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THE IMPOTENT SWORD OF JAPANESE JUSTICE: THE DOCTRINE OF *SHOBUNSEI* AS A BARRIER TO ADMINISTRATIVE LITIGATION

Robert W. Dziubla†

INTRODUCTION

Administrative litigation in Japan began with the Meiji Restoration of 1868, when fundamental changes within the Japanese political and legal systems began to occur. From a legal viewpoint, the most significant changes were the enactment of the Meiji Constitution in 1889 and the promulgation of the Civil Code, Commercial Code, and the Court Organization Law in 1890 and of the Code of Civil Procedure in 1891.[1]

The Meiji Constitution and the various codes bore a marked German influence.[2] The approach to administrative litigation reflected this influence through the constitutional establishment of a separate Administrative Court[3] whose jurisdiction was limited to administrative acts.[4] Although the administrative court was abolished after

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1. D. HENDERSON & J. HALEY, LAW AND THE LEGAL PROCESS IN JAPAN 75-78 (1979 ed.) (unpublished course materials used at the University of Washington; available through the Cornell International Law Journal).

2. For a more complete discussion of the reception of western law into Japan, see Mukai & Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, 1 LAW IN JAPAN 25 (1967).

3. MEIJI CONST. art. 61 (1889).

4. The Japanese term "administrative acts" (*gyōsei kōi*) came from the German *Verwaltungsakt*, "a term of art that excluded all informal nonbinding actions by administrative officials regardless of their illegality or injury." J. Haley, Postwar Developments in Japanese Administrative Law: The Failure of the Occupation Reforms 6 (1983) (unpublished manuscript; on file at the offices of the Cornell International Law Journal).

World War II, this jurisdictional limitation to an administrative act, which is now usually referred to as a *shobun* (disposition), persisted. It is also called the doctrine of *shobunsei*, "in the nature of a disposition."[5]

The hypothesis of this article is that the Japanese legal system uses the *shobunsei* doctrine as a tool to delay judicial review of administrative actions until a time when any review would be futile. Section I of the article outlines the development of modern Japanese administrative litigation law. Section II describes the format and operation of the Administrative Case Litigation Law (*Gyōsei jiken soshō hō*),[6] giving particular emphasis to the courts' analysis in determining whether a justiciable *shobun* exists.

Section III analyzes two problems that can result from the *shobunsei* doctrine. 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 problem is that the delay in judicial review of administrative actions causes administrative agency personnel to develop increased bureaucratic insularity. Instead of working for the interests of the citizens whom they are supposed to serve, agency personnel work to further their personal goals within the goal-oriented framework that the agency itself has developed and that itself is unresponsive to public demand.

Section IV compares two possible solutions to the problems *shobunsei* causes. The first solution is to use the State Redress Law (*Kokka baishō hō*)[7] as a means of indirect judicial review of administrative action. The second solution is to expand the notion of *shobunsei* to allow for judicial review at a stage of administrative action when that action is neither set in stone nor obfuscated by possible bureaucratic cover-ups. This second solution draws upon the American leg-

5. Perhaps the most widely used definition of *shobun* is that proposed by Jiro Tanaka, former professor of law at the University of Tokyo and a justice of the Supreme Court from 1964 until 1973. Tanaka states that an administrative disposition (*gyōsei shobun*), which is simply the positive-law equivalent of an administrative action (*gyōsei kōi*), is "an action performed by an administrative agency, as an exercise of its power of control or superior intention, in order to regulate a given concrete legal relationship." J. TANAKA, GYŌSEIHŌ TAI-I (AN OUTLINE OF ADMINISTRATIVE LAW) 65 (1950). Although many Japanese courts and commentators translate *shobunsei* as "ripeness" because of its similarity to the American administratrive law doctrine, this comparison is somewhat misleading, for *shobunsei* is a very demanding standard that causes the dismissal of many lawsuits that would probably proceed in the United States. *See* Upham, *After Minamota: Current Prospects and Problems in Japanese Environmental Litigation*, 8 ECOLOGY L.Q. 213, 235 n.72 (1979).

6. Law No. 139 of 1962 (English translation in 5 EIBUN HŌREI SHA (EHS) No. OB 2391). Because this author often disagrees with the EHS translation, the author's own translations of relevant provisions of the ACLL are noted throughout this Article.

7. Law No. 125 of 1947; *see* J. Haley, *supra* note 4, at 20-21.

islative and judicial responses to the behavior of American administrative agencies.

I. THE DEVELOPMENT OF JAPANESE ADMINISTRATIVE LITIGATION LAW

In August 1945, Japan surrendered to the Allies, and from September 2, 1945, until April 28, 1952, the Allies formally administered Japan. The instrument of surrender provided that "the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."[8]

One of the first steps the Supreme Commander took "to effectuate these terms of surrender" was to draft a new constitution and to rewrite the various legal codes to conform with the new constitution.[9] The new Constitution was promulgated on November 3, 1946, and put into effect on May 3, 1947.[10] Chapter VI of the Constitution outlines the role of the judiciary within the new governmental system. Article 76 attempts to assure an independent judiciary.

