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Perceptions of Judicial Function in Administrative Litigation
--A comparative study of the judicial behaviour in Japan and India--

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Introduction

Public Law Litigation,[1] in which courts are requested to scrutinize the operation of large public interest institutions, has been a problematic phenomenon in many countries, including Asian countries like India and Japan, during the last two or three decades, and has raised critical debate regarding the judicial function.

First of all, let me present two examples.

First example: In the well-known "Unfair Juice Labeling Case" in Japan, the plaintiffs (the Federation of Housewives and its Chairwoman) attacked the Fair Trade Commission's (FTC's) finding in relation to the Japan Juice Association's application for "a fair competition agreement relating to labeling of fruit juice beverages etc", by bringing objection proceedings.[2] The FTC and the aforementioned producer association prepared this agreement, because it had become an object of public concern that producers were using so much misleading labeling of fruit juice. The plaintiffs argued that the agreement approved by the FTC was oriented toward producer's interest at the cost of fair and precise labeling and the interests of general consumer. However, the FTC dismissed this objection as lacking standing. Consequently, the plaintiffs brought a judicial review action to quash this dismissal measure. The Supreme Court delivered a judgment, which established the standard of standing needed for both the objection proceedings and the suit against administrative agencies.

Only if the plaintiffs have suffered damage to a right or "a legally protected interest," and moreover, only if this is concrete and individualistic, they will be entitled

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1 Although it has been discussed under a variety of names, e.g., public law litigation or institutional litigation in the United States, public interest litigation or social action litigation in India, Gendaigata sosyo(the contemporary model litigation) in Japan, I would like to use the word "Public Law Litigation" as a neutral word, which refers to a litigation model that involves large public interests, without local characteristics.

2 The Supreme Court, Showa Year 53 (1978) 13 February, Minshu vol.40 no.1 p.1. For more details of the case, S. Sugai & I Sonobe, Administrative Law in Japan, (Tokyo: Gyousei, 1999) pp.126-127.

to maintain proceedings and/or an action against an administrative disposition.[3] The upshot of these requirements is that to be no more than a general consumer is to lack the necessary standing qualification.[4] The Supreme Court dismissed this action.

Second example: In India, an advocate filed a writ petition, which asked the Supreme Court to direct cinema halls to exhibit slides containing information and messages on the environment, free of cost, so that people could be made aware of their social obligations in matters of environment and be encouraged to avoid acting as polluters.[5] The petition also asked that "environment" be made a compulsory subject in schools and colleges in order to spread general awareness.

The Supreme Court of India, issuing many directions, held that licences of all cinema halls, touring cinemas and video parlors should be conditional on the exhibition, free of cost, of at least two slides on the environment in each show. The Court also directed Ministry of Environment to generate appropriate slide material within two months, and to start producing information films of short duration.

Threshold issues like standing qualification were not raised at all, since in India, the standard of standing had been relaxed thoroughly in "public interest litigation." The Supreme Court of India has declared that "a broad rule is evolved which gives the right of locus standi to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury."[6]

Although it can be observed that the Supreme Court of Japan has been relaxing the rule of standing gradually, there are a couple of other standards that prevent the public from pursuing an action in administrative litigation cases.

How can we explain this difference between the situations in India and Japan? I find one answer in their ways of understanding the judicial function.

I. The Features of Public Law Litigation

Although Public Law Litigation is not defined precisely, it has been regarded as a departure from the traditional model of litigation.

Chayes, observing the new movement of the judicial function in the United

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3 Sugai & Sonobe, Id. p.127.

4 In Japan, suits based on rights and duties of individual citizen's interests form the center of administrative litigation. For suits that do not aim to protect individual plaintiff's rights and interests but only aim to preserve the legal order, specific statutory provision is required. Sugai & Sonobe, Ibid.

