# COMMENT

JOHN O. HALEY*

Japan's four decades of experience with judicial review under the postwar Constitution are difficult to evaluate fully without some appreciation of the institutional and theoretical context within which judicial review occurs. Thus, while I have little to add to the papers presented on this theme, a brief comment on judicial review and its setting in Japan may be helpful.

The 1947 Constitution is widely understood to have introduced the idea of judicial review into Japanese judicial practice.[1] This view is accurate, however, only in the very narrow sense of direct judicial review of legislative and administrative actions by the regular courts. Although the 1889 Constitution of the Empire of Japan ("the Meiji Constitution") did not expressly provide for judicial review, it also did not deny the regular judiciary the power of judicial review. Hence, the logic of *Marbury v. Madison*[2] was as applicable in prewar Japan as it was in the United States. Chief Justice John Marshall reasoned in *Marbury* that the legal rules of a constitution overrode those of a statute or regulation. Thus, American courts could not properly enforce a statute or administrative measure that was in conflict with constitutional provisions. In a similar way, the regular Japanese courts in the prewar era could rule on the constitutionality of a statute, regulation, or administrative measure as long as the issue was properly presented in a case over which the courts had jurisdiction. Japan's prewar courts, however, were constrained in their ability to exercise judicial review by two factors: first, an administrative court system that had exclusive jurisdiction over any direct challenge to the legality of an administrative action; and, second, Japan's style of parliamentary supremacy that limited nearly all expressly protected constitutional rights.

As to the latter, in chapter 11 on the Rights and Duties of Subjects, the Meiji Constitution included an impressive catalogue of constitutional guarantees. Few, however, were absolute. Nearly all were subject to the condition that they could be defined or limited by statute (horitsu). For example, as commonly translated in English, Article 29 provided: "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meeting and association."[3] The phrase "within the limits of law" was not as open-ended as it appears in English translation. The

---



* Professor of Law and of East Asian Studies, University of Washington.

1. *See, e.g.*, H. TANAKA, THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 692 (1976).

2. 5 U.S. (1 Cranch) 137 (1803).

3. 1889 CONST. art. 29.

original Japanese, more literally translated, reads "within the limits of *statutory* law." In other words, only the elected Diet could restrict these liberties; they were inviolable against encroachment by means of administrative or other regulation. In a 1936 decision,[4] for example, the Great Court of Cassation (Daishin'in) dismissed a prosecution based on an administrative enforcement order issued pursuant to the 1933 Foreign Exchange Control Law because the administrative agency improperly expanded the statutory language prohibiting exports of gold bullion to include preparation of exports. The implicit basis for the decision was Article 9 of the Meiji Constitution, which provided that no imperial order "shall in any way alter any existing statutory law [horitsu]."[5] Although inhibited by structural constraints, the regular judiciary regularly reviewed administrative measures within the interstices of the civil and criminal cases it adjudicated.[6]

Moreover, in ordinary civil cases, prewar Japanese courts had, at least in theory, as extensive remedial powers against the political organs of the state as most common law courts had at that time. Judicial independence was guaranteed by Article 57 of the Meiji Constitution, which stated that the courts of law exercised their judicial powers "in the name of the emperor." This phrase, like the military's claims in the 1920s and 1930s to direct access to the throne as a prerogative of the emperor's supreme command,[7] was prewar Japan's constitutional guarantee of judicial autonomy. The unique historical nature of the imperial institution in Japan and the Meiji Constitution's express definition of the emperor as the locus of all sovereign authority combined to designate those institutions that acted in the name of the throne, or with "direct access" to it, as theoretically insulated from legal or political controls by other organs of government.

In addition to the historical and constitutional guarantees of judicial independence, common law notions of the state's sovereign immunity did not exist. As in other civil law systems, to the extent that the state's activities could be construed as outside the scope of its governmental functions—such as operation of a school playground or any commercial activity—they were governed by private law and did not enjoy any immunity from ordinary claims arising from tort or contract. As a result, the tort action, usually having the beneficial remedy of damages, quickly became the most common means of redress against improper official conduct.[8]

The postwar Constitution expanded these existing means of redress in two ways. First, it abolished the administrative court system[9] and expressly

---

4. Satō v. Japan, 16 Keishū 1931 (G. Ct., 3d Crim. Dept., Dec. 3, 1936).

5. 1889 CONST. art. 9.

6. *See, e.g.*, Ogawa, *Several Problems Relating to Suits for the Affirmation of the Nullity of Administrative Acts*, 6 LAW IN JAPAN 73 (1973).

7. *See, e.g.*, J. CROWLEY, JAPAN'S QUEST FOR AUTONOMY 66-78 (1966).

8. *See, e.g.*, J. TANAKA, HANREI YORI MITARU GYŌSEIJŌ NO FUHOKŌI SEKININ (1937) (administrative tort liability recognized in judicial precedents).

9. 1947 CONST. art. 76(2).

provided for judicial review.[10] For most Japanese seeking redress from illegal or otherwise improper governmental actions, however, the more important provision is Article 17, which, literally translated, provides: "Every person may sue for compensation from the state or a public entity, as provided by law, in the event he has suffered damage by the delict of any public official."[11] This provision, which was added to the Constitution in the Diet after receiving initially negative reactions from Occupation authorities,[12] was the basis for a major expansion of state liability under the National Compensation Law.[13] As Michael Young and others have observed,[14] the remedy in tort, not the direct appeal, is the most popular vehicle for judicial review under the postwar Constitution.

Neither the Constitution nor subsequent legal reforms dismantled the theoretical scaffolding that supported the administrative court system and other structured constraints on direct review. Doctrines that restrict standing to sue and narrow the definition of reviewable administrative actions remain in force along with constrained conceptions of judicial power and available judicial remedies. The consequence is a judiciary without the capacity either to exercise power of review or to provide forms of relief that most American jurists take for granted. The malapportionment cases illustrate the more general obstacle to judicial relief that exists in Japan relative to other industrial democracies.

These limitations have not, however, reduced the courts to impotence. As I have argued elsewhere,[15] judicial review has become a crucial factor in achieving political solutions through the democratic process. As the papers presented on judicial review for this symposium indicate, under the postwar Constitution, the Japanese judiciary has become a vital organ in Japanese governance.

---

10. *Id.* art. 81.
11. *Id.* art. 17.
12. I. TAKAYANAGI, I. OHTOMO & H. TANAKA, NIHONKOKU KENPŌ SEITEI NO KATEI 198-200 (1972) (the making of the Constitution of Japan).
13. Kokka baisho hō (National Compensation Law), Law No. 125, 1947; *see* Tanaka, *Kokka Baisho hō ni Tsuite*, 19 HŌRITSU JIHŌ No. 13, 33 (1947) (conceiving the national compensation law).
14. Young, *Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation*, in LAW AND SOCIETY IN CONTEMPORARY JAPAN 85-111 (J. Haley ed. 1988); *see also* Y. KOSAKI, KOKKA BAISHO HŌ 17-20 (1971) (national compensation law).
15. See Haley, *Introduction: Legal vs. Social Controls*, in LAW AND SOCIETY IN CONTEMPORARY JAPAN, *supra* note 14, at 4-5.