> The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.
>
> No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.
>
> All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.[11]

Article 78 further safeguards the separation of the judiciary from the executive: "Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges

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8. R. WARD, JAPAN'S POLITICAL SYSTEM 19-20 (2d ed. 1978).

9. For a full discussion of the legal reform in occupied Japan, see A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN (1976).

10. The Constitution, in fact, had secretly been drafted by the Government Section of the Supreme Commander for Allied Powers (SCAP) after it had become evident that the Japanese government needed guidance and assistance to produce a document that would embody the essentials of democratic government. H. QUIGLEY & J. TURNER, THE NEW JAPAN 93-94 (1956). Whether this Constitution was "imposed" by SCAP on Japan is a subject of disagreement. *Compare* H. QUIGLEY & J. TURNER, *supra*, at 94 (the Japanese in reality could not reject a document drafted and endorsed by SCAP) *with* Williams, *Making the Japanese Constitution: A Further Look*, 1965 AM. POL. SCI. REV. 665 (SCAP's suggestions and guidance do not equal imposition). In any event, there is general agreement that "[o]ne of the primary aims of the postwar Japanese Constitution and related legal reforms under the Allied Occupation was to create an institutional structure within which administrative officials would be held accountable for their actions." J. Haley, *supra* note 4, at 1. The methods chosen included parliamentary supremacy and judicial review. *Id.* at 7. For a more detailed description of the methods, see A. OPPLER, *supra* note 9, at 86-104.

11. JAPAN CONST. art. 76.

shall be administered by any executive organ or agency."[12]

The most immediate consequence of these constitutional provisions upon the Japanese administrative litigation system was the abolition of the Administrative Court and the grant to the judicial courts of the competency to review administrative actions.[13] This was achieved through the promulgation of the Administrative Litigation Special Measures Law.[14] Article 1 of the new law provided that administrative suits would be treated procedurally as ordinary civil actions.[15] Article 2 established the requirement of exhaustion of administrative appeals.[16] This law, according to one commentator, would bring a remarkable change in Japanese administrative law.

> Now the revolutionary principle was established that the legality—not the expediency or discretion—of any administrative act could be challenged in the regular courts, where the rules of civil procedure were to apply. This protection of the citizen from violation of the law by the executive branch goes beyond that granted in most Western states.[17]

The Administrative Litigation Special Measures Law, however failed to achieve revolutionary results. The law limited the courts' capacity to give effective relief from illegal administrative action. First, under article 11, "the courts were required to dismiss all suits if, despite the illegality of the action under review, the relief would be against the public interest."[18] Because the courts were free to define the "public interest" and to determine whether a particular case warranted dismissal, this article did not significantly restrict judicial oversight. Second, under article 11, filing an appeal to the courts did not automatically suspend the execution of the administrative action at issue under article 10(1).[19] Thus, any challenged administrative conduct could continue, regardless of its possible illegality, unless the

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12. *Id.* at art. 78.

13. From 1946 until 1948, the courts heard administrative cases under the Code of Civil Procedure (CCP), which was promulgated in 1890. This procedure did not last long, however, because administrative cases differ from civil cases in many important respects; the CCP was not entirely suitable to the conduct of administrative cases. K. Machii, The Japanese System of Judicial Review: Its Organization and Procedure 262 (1973) (unpublished Ph.D. dissertation at the University of California, Los Angeles; on file at the offices of the Cornell International Law Journal). "[A] few scholars insist that the new Constitution does not prohibit the establishment of a system of administrative courts alongside the judicial courts . . . ." Hashimoto, *The Rule of Law: Some Aspects of Judicial Review of Administrative Action*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 239, 241 (A. von Mehren ed. 1963).

14. Administrative Litigation Special Measures Law (*Gyōsei soshō tokurei hō*), Law No. 81 of 1948.

15. *Id.* at art. 1.

16. *Id.* at art. 2. This discussion is based upon J. Haley, *supra* note 4, at 12-15.

17. A. OPPLER, *supra* note 9, at 134.

18. J. Haley, *supra* note 4, at 12-13; Administrative Litigation Special Measures Law, art. 11.

19. Administrative Litigation Special Measures Law, art. 10(1), 11.

court suspended execution of the conduct under article 10(2).[20] Such a suspension, however, could be granted only in the case of "urgent necessity to prevent irreparable damage," and the Prime Minister could still override a court decision to suspend execution if the delay in effecting the administrative action was deemed to have a "material influence on the public interest."[21]

Other, more serious problems also remained.

> The Special Measures Law lacked any provision delineating what relief the courts could give once an administrative action was found to be illegal. Nor did the statute define what actions could be reviewed. . . . For lack of new or broader definitions of judicial power Japanese courts could only fall back on the restrictive concepts of the prewar system.[22]

The Special Measures Law was repealed in 1962 and replaced with the Administrative Case Litigation Law (ACLL),[23] which "codified the prevailing concepts and doctrines without, needless to say, expanding the notion of judicial power or the reviewability of less formal administrative measures."[24]

II. FORMAT AND OPERATION OF THE ACLL

Articles 1 through 6 of the ACLL establish the scope of the ACLL. Article 1 states that the ACLL shall govern "administrative case litigation" (*gyōsei jiken soshō*) unless special provisions in other laws exclude such application.[25] Articles 2 through 6 of the ACLL

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20. *Id.* at art. 10(2).