5 M.C. Mehta v. Union of India, A.I.R. 1992 S.C. 382. For more detail, S. Ahuja, People, Law and Justice – casebook on public interest litigation, vol.2, (Hyderabad: Orient Longman, 1997) pp.430-431.

6 Janata Dal v. H.L. Chowdhary, A.I.R. 1993 S.C. 892.

States, described the traditional lawsuit as "a vehicle for settling disputes between private parties about private rights."[7] According to him, the defining features of this type of civil adjudication are as follows: (1) The lawsuit is bipolar, (2) Litigation is retrospective, (3) Right and remedy are interdependent, (4) The lawsuit is a self-contained episode, (5) The process is party-initiated and party-controlled.

By contrast, the public law model transposes many of the characteristics of the traditional litigation.[8] (1) The scope of the lawsuit is shaped primarily by the court and parties, (2) The party structure is sprawling and amorphous, (3) The fact inquiry is predictive and legislative, (4) Relief is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees, (5) The remedy is not imposed but negotiated, (6) The decree does not terminate judicial involvement in the affair, its administration requires the continuing participation of the court, (7) The judge is not passive, but active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome, (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

In short, the "new" type of litigation is characterised as a public, multi-polar, and flexible forum for the airing of social grievance, while the traditional litigation is as a private, dualistic, and remedially limited system of dispute resolution.

A variety of criticisms have been expressed on public law litigation cases.[9] Among them, the most powerful line of criticism argues that judicial behaviour in these cases might violate the traditional separation of powers principles. Those critics point out that the administration of institutions is an executive function, thus public law litigation cases, especially when the courts deliver innovative decisions, bypass majoritarian political controls.

Although these critics may appear persuasive, we can certainly raise one question; is it possible to separate powers to three branches so neatly?

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7 A. Chayes, "The role of the Judge in Public Law Litigation," Harvard Law Review, vol.89 no.7 p.1281 (1976) pp.1982-83. Another understanding of public law litigation can be found in, e.g., T. Eisenberg & S.C. Yeazel, "The Ordinary and the Extraordinary in Institutional Litigation," Harvard Law Review, vol.92 no.3 p.465 (1980).

8 Chayes, Id. p.1302.

9 For example: L.L. Fuller, "The Forms and Limits of Adjudication," Harvard Law Review, vol.92 no.2 p.353 (1978).

II. An Economic Approach to Public Law Litigation

By using the terms “Law and Economics” or “Economic Analysis of Law”, the features of public law litigation can be described as follows[10]; (1) the new litigation cases have more “externalities” than the traditional cases, (2) in the new type cases, “asymmetries” and/or the lack of mutuality/interchangeability between plaintiffs and defendant, are acuter than the traditional cases, i.e. plaintiffs are always individual citizens or associations that do not have enough information or resources to pursue their actions, while defendants are usually governmental agencies or big companies. For the purpose of this paper, the former is worth mentioning more thoroughly.

“Externalities” is defined as a cost or benefit that actions of one or more people imposes or confers on a third party or parties without their consent. According to Ota, there are three types of externalities in a judicial case.[11] First, the commencement of action itself has externalities, which exert influences or impacts upon society. Secondly, remedies given by courts have externalities. The remedies may affect third parties who are not participants in the proceedings. Thirdly the interpretation or application of law itself is law-making by judges, thus this will affect third parties, because it will surely have some influence on similar cases that may occur in future.

Because these externalities are more apparent, standing qualification has been the most problematic of the controversies in public law litigation cases, and also participation of the third parties to the litigation has been discussed frequently in these cases. Although it has been strongly supposed in legal theories that there are no legal effects on third parties who do not participate in the proceeding, externalities have inevitably been involved in all litigations, more or less.

