power plants in Japan.¹¹⁵ In civil actions, local residents seek temporary injunctions against the operation of coal power plants by asserting that it infringes on both their personal and environmental rights.¹¹⁶

In January 2018, in the *Ikata* nuclear power plant case, the Hiroshima High Court ruled on a request for a provisional injunction against the

111. Kankyo Eikyo Hyouka hou [Environmental Impact Assessment Act], Law No. 81 of 1997 (Japan), Art.12; *see also* Denki Jigyuu Hou [Electricity Business Act], Law No. 170 of 1964 (Japan), Art.46-2 to Art.46-22.

112. Report by Working Group on Establishment of Primary Environmental Impact Consideration, Keikaku Dankai Hairyo Tetuduki ni kakaru gijutsu gaido [Guideline on Establishment of Primary Environmental Impact Consideration] (Mar. 2013), page 2; *see also* ENVTL. IMPACT ASSESSMENT DIV., *Environmental Impact Assessment in Japan* (May 2012).

113. *Id.*

114. MINISTRY OF ECON., TRADE AND INDUS., Hatsudensho ni kakaru Kankyo Eikyo Hyouka no tebiki [Guideline on environmental impact assessment for power plant] (May 2017), <https://perma.cc/4YD8-DUQL>.

115. Kawakita Shimbun, Sendai PS Unten Sashitome Soshou [Injunction for Sendai power station] (Dec. 14, 2017), <https://perma.cc/JA7N-Q86A>.

116. *Local Consent For Nuclear Plant Restarts*, JAPAN TIMES (Apr. 5, 2018), <https://perma.cc/LFQ6-X75S>.

operation of Unit 3 of the Ikata nuclear power plant.¹¹⁷ The Hiroshima High Court recognized potential catastrophic eruption of a volcano near the nuclear plant stating that a pyroclastic flow by eruption would reach the Ikata nuclear power plant. The Hiroshima High Court reviewed safety issues by following a volcano impact assessment guideline, which was established by the administrative agency. Before this case, the Hiroshima District Court and the Miyazaki branch of the Fukuoka High Court rejected the injunction.¹¹⁸

The ministerial guideline estimates the risk of an active volcano within a radius of 160 kilometers from a nuclear power plant along with the possibility of volcanic activity. If within range, it presumes the magnitude of eruption and reviews the probability of pyroclastic flow reaching the power plant. Volcanologists are concerned with an administrative agency establishing the volcano impact assessments. While drafting this guideline, the administrative agency needs to consider expert perspectives, utilizing an observation network that is able to detect volcanic expansion before eruption and be able to move nuclear fuel to a safe place. However, other experts argue that this monitoring may not precisely predict eruption using today's science and technology. Catastrophic disasters may occur not only in a nuclear power plant site but also in any site in Japan. It is still unclear how the Supreme Court in Japan reviews guidelines for a volcano impact assessment.

Both Japanese and U.S. Courts empower administrative agencies to exercise discretionary power established by statute. It might be surprising to review the decision in *Massachusetts v. EPA*, where the Court concluded that CO₂ is an air pollutant.¹¹⁹ Unlike in the U.S., shaping policy through litigation used to be unfamiliar to Japanese people, who make decisions on how to assess and accept accidental risk by natural disaster. People may change governmental policies through voting. Otherwise, people may bring litigation to the Court to change administrative dispositions. In this process, the judiciary in Japan is required to show its authority through its decisions.

CONCLUSION

The Great East Japan Earthquake occurred on March 11, 2011 in Fukushima, after which nuclear power plants were shut down. People outside of Japan often wonder why Japan recently reactivated the nuclear

117. Hiroshima Koto Saibansho [Hiroshima High Ct.] Dec. 13, 2017, Heisei 29 (ra) no. 63, 2357 HANREIJIHO [HANJI] 300 (Japan).

118. Fukuoka Koto Saibansho[Fukuoka High Ct.] Apr. 6, 2015, Heisei 27 (ra) no. 33, 2290 HANREIJIHO [Hanji] 20 (Japan).

119. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

power plant, but the explanation can be seen from the perspective of environmental law.

Administrative discretion is defined as the power and authority of an administrative agency to set regulatory standards or to make administrative decisions within the scope set forth in its enabling legislation or other statutes. The grounds for administrative discretionary power are agency expertise and policy judgment.

Today, under Article 30 of the JACLA, Japanese Courts can revoke an original administrative disposition when it exceeds the agency's discretionary power or when there is an abuse of such power.¹²⁰

Studies on Japanese environmental law focus on cases in which administrative dispositions have been determined by the Courts to be beyond the limits of discretionary power, or an abuse of such power. It is very similar to studies on U.S. environmental law, where U.S. Courts use the *Chevron* doctrine, or review arbitrary or capricious fact-finding of an administrative agency under the Administrative Procedure Act.

In the *Ikata* decision of 1992, the Japanese Supreme Court explained that the power of an administrative agency could be discretionary, but not unfettered, as it is still under judicial review.¹²¹ Further, when a disposition based on discretionary power infringes upon human health and safety, the judiciary will take a hard look at such a disposition. The Court noted that it would respect the expertise of the administrative agency.

The *Ikata* decision of 1992 established a framework for the review of cases involving the safety of nuclear power reactors in Japan. The judiciary did not use the term scientific "discretion" in its decision, probably because it was attempting to distinguish discretion based on policy from that based on expertise.

In 2012, a year after the Great East Japan Earthquake, the government changed its policy on energy and environmental issues. The Abe government stated that the power plan minimized dependence on nuclear power, but did not abolish it because the government declared that nuclear energy was the base of electric power for Japan.¹²²

Recently, local citizens brought a civil action to seek a provisional injunction against the operation of nuclear power plants in Japan. The Japanese judiciary is now facing how judges may make policy for the

120. Gyousei Jiken Soshouhou [Administrative Case Litigation Act], Law No. 59 of 2015, art. 30 (Japan).

121. Abe, *supra* note 97, at 254-56. (Abe strongly argued administrative discretion is under judicial review. The Judiciary should review the fact finding of an administrative agency if it is related to human health.)

122. AGENCY FOR NATURAL RESOURCES AND ENERGY, *Cabinet Decision on the New Strategic Energy Plan*, MINISTRY OF ECONOMY, TRADE AND INDUSTRY, (July 3, 2018), <https://perma.cc/K3ET-69MW> (last visited Feb. 3, 2019).

future of energy in part and allocate burdens of proof to citizens or administrative agencies. It is easy for judges to say that science is beyond their understanding, as the risk of volcanic eruption is based on research of seismologists.

Judges should not make policy judgments and may defer to the expertise of administrative agencies, as it is not common for litigation to shape policy in Japan. Nonetheless, judges are still obligated to review safety standards and damage to the lives and health of the people. Japanese administrative law researchers and legal professionals need to remain vigilant in policing the proper role of Japan's judiciary.

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