21. J. Haley, *supra* note 4, at 13.

The Administrative Procedure Act provides an interesting contrast:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (1982).

Particularly interesting in this section is the disparity between the agency standard and the judicial standard for postponing the effective date of administrative action. The agency "may postpone" the effective date when "justice so requires," while the court's standard is "irreparable injury." Thus, the agency, which has a vested interest in *not* postponing its own actions, may do so if justice requires it to do so—a remarkable allowance of agency discretion. The court, on the other hand, can postpone administrative action only if the aggrieved party can show irreparable injury—a very demanding burden of proof. In the end, the reasonable conclusion may well be that little difference exists between the Japanese and American systems in this regard, even under the Administrative Case Litigation Law (ACLL) (*Gyōsei jiken soshō hō*), Law No. 139 of 1962, which is largely unchanged in this area. See *infra* text accompanying note 99.

22. J. Haley, *supra* note 4, at 13-14.

23. *See supra* note 6.

24. J. Haley, *supra* note 4, at 14.

25. ACLL, art. 1. The constitutional support for this provision is article 32 of the Constitution, which provides that "[n]o person shall be denied the right of access to the courts." JAPAN CONST. art. 32. The statutory support is provided by article 3 of the

define the term "administrative case litigation,"[26] establishing three basic types of lawsuits in which administrative actions can be challenged: (1) suits in which a private party—either an interested party in a *kōkoku* lawsuit or a disinterested party in a public lawsuit—seeks judicial relief from administrative dispositions, decisions, or inaction, or from the nonconformity of state or local actions with the law; (2) suits in which two private parties sue each other on the basis of a legal relationship that has arisen between them by reason of an administrative disposition or decision;[27] and (3) intergovernmental disputes between state agencies over their respective powers.

Courts Act (*Saibanshohō*), Law No. 59 of 1947 (English translation in 2(1) EHS No. 2010), which declares that (1) "Courts shall, except as expressly provided for in the Constitution of Japan, decide all legal disputes and shall possess such other powers as are specifically provided for by law. (2) The provisions of the preceeding paragraph shall in no way prevent preliminary determinations by administrative agencies."

26. ACLL, art. 2-6 (author's translation).

Article 2. *Administrative case litigation.* In this Law, "administrative case litigation" shall mean a *kōkoku* appeal lawsuit, a party lawsuit, a public lawsuit, or an agency lawsuit.

Article 3. *Kōkoku appeal lawsuits.* In this Law, "*kōkoku* appeal lawsuit" shall mean a lawsuit of exception [*fufuku*] to the exercise of public power by an administrative agency.

(2) In this Law, "lawsuit for revocation of disposition" shall mean a lawsuit that seeks the revocation of conduct constituting an administrative disposition or other exercise of public power (excluding such decision, ruling, or other act prescribed in the following paragraph; hereinafter simply referred to as "disposition").

(3) In this Law, "lawsuit for revocation of decision" shall mean a lawsuit seeking the revocation of an administrative decision, ruling, or other action (hereinafter simply referred to as "decision") on a petition for review, petition of objection, or other petition of exception (hereinafter simply referred to as "petition for review").

(4) In this Law, "lawsuit for affirmation of nullity" shall mean a lawsuit seeking the affirmation of either the existence or nonexistence, or the validity or invalidity, of a disposition or decision.

(5) In this Law, "lawsuit for the affirmation of illegality of forebearance" shall mean a lawsuit seeking an affirmation of the illegality of an administrative agency's failure to make a disposition of or decision on a petition that is based on the law within a considerable period of time, even though the agency should make some disposition or decision with regard thereto.

Article 4. *Party litigation.* In this Law, "party lawsuit" shall mean a lawsuit concerning a disposition or decision that affirms or constitutes a legal relationship between parties, by which lawsuit one of the parties is made a defendant pursuant to provisions of law or pursuant to a public law legal relationship.

Article 5. *Public litigation.* In this Law, "public lawsuit" shall mean a lawsuit brought by a qualified voter or other personally and legally disinterested party seeking to correct the actions of a State or public body agency not in conformity with provisions of law.

Article 6. *Agency litigation.* In this Law, "agency lawsuit" shall mean a lawsuit concerning disputes between State or public body agencies over the existence or nonexistence of the relative power between them, or the exercise of such power.

27. An example would be when a purchaser of land from the state is sued by a party claiming that he legally owned the land and that the state had wrongfully expropriated the land from him before selling it to the defendant.