To sum up, the traditional litigation cases nevertheless involved those externalities, while these can be found more apparently in public law litigation cases. Thus a question arises. If both the traditional model and the new model have externalities, how can we say that the traditional model is inside the judicial function, and that the other is not? Furthermore, in parliamentary democracy, the interests of an organized sector, such as industry and labour, tend to be over-represented compared to the interests of an under-organized sector, such as general consumers; thus, the public law litigation cases have a role to provide one channel, which is supplementary to the

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[10] R. Cooter & T. Ulen, Law and Economics, (Harper Collins Publisher, 1988). S. Ota “Atarashii taipuno sosyo to Minji sosyo seido,” Jurisuto, vol. 91 p.58 (1991 Jan.).

[11] Ota, Ibid.

parliamentary and administrative procedures.[12]

III. On the Principle of Separation of Power

Chayes, listing six advantages of the judiciary in deciding the public law litigation cases, went further to discuss as follows:

"In any event, I think, we have invested excessive time and energy in the effort to define—on the basis of the inherent nature of adjudication, the implications of a constitutional text, or the functional characteristics of courts – what the precise scope of judicial activity ought to be. Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories. In practice, all governmental officials, including judges, have exercised a large and messy admixture of powers, and that is as it must be."[13]

"I am inclined … to urge…a willingness to accept a good deal of disorderly, pragmatic institutional overlap. After all, the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy. And despite its new role, the judiciary is unlikely to displace its institutional rivals for governing power or even to achieve a dominant share of the market."[14]

It is clear from these quotations that what matters is how we perceive the judicial function. From this point of view, I would like to compare the situations in two countries, namely, Japan and India. However, more effort will be made to analyse the former than the latter.

IV. Administrative Litigation in Japan

1. A brief history of Administrative Litigation in Japan

Before World War Ⅱ, Japan had the Administrative Litigation Court, which was independent from ordinary law courts.[15] In 1889, the Meiji Constitution was

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12 Ibid.
13 Chayes, op. cit. 1307.
14 Id.1313.
15 On the history of administrative law in Japan, J.O. Haley, "Japanese Administrative Law – Introduction," Law in Japan, vol.19 p.1 (1986), H. Wada, "The Administrative Court under the Meiji Constitution" Law in Japan, vol.10 p.1 (1977). Sugai & Sonobe, op. cit. pp.11-99.

introduced, which had Article 61 providing:

"No suit at law, which relates to a right alleged to have been injured by illegal dispositions of administrative authorities and which shall come within the jurisdictions of the Court of Administrative Litigations, shall be taken cognizance of by a Court of law."

It is this provision that set a pattern for the future continental type administrative law that developed in Japan[16]. Only one Administrative Litigation Court existed as the first-instance and last-resort court, and the jurisdiction of the Court was very limited. The Administrative Court Act enacted in 1890, only listed assessment of taxes and their collection, refusal of trade-licenses and public work cases as litigious matters.

In 1946, during the occupation by the Allies, the new constitution was enacted, and provided for administrative litigation just as for civil cases.[17] As a result, the Administrative Litigation Court was abolished and replaced by ordinary law courts. The judicial system was transformed from a continental law system with an administrative litigation court to Anglo-American type administrative lawsuit proceedings by ordinary law courts. However, Japanese administrative law has never done away with the old theories of administrative litigation, as can be seen from the fact that the Administrative Case Litigation Act of 1962 (ACLA) changed the system back again into a peculiar system, in which ordinary law courts act "as if they were direct descendants of the administrative litigation court of the old days."[18]

Why has such a curious thing been happening?

2. The "Osaka Airport Case"

In the well-known "Osaka Airport Case," the plaintiffs, bringing a civil action from the court of first instance, demanded for injunctive relief to curtail the use of a state-run airport.[19] Against the judgment of the appeal court, which not only affirmed the injunction but also extended the time period covered by it, the further appeal to the Supreme Court resulted in a judgment holding that the action was an inappropriate form

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16 Sugai & Sonobe, op. cit. p.26.

17 Article 76 provided that the "whole judicial power should be vested in law courts." This clause means that the power of adjudicating administrative litigations should be included, so that not only civil and criminal cases but also administrative cases would be included in the "whole judicial power."

18 Sugai & Sonobe, op. cit. p.30.

19 The Grand Bench of the Supreme Court, Showa Year 56 (1981) 16 December, Minsyu vol.35 no.10 p.1369. For more details, J.O.Haley, op. cit. p.13, Sugai & Sonobe, op. cit. p.121.

of action. The reason given was that a "civil law" application for an injunction is an incorrect use of the law, since the matter applied to a "state-run airport".

As Sonobe analysed, the judgment clearly distinguishes between civil suits and administrative suits, regardless of the fact that under the ACLA, it is stated that administrative litigation is to be treated as a special branch within civil litigation.[20] Although this is a problem of the difference in procedure of the same Court of Justice, there is a further problem. Whether the ACLA include injunction as a final remedial measure against the administrative bodies or not remains undecided. In short, the Court's decision left the plaintiffs with no clear avenue to challenge the operation of the state-run airport.

Under the ACLA, a court will review an agency determination only if it involved an administrative disposition (gyosei syobun). This test is extremely important, as Dziubla regarded this test as a barrier to administrative litigation[21]. If agency action involved an administrative disposition, then review lies under the Act, if it did not, then review lies, if it exists at all, under ordinary civil procedure rules[22]. According to the Supreme Court, "the term phrase disposition by an administrative agency does not refer to all action that an agency takes based on law. Rather, it refers to those actions based on law that a national or public organization takes that directly structure or determine the rights and duties of citizens."[23] For example, if an agency rejects/permits some applications, such as license application (the disposition of applications), or if an agency orders a store to close for selling spoiled food (disadvantageous dispositions), it determines the rights of the citizens and it is an administrative disposition, thus subject itself to judicial review.

However, it is not clear in the ACLA, other statutes and case law whether there exist any administrative dispositions in a case like "Osaka airport." Because this action was brought at the stage of operating public facilities and there is no clear

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[20] Sugai & Sonobe, Ibid.

[21] R.W. Dziubla, "The impotent sword of Japanese justice: the doctrine of Syobunnsei as a barrier to administrative litigation," Cornell International Law Journal, vol.18 p.37 (1985). He pointed out two problems that can result from this test. The first problem is that individual rights may suffer because by the time judicial review is allowed, the court is faced with a fait accompli that it is unwilling to undo. The second is that the delay in judicial review of administrative actions causes administrative agency personnel to develop increased bureaucratic insularity.

[22] J.M. Ramseyer & M. Nakazato, Japanese Law – an economic approach, (Chicago: The university of Chicago Press, 1999) p.196.

[23] The Supreme Court, Showa Year 39 (1964) 29 October, Minsyu vol.18 no.8 p.1809. Ramseyer & Nakazato, Id. p.197. This definition of justiciability is terribly restrictive compared to American standards, Dziubla, op. cit. p.44.

administrative disposition at that stage[24]. So there is a possibility that, although the Supreme Court suggested that suits like "Osaka Airport" should come from administrative litigation procedure, the review may not lie on this kind of disputes under the Japanese administrative litigation system.

3. Lack of effective remedies

The corresponding side of this concept "administrative disposition" is the lack of effective remedies. The ACLA provides the annulment action, which is a demand for quashing the administrative disposition, as a main remedy (Torikeshi Sosho (lawsuit seeking the annulment of administrative measures)), supported by a remedy for a failure to act (Fusakui Iho Kakunin Sosho (lawsuit for confirmation of illegality of nonfeasance)).[25]

In the case of annulment action, the applicant must find some administrative disposition to be the subject-matter of the proceedings. In the case of omission, proceedings for a failure to act cannot be brought unless the qualified applicant has first addressed a formal request for administrative dispositions to the defendant.

The actions, which do not come within one of the categories provided by the Act, are called implied complaint actions (Mumei Koukoku Sosho (innominate action)). Although actions similar to Anglo-American injunctions and mandamus suits compelling the government to do or refrain from doing specified actions have been discussed as implied complaint actions, whether this type of actions could be recognized or not has remained vague.