A. Ability of Courts To Enjoin Administrative Action

Before the enactment of the ACLL in 1962, there was some confusion as to whether private citizens could obtain injunctive relief against administrative action.[28] In the early days of post-World War II Japan, legal scholars and the courts decided that injunctions and mandamus suits compelling the government to do or to refrain from doing specified actions were impermissible.[29] Accordingly, these suits were usually dismissed[30] and then replaced by declaratory judgment actions. Although declaratory judgments initially found little favor in the courts,[31] they eventually gained acceptance.[32] Likewise, injunction suits experienced an increased popularity.[33]

The ACLL attempts to clarify this confusion in two ways. First, article 44 eliminates the provisional disposition remedy of the Code of Civil Procedure: "The provisional disposition (*kari shobun*) provisions of the Code of Civil Procedure are impermissible with regard to administrative dispositions or other acts comprising an exercise of the public power."[34] In order to compensate for this elimination of the provisional disposition remedy, article 25 of the ACLL provides,

> In cases where a suit for revocation of a disposition has been filed, when it is urgently necessary to prevent a loss which is produced by a disposition, the execution of a disposition, or the continuation of procedure and which is difficult to restore, the court may, upon application and by way of a ruling, suspend in whole or in part the effect of a disposition, its execution, or the continuance of procedure (hereinafter referred to as "suspension of execution")[35]

Article 25(3) limits the availability of this remedy by declaring that it shall not be granted when it significantly influences the public welfare

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28. K. Machii, *supra* note 13, at 267-69.

29. *Id.* at 266.

30. *See, e.g.*, Kimura v. Governor of Tokyo-to, 4 Gyōsai reishū 2174 (Tokyo Dist. Ct. Sept. 16, 1953) (suit for injunction dismissed); City of Osaka v. Governor of Osaka-fu, 2 Gyōsai reishū 1403 (Osaka Dist. Ct. July 7, 1951) (mandamus action dismissed). *See also* K. Machii, *supra* note 13, at 266.

31. *See, e.g.*, Kudō v. Ministry of Justice, Fukushima Dist. Chief, 5 Gyōsai reishū 1528 (Sendai High Ct. June 29, 1954); Kawakami v. Mayor of Fukuoka, 4 Gyōsai reishū 2477 (Fukuoka Dist. Ct. Mar. 11, 1954).

32. *See, e.g.*, Son-to Ya v. Japan, 13 Gyōsai reishū 1831 (Osaka High Ct. Oct. 19, 1962); Iso Medical Found. Dispensary v. Japan, 6 Gyōsai reishū 1193 (Tokyo Dist. Ct. May 26, 1955).

33. *See, e.g.* Kinoshita v. Warden of Fuchū Penitentiary, 14 Gyōsai reishū 1316 (Tokyo Dist. Ct. July 29, 1963); Ueno v. Tokyo Dist. Procurator's Office, 13 Gyōsai reishū 2393 (Tokyo Dist. Ct. Dec. 25, 1962).

34. ACLL, art. 44 (author's translation). The provisional disposition to which Article 44 refers is similar to the preliminary injunction in U.S. law. The provisional disposition is delineated in articles 755 to 761 of the Code of Civil Procedure. In essence, article 755 authorizes the courts to grant a provisional disposition when it is necessary to protect the material existence of the right in issue.

35. ACLL, art. 25(2) (author's translation).

or when the reasons for the suit are not apparent.[36]

Second, article 27(1) limits the courts' ability to suspend a *shobun* by granting the Prime Minister power to quash a court's suspension.[37] This power is broad. Although article 27(1) of the ACLL simply states that the Prime Minister "can" state his objections to a judicial suspension of a *shobun*, subparagraph 4 of the same article declares that when the Prime Minister has made his objection, the court shall not suspend the execution of the *shobun* or, if it has already done so, shall cancel the suspension.[38] In short, the Prime Minister has unfettered discretion to reverse a judicial determination that an adminstrative disposition should be suspended pending a final decision on the merits. The Prime Minister has not been reluctant to exercise his discretion.[39]

B. Suits for Revocation and for Affirmation of Nullity: The Determination of the Existence of a *Shobun*

The primary type of lawsuit questioning an administrative action is a *kōkoku* suit, which seeks a revocation of "conduct constituting an administrative disposition or other exercise of public power" under article 3(2) of the ACLL. The key issue in all such cases is whether the agency action constitutes "an administrative disposition or other exercise of public power" or is simply factual or proprietary behavior not directly related to questions of public law. Because the administrative and civil sections of each district court are separate, if the contested action is deemed to be a *shobun* or an exercise of public power, the ACLL applies and any civil action that has been filed must be dismissed. "[R]eliance on the wrong form of action means that plaintiffs risk not only application of private or public law doctrines that they would rather avoid, but also the dismissal of the entire case with an implied reference to the other section."[40] Thus, a plaintiff could substantially prejudice his own case by characterizing the contested administrative action incorrectly.[41]

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36. *Id.* at art. 25(3).

37. *Id.* at art. 27(1)(4).

38. *Id.*

39. *See, e.g.*, Fukuda v. President of Kyoto Prefecture Medical Univ., 1 Gyōsai reishū 764 (Kyoto Dist. Ct. July 19, 1950) (the Prime Minister quashed the Kyoto District Court's injunction prohibiting the President of the Medical School from expelling protesting students).

40. *See* Upham, *supra* note 5, at 229.