3.1 Approaches to mandamus

The typical case of proceedings for a failure to act (Fusakui Iho Kakunin Sosho) is that, when the administrative authorities have to make some disposition within a due period on a citizen's application based on law, for example on an application for a license to run a store, and after the period there are no reply from the agency. Then the citizen can sue to have the illegality of official omission established. The result of this suit is to confirm some obligation of administrative agencies to act.

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[24] Dziubla argues that the doctrine of administrative disposition delays judicial review of administrative actions until a time when any review would be futile. Dziubla, op. cit. p38.

[25] For more details, Haley, op. cit. pp.7-8, Dziubla, op. cit. pp.41-42, Ramseyer & Nakazato, op. cit. pp.196-202, Sugai & Sonobe, op. cit. p.134. As mentioned earlier, it should be noted that in the ACLA, there is no procedure equivalent to the Anglo-American Action for a declaration or injunction. The courts cannot consider the legal

This is the nearest the Japanese have come to mandamus. According to Sugai, "the timid Japanese law approached mandamus with several fits of hesitation, but in spite of that, it was an improvement on the old law, according to which only an annulment of illegal administrative dispositions was allowed, whereas ordering and compelling administrative agencies to act and do something was held to be against the separation of powers doctrine and alleged therefore to be unconstitutional."[26]

However, can a citizen demand that a court should order administrative bodies to give an applicant a license? The Act does not list such a remedy. Then, in Japan this type of litigation has been discussed as implied complaint action.

In the early days of post-World War Ⅱ, the legal scholars and the courts decided that this action was impermissible, because only after an administrative disposition had been given, the litigation should lie against administrative bodies; otherwise, the separation of power doctrines would be infringed. However, by now, almost all scholars and also the courts may accept this type of suit, mainly because the concept of ripeness has been imported from United States.[27]

Although this bipolar type (applicant v. administrative agency) innominate action for duty-imposing suits (Gimmu Zuke Sosho) is basically accepted by legal scholars and the courts by now, the multi-polar type is not. Suppose there is a company that causes pollution, and residents brought a suit in a court demanding a judgment that orders an administrative agency in charge to invoke its regulatory power against that company. In this case, there are normally no statutorily provided application procedures for citizens to invoke regulatory power of administrative agency; thus, the citizen cannot utilize the remedy for a failure to act. As long as otherwise provided by some specific statutory provisions, this type of action has not been accepted as a remedy in the field of administrative law in Japan, since it is thought that it would destroy the balance of power between the judiciary and the executive.[28]

3.2 Approaches to injunction

The other type of implied complaint action having been discussed is injunction. The annulment action for quashing administrative disposition certainly has an effect similar to that of the injunction, but this is available only if administrative dispositions

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position of the applicant in the abstract without specific statutory provisions.

[26] Sugai & Sonobe, op.cit. p.84.

[27] K. Shiraishi, "Kohojyo no Gimukakuninsosyo ni tsuite," Koho Kenkyu, vol.11 p.46 (1954).

precede the suit. The feature of this suit is ex post facto. Are there any possibilities whether the demand for an injunction against administrative agencies lies in the case where no administrative disposition has been delivered yet or in the case where there is no clear administrative disposition, like the Osaka Airport case?

Suppose that an administrative agency is about to give a permit to a person who applied to build an apartment building. Then the residents nearby worried about environmental effects that will be caused by this construction. The residents bring suit in a court demanding an injunction against the administrative agency to refrain the agency from giving a permit. It seems that this type of innominate action would be accepted, with strict conditions.[29]

Then how about the Osaka Airport type? As mentioned before, there are no clear answers, although some scholars are discussing the possibility of allowing similar type of injunction in civil proceedings by some innovative interpretations.[30]

4. Analyses

What are the reasons for these difficulties in bringing actions and getting remedies against the administrative agencies in Japan? One reason is that the ALCA provides as its main remedy the annulment action that quashes the administrative disposition. Behind this format of the Act, there is a strong hypothesis that the judicial review of the administrative actions is a tool to correct the illegality that was caused by administrative dispositions after administrative bodies exercised their rights to first decision (Daiichiji Handan Ken, right to judge the matter first) and thus made authorization determinations.[31] One judgment by a district court says that "in the light of separation of power, it is the administrative agency that will decide first whether the executive power is to be exercised or not, and jurisdiction of an ordinary court in administrative litigation cases should basically remain ex post review to judge whether the administrative disposition is legal or not after the executive branch has decided the matter."[32]

Then what is the right to first decision of administrative agencies? It is now clear that first, administrative agencies hold the rights whether or not to exercise their

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[28] For example: H. Shiono, Gyoseiho dainihan, (Tokyo: Yuhikaku, 1994) pp.185-194.
[29] Id. pp.190-193.
[30] Id. pp.193-195.
[31] K. Ohama, "Mumeikokku sosyo to Shihoken," in Sensyu Daigaku Imamura Horitsu Kenkyusitsu ho, vol.17 p.33 (1990) pp.37-43.

powers, and second, administrative agencies can decide the matter independently to achieve the best results.

The next question is this. Why should the ordinary courts defer to the first decision rights of administrative agencies? It is widely regarded that the executive function is to achieve the public purposes or policies, while the judiciary holds only a passive function that applies law to certain litigation and it is not a branch that achieves goals actively. That is to say, the judiciary cannot exercise the right to first decisions to achieve statutory goals.

As some scholars have pointed out, this thought has its origin in particular understanding of the separation of power principle under the Meiji Constitution, where it was considered that judicial control over the executive is an infringement of executive power by the judiciary.[33]

Under the Meiji constitution, the emperor had all the power and only when it infringed the rights of property or freedom of the subjects, was the power regulated by law. However, it seems to me that, under the new constitution, the executive is given its base to act only by constitution and statutes enacted by the legislature, the representatives of the people, and the judiciary must control the executive if it violates law, regardless of exercising its right to first decision. Furthermore, the judiciary under the new constitution, which is based on the supreme consideration of liberty and rights of individuals, has a role to protect human rights. In other words, the new constitution established the rule of law in Japan.[34]

V. Public Interest Litigation in India

India has developed quite a different pattern of judicial function in administrative litigation cases. It is in Public Interest Litigation cases, a large part of which involve the omissions of the executive branch, that the judiciary in India showed its innovative operation, as Barr evaluated it as the world's most active judiciary.[35]

Its distinctive characteristics include liberalization of the rules of standing,

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[32] Nigata District Court, Showa Year 54 (1979) 30 December, Gyosyu vol.30 no.3 p.671.

[33] For example, S. Takayanagi, Gyoseihoriron no Saikosei, (Tokyo: Iwanami, 1985) pp.1-5, Ohama, op. cit. pp.37-43.

[34] Takayanagi, op.cit.. pp.1-22, Ohama, op .cit. pp.41-43.

[35] C. Baar, "Social Action Litigation in India: the Operation and Limits of the World's Most Active Judiciary," in Comparative Judicial Review and Public Policy, eds. D.W. Jackson and C.N. Tate (Westport, CT: Greenwood Press, 1992) pp.77-87.

procedural flexibility, a creative and activist interpretation of legal and fundamental rights, and remedial flexibility and ongoing judicial participation and supervision.[36] Why could the judiciary in India carry out such decisive action? Needless to say, there are many factors to be considered, I would like to cast light on the perception of the judicial function that appeared in the decisions delivered by the Supreme Court.

In S. P. Gupta v. Union of India,[37] in which the plaintiffs contended that a circular letter issued by the Law Minister infringed the independence of the judiciary, Justice Bhagwati directly discussed the judicial function.