41. Another difficulty that aggrieved parties face in challenging a *shobun*—one that also inheres in determining the presence of a *shobun*—is the limitation imposed by article 9 of the ACLL, which limits the availability of suits for revocation of disposition and of decision to persons having a legal interest with respect to seeking the revocation. Article 9 is a standing provision that, although statutorily distinct from the *shobun* language of article 3(2), involves many of the same issues as the *shobun* cases.

The seminal case setting the scope of the *shobunsei* rule is *Hayashi Ken Shipbuilding Co. v. Director of High Seas Accidents Inquiry Board*,[42] an *en banc* decision of the Supreme Court under the Administrative Litigation Special Measures Law. This case involved a finding by the defendant Board that the cause of an accident on the high seas between two Japanese ships was the plaintiff's inadequate inspection and repair of a rudder. The plaintiff had not been a party to the Board's hearings nor had it had an opportunity to present any evidence or to express any opinion to the Board. After the findings were announced, the plaintiff brought suit to have them revoked.

The Tokyo High Court held that the Board had violated the principle of "no hearing, no judgment" and thus had violated the plaintiff's rights. On appeal by the Board, the Supreme Court reversed, holding that:

> The decision [by the Board] is a decision clarifying the cause of the above maritime accident. That it does not impose any duties whatsoever on the appellee or hinder any exercise of appellee's rights is clear from the provisions of the law and the decision itself. As stated below, it does not have the effect of a binding determination of the appellee's negligence. This being the case, the decision does not have a direct effect on the appellee's rights and duties; thus it cannot be considered to be an administrative disposition and we must hold that the appellee is not allowed to file suit.[43]

By American standards, this definition of justiciability is terribly restrictive. Nonetheless, this interpretation of *shobun* has largely been followed. For example, in *Sasaki v. Atami City Agricultural Council*,[44] the Supreme Court considered a notice from the defendant to the plaintiff concerning the boundaries of the plaintiff's farm. In holding that the notice did not qualify as a *shobun*, because it had no legal effect and because it did not affect the scope of the plaintiff's ownership right in his farmland, the court declared that a *shobun* is an "official action which forms the rights and duties of the citizens or confirms the scope thereof."[45] The effect of the *Sasaki* rule is that supervisory orders, permissions, approvals, and regulations among agencies or within a single agency cannot be the object of litigation because they do not directly create or form the rights and duties of citizens.[46] One scholar notes that "this type of administrative act,

42. 15 Minshū 467 (Sup. Ct., G.B. Mar. 15, 1953). For an English-language discussion of this case, see J. Haley, Japanese Administrative Law (1976) (unpublished and unpaginated course materials used at the University of Washington School of Law in spring 1983 available through the Cornell International Law Journal); Nathanson & Fujita, *The Right to Fair Hearing in Japanese Administrative Law*, 45 WASH. L. REV. 273, 279-81 (1970).

43. 15 Minshū at 470.

44. 9 Minshū 217 (Sup. Ct., 1st P.B. Feb. 24, 1955).

45. *Id.* at 218.

46. Upham, *supra* note 5, at 236.

termed 'internal behavior,' is beyond judicial scrutiny. Only when the agency order is actually applied to individuals' rights and duties, can the action be challenged through an administrative suit."[47]

A recent famous case illlustrating the *Sasaki* rule is *Edogawa Ward v. Minister of Transportation*,[48] popularly known as the *Narita Shinkansen* case.[49] In that case, the Minister of Transportation published the Ministry's formal plan to extend the Japanese National Railway's bullet train, or *shinkansen*, from Tokyo to Narita, the site of Tokyo's new airport. The Japan Railway Construction Corporation, which was to do the construction, subsequently submitted its construction implementation plan to the Minister, and the Minister approved it two days later. The plan included a map that designated within 200 meters where the track was to be laid.

Plaintiffs, who lived within the designated area, filed suit under article 3(2) of the ACLL to have the plan revoked. They contended that they would most likely have to give up their land and that, even if their property escaped condemnation, they would suffer severe physical and psychological harm from noise and vibration.[50]

The Tokyo District Court dismissed the lawsuit on the ground that the plan was still too nebulous for its approval to qualify as a *shobun*.

> At the stage of the approval of a Construction Implementation Plan, it has not necessarily been concretely confirmed who will in the future become an interested party when the Plan is executed. In that sense, a Construction Implementation Plan and its official approval must be considered as abstract in nature. In other words, that approval is unlike a concrete disposition directed at a specified individual. Furthermore, there is no provision that requires its publication, and it itself has no effect whatsoever on citizens' rights and duties.[51]

The court also noted that those plaintiffs whose land would eventually be taken for the railroad could challenge the *shobun* designating their land for expropriation. This remedy, declared the court, would be "entirely adequate."[52] The court failed to state what remedy, if any, would be available to plaintiffs whose property would not be con-

47. *Id.* A host of cases, particularly in the construction area, provide concrete examples of the above analysis. *See, e.g.*, Sakamoto v. Governor of Tokyo Prefecture, 20 Minshū 271 (Sup. Ct., G.B. Feb. 23, 1966) (in which the Supreme Court affirmed the dismissal of a suit, brought by suburban residents challenging a revised renewal plan, because the plan was not a concrete disposition affecting specific individuals but rather was "nothing more than a blueprint"). This case is described in J. Haley, *supra* note 42.