" …there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest… Who would have standing to complain against such act or omission of the State or public authority? …To answer these questions it is first of all necessary to understand what is the true purpose of the Judicial function … Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public or is it mainly directed towards the protection of private individuals by preventing illegal encroachment on their individual rights? The first intention rests on the theory that Courts are the final arbiters of what is legal and illegal … We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law …"[38]

The judicial function in administrative litigation, as understood by Bhagwati, is

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[36] There are numerous articles on Public Interest Litigation in India, for example, J. Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible," the American Journal of Comparative Law, vol.37 no.3 Summer 1989 pp.495-519. P.N. Bhagwati, "Judicial Activism and Public Interest Litigation," Columbia Journal of Transnational Law, vol.23 1985 pp.561-577. Idem, "Social Action Litigation: the Indian Experience," in The Role of Judiciary in Plural Societies, eds. N. Tirucheruvam and R. Coomaraswamy (London: Frances Printer, 1987) pp.20-31. R. Dhavan, "Law as Struggle: Public Interest Law in India," Journal of Indian Law Institute, vol.36 no.3 July-Sept. 1994 pp.302-338, C.D. Cunningham, "Public Interest Litigation in the Indian Supreme Court: a study in the light of American experience," Journal of Indian Law Institute, vol.29 no.4 Oct.-Dec. 1987 pp.494-523. S.K. Agrawala, Public interest litigation in India: a critique, (Bombay: Tripathi, 1985). U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," in The Role of …, pp.32-60.

[37] A.I.R. 1982 S.C. 149. pp. 189-190.

[38] Id. p.190. He went further to discuss as follows: "If public duties are to be enforced and social collective diffused rights and interest are to be protected, we have to utilize the initiative and zeal of public-minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights. It is for this reason that in public interest litigation—litigation undertaken for the purpose of redressing public injury--enforcing public duty protecting social, collective, diffused rights and interests or vindicating public interest, and a citizen who is acting bona fide and who has sufficient interest has to accord standing."

not passive but active, and it can be said that he perceived that the judiciary as well as the executive is obliged to achieve public, statutory, and constitutional purposes.

In contrast, according to P. Shin, Justice Mukharji followed the path of judicial self-restraint.[39] In State of H.P. v. Umed Ram, a case involved in road constructions to the hilly areas, Mukharji pointed out that "judicial review of administrative action or inaction where there is an obligation for action should be with caution and not in haste,"[40] and concluded that it was the legislature that were entitled to fix priorities for expenditure to satisfy basic needs of the people, upon the judgment and recommendation of the executive. However, at the same time, he also said, "To the residents of the hilly areas as far as feasible and possible, society has a constitutional obligation to provide roads for communication."[41] In short, in this case, Mukharji took an expansive interpretation of the constitutional right to life, while taking a cautious view of judicial function to enforce that right.

From Japanese eyes, Mukharji's view is judicial activism rather than judicial self-restraint. Surely he showed the way of judicial deference to the legislature and the executive in the sphere of remedy, but he did not defer to them at all in deciding what is the right of the people and what is the purpose of the constitution.

Conclusion

It is true that there are many other reasons and factors to be considered, but I am sure that it is clear from the above discussions that one reason why the judicial behaviour in cases where large public interest is involved differs between Japan and India lies in the way the judicial function is perceived.

As judicial reform has been taking place in many Asian countries, and also as the rise of litigations that involve large public interest is inevitable in modern society, I believe that it is important to re-think the judicial function, because "it is first of all necessary to understand what is the true purpose of the judicial function"[42] to deal with the cases, as Bhagwati described.

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39 P. Singh, "Justice Savyasachi Mukharji's perception of Judicial Function in Public Interest Litigation – a tribute," Delhi Law Review, vol.13 (1991) p.145.
40 A.I.R. 1986 S.C. 847, p.855.
41 Ibid.
42 A.I.R. 1982 S.C. 149. pp. 189-190.