48. 691 Hanrei jihō 7 (Tokyo Dist. Ct. Dec. 23, 1972), *aff'd*, 722 Hanrei jihō 52 (Tokyo High Ct. Oct. 24, 1973).

49. *See, e.g.*, Upham, *supra* note 5, at 236-38. The following discussion is based in part on this source.

50. 691 Hanrei jihō at 7.

51. *Id.* at 12. This translation is from Upham, *supra* note 5, at 237.

52. 691 Hanrei jihō at 12.

demned but who nonetheless would be affected by the construction and operation of the new line. Viewed in another light, the Minister's approval according to the court was "internal behavior" directed at the construction corporation and authorizing it to proceed according to the plan. Thus, the plan did not affect a citizen's concrete rights and duties, and, therefore, it lacked ripeness (*seijukusei*).[53] In short, the court said that judicial review will be delayed until an administrative policy is actually implemented rather than when it is announced or planned.

A case in which an individual was the direct object of administrative action from which he suffered a detrimental effect, but in which he still was unsuccessful in court, was *Nakamoto v. Governor of Tochigi Prefecture*.[54] There the defendant governor sent an admonition (*kaikoku*) to Dr. Nakamoto because he "filed a claim against the social insurance fund for payment in excess of the amount to which he was entitled."[55] The doctor sued for revocation of this admonition. Although the Utsunomiya District Court entered judgment in his favor because the admonition "could exert a factually significant influence"[56] on his honor and reputation, the Tokyo High Court reversed on the merits, and the Supreme Court dismissed the subsequent *jōkoku* appeal. The Supreme Court noted that repeated violations of the rules may lead to revocation of a doctor's commission as a social insurance physician, and such a revocation would be a *shobun* under article 1 of the Administrative Litigation Special Measures Law. An admonition itself, however, had no legal effect, even though "[i]t is undeniable that the admonition . . . will have a detrimental effect upon the plaintiff's reputation."[57] Thus, the Court dismissed the suit.

Another case in which the plaintiff undoubtedly suffered a detriment but still was not able to seek redress under the ACLL is *Kubota*

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53. *Id.* As the court declared:

> The approval in this case can be viewed not only as the defendant's endorsement of the . . . fundamental provisions concerning the construction of the Narita Line, but also as authorization given to the Japan Railway Construction Corporation to proceed with construction based on the Plan. It is therefore internal behavior directed at the above Corporation and cannot be said to be a concrete disposition directed at any private citizen or to have any influence whatsoever on citizens' rights or duties. As a legal case, therefore, it lacks the ripeness necessary for a controversy.

Id.

54. 17 Minshū 682 (Utsunomiya Dist. Ct. May 28, 1957), *rev'd*, 17 Minshū 690 (Tokyo High Ct. Mar. 14, 1961), *aff'd*, 17 Minshū 670 (Sup. Ct., 3d P.B. June 4, 1963). Excerpts from the Supreme Court's opinion are translated in THE JAPANESE LEGAL SYSTEM, INTRODUCTORY CASES AND MATERIALS 389 (H. Tanaka ed. 1976).

55. 17 Minshū at 686; THE JAPANESE LEGAL SYSTEM *supra* note 54, at 389.

56. 17 Minshū at 686.

57. THE JAPANESE LEGAL SYSTEM, *supra* note 54, at 389.

v. Mayor of Chiyoda Village.[58] In *Kubota*, the plaintiffs filed suit seeking the revocation of orders transferring them to other locations. The three plaintiffs were employees in the Chiyoda Village Office.[59] Under the Local Public Personnel Act,[60] the defendant Mayor had the power of appointment over the plaintiffs. The Mayor exercised this power and detached the plaintiffs from the Chiyoda Village Office and reassigned them to the environmental sanitation facilities unions in three separate cities. On the same day, the management of the receiving union appointed Kubota as the secretary and chief clerk to the Plans and General Affairs Section, as well as chief clerk for garbage collections. Imada and Ozawa retained their former positions but in a new city. The plaintiffs requested an explanation from the mayor of his reasons for the detachment disposition, which the plaintiffs considered to be disadvantageous, but the mayor refused the request. On November 2, the Fairness Commission, the political organ competent to review plaintiffs' statements of dissatisfaction about disadvantageous positions, also denied the plaintiffs' request for a revocation of the mayor's disposition. The plaintiffs brought suit, claiming that the disposition was illegal because it was an abuse of the mayor's personnel power.

The court dismissed the lawsuit, holding that the transfer order was not a *shobun*. The court stated that because the mayor's detachment order could not be separated from the subsequent hiring by the new agency, the order was not an independent disposition.

> [T]he order of detachment simply is nothing more than an action giving notice to the employee concerned, the purport of which is that one appointing authority consents to the appointment made by another appointing authority. That notice of the shift of the employee in question to the later organization, by itself, is not an independent administrative disposition. It is not something that produces a direct legal effect on the employee in question. (The action by the later organization's appointing authorities appointing someone to a new office is a disposition subject to a lawsuit for revocation.)[61]

In sum, although the plaintiffs were transferred by the mayor of the village in which they worked because of alleged personal ill-will, they could not have his detachment order revoked because it was not an "independently completed appointment action." Rather, it was simply his acquiescence to appointments by the agencies for which the plaintiffs ended up working. Thus, the lawsuit against the mayor had

58. 992 Hanrei jihō 41 (Maebashi Dist. Ct. Mar. 27, 1980), *kōso* appeal filed.

59. Until October 1977, plaintiff Kubota was the section chief of the Residents Section, plaintiff Imada was a technical officer working as a garbage truck driver, and plaintiff Ozawa was a garbage man.

60. Local Public Personnel Act (*Chihō kōmuin hō*), Law No. 261 of 1950.

61. 992 Hanrei jihō at 44.

to be dismissed.[62]

1. The Distinction Between the Existence of a Shobun *and a Private Law Action*

The civil law system divides law primarily into public law and private law.[63] Private law traditionally has been that area of the law in which the sole function of government is the recognition and enforcement of private rights.[64] In contrast, public law is that area of law in which the effectuation of the public interest by state action is the driving consideration.[65]

Public law thus defined has two major components. The first is constitutional law, which establishes the governmental structure; the second is administrative law, which defines the government's relations with private individuals.[66] In contrast to private legal relations, in which the parties are equals and the state acts as referee, in public legal relations the state is a party, which, as representative of the public interest, is superior to the private individual.[67]

A corollary assumption accompanying this general dichotomy between public law and private law is that the economy functions in a fairly simple fashion, with private individuals as the principal actors and with the appropriate sphere of government activity severely limited.[68] This assumption contemplates neither government participation in the economic and social life of the nation nor concerted activity by associations of individuals, such as corporations or labor unions. One scholar noted that such an assumption is based on the proposition that the "only actors in the legal universe [are] the private individual and the state, and each [has] its domain: private law for one and public law for the other."[69]

The relation of this public law-private law distinction to a court's determination of whether a *shobun* exists can be seen in *Nagasugi v.*

62. Not all Japanese courts, however, take such a rigid position on the *shobunsei* requirement. *See, e.g.*, Yamaguchi v. Minister of Transport., 692 Hanrei jihō 30 (Hiroshima Dist. Ct. Jan. 17, 1973) (holding, on policy grounds, that plaintiff had standing to sue the Minister of Transportation for allegedly unfair bus fare increases); Umehara v. Japan, 20 Minshū 1227 (Tokyo Dist. Ct. Oct. 24, 1962), *aff'd*, 20 Minshū 1234 (Tokyo High Ct. Apr. 26, 1963), *aff'd*, 20 Minshū 1217 (Sup. Ct., G.B., July 20, 1965) (denying a motion to dismiss suit contesting a self-executing statute which terminated plaintiff's right to operate his drug store). Both *Yamaguchi* and *Umehara* are notable for their recognition that a citizen's legal rights may be affected before a *shobun* occurs and that such a result should be subject to judicial review.

63. J. MERRYMAN, THE CIVIL LAW TRADITION 99 (1969).

64. *Id.* at 100.

65. *Id.* at 101.

66. *Id.*

67. *Id.*

68. *Id.* at 100.

69. *Id.*

Governor of Fukui Prefecture.[70] In *Nagasugi*, defendant Tanaka, the governor of Fukui Prefecture, decided to make a capital loan under the Small- and Medium-size Enterprise Promotion Trade Group Law[71] and the Small- and Medium-size Retail Commerce Promotion Law[72] to the Jinmei Shopping Center Cooperative Association. The plaintiff, who was a resident of the prefecture, sought to have the loan decision revoked on various grounds as an illegal *shobun*.

The court dismissed the suit because there was no *shobun*. The court first noted that since neither a right to receive nor a legal interest in a capital loan is generally granted to applicants for a loan under the capital loan regulations, even a rejection of the loan application does not cause any change whatsoever in the legal position of loan applicants. The court thus concluded that the governor's notice of his decision on the loan could not qualify as a *shobun* but was actionable under private law.[73]

Although the court failed to explain clearly its distinction between a private law action and a *shobun*, it is evident that the distinction was the basis of the court's decision. The court reasoned that because the governor's loan approval did not change anyone's legal rights or duties—for no one had a right to receive nor a legal interest in the capital loan at issue—no *shobun* existed. If no governmental action existed, public law was inapplicable. And because public law was inapplicable, the substantive and procedural rules of administrative law could not apply. Therefore, according to the court, the only other law that could apply was private law, even though the plaintiff lacked any private law remedy comparable to the one for revocation of a *shobun*.[74] In short, the court's decision left the plaintiff with no avenue to challenge the governor's approval of the loan.

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70. 991 Hanrei jihō 64 (Fukui Dist. Ct. Apr. 25, 1980).

71. Small- and Medium-size Enterprise Promotion Trade Group Law (*Chūhō kigyō shinkō jigyō dan hō*), Law No. 56 of 1967.

72. Small- and Medium-size Retail Commerce Promotion Law (*Chūhō kouri shōgyō shinkō hō*), Law No. 101 of 1973.

73. 991 Hanrei jihō at 68. In reaching its conclusion, the court found that the chain of administrative procedures set forth in the appendix to the capital loan regulations was particularly persuasive in countering the argument that a further decision on the loan, after the initial decision, would be a justiciable *shobun*.

74. Although article 1 of the Civil Code states that "[n]o abuse of rights is permitted," and even assuming that the plaintiff in *Nagasugi* could convince the court that the governor had abused the plaintiff's rights, the plaintiff would essentially be limited to monetary damages, because the Japanese judiciary lacks the injunctive and contempt powers that U.S. courts enjoy. *See* Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUDIES 359, 387 (1978) (remedies available in civil suits are specific performance, damages, and declaratory judgments affirming the legal relations of the litigants).

It would be difficult for the plaintiff in *Nagasugi* to persuade the court in his favor on an abuse of rights theory because the Japanese courts have traditionally applied this doctrine only in riparian rights cases and in real property cases in which a party has encroached on an adjoining landowner's property rights. *See*, Aoyama, *Wagakuni ni okeru kenri ranyō*

The reasoning behind this result is less than satisfactory. First, although the court may well be correct in its anaylsis that loan applicants like those at bar had no legal right to receive nor an interest in the loan, it failed to consider the the plaintiff's position. It was the *plaintiff's* legal rights and duties that were being asserted, not those of loan applicants. Simply to sidestep any consideration of the effect of the governor's loan decision on the plaintiff's legal rights and duties by saying that the legal rights and duties of loan applicants in general are unaffected by that decision is to ignore the very core of the suit.

Another deficiency in the court's reasoning is its cryptic invocation of the public law-private law distinction in its determination that a governmental action, justiciable only in the public law realm, had not occurred. Stated simply, the court reasoned that because there was no public law action, public law could not apply and, thus, *ipso facto* the loan approval was a private law action. The language and reasoning in the opinion suggest that the court was flustered by having to decide whether a loan transaction involving the government was cognizable in a public law suit because loans were historically private law matters and, as such, should be governed by private law.

Although this indecision is understandable given the historical longevity of the public law-private law distinction, the court was remiss in not addressing the problem more directly. Moreover, the traditional dichotomy between public and private law evolved in a far less complex society. However valid that distinction may have been when the systematic and conceptually logical theories of civil law were being formulated, the distinction is less valid today.[75] Although the public law-private law distinction had logical and factual validity in the European legal systems of the seventeenth to nineteenth centuries, it is less valid today. As one scholar has stated, "Such terms as public law and private law do not import any given meaning; their meaning is supplied by the culture of a given time and place. This truism has been underlined by both those who attack and those who defend tradi-

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riron no hatten (The development of the abuse of rights theory in Japan), in 1 KENRI NO RANYŌ (ABUSE OF RIGHTS) 9 (Suekawa commemorative ed. 1962).

75. Perhaps the most important factor undermining the continued vitality of the dichotomy is the way in which governments have changed during the past century and a half. *See* J. MERRYMAN, *supra* note 63, at 102-05. The social state of the twentieth century has replaced the individualistic state of the nineteenth century. As a result, not only has the area of private autonomy decreased, but the area of state involvement in the economy has increased. State entities and state-controlled corporations increasingly engage in commercial and industrial activities using the legal forms of private law. Thus, as the private-law realm is decreasing from the standpoint of the individual because of enlarged notions of the "social function" of property and other private rights, the state is increasingly becoming involved in the private law realm because of the growing activity of the state's commercial entities. The net result is that "[i]n so complicated a legal universe, simple dichotomies like public law and private law seem to lose their utility." *Id.* at 104.

tional conceptions."[76]

Another factor undercutting the rationale for the dismissal in *Nagasugi*, and one that is more true of Japan than other civil law countries, is the abolition of the Administrative Court and the constitutional prohibition against special tribunals. In the civil law system, the separation of powers doctrine necessitated the existence of two sets of courts, the administrative courts and the civil courts.[77] Public law questions were adjudicated by administrative courts and private law questions by civil courts. The postwar establishment of a unitary Japanese judiciary with jurisdiction over both private law and public law issues has reduced the significance of the separation of powers doctrine and has probably blurred the public law-private law distinction.[78]

Despite these infirmities in the public law-private law distinction, the *Nagasugi* court ultimately relied on this theory for its finding that there was no *shobun*. However, in denying the plaintiff a hearing on the validity or propriety of the governor's loan approval the court did not mention, much less discuss, any of the problems surrounding the public law-private law theory, nor did it cite any of the Japanese critics of this distinction.[79] Perhaps the loan approval was proper and perhaps the plaintiff really had no justiciable interest that the court could legally protect, but the court's rationale fails to present a persuasive statement of the reasons for its dismissal.

In sum, with few exceptions, the Japanese courts appear willing and able to use *shobunsei* to justify their dismissal of cases where no concrete effect upon people's legal rights and duties can allegedly be established. This willingness to delay adjudication of disputes may well have serious ramifications for Japanese society.

III. *SHOBUNSEI* AS A BARRIER TO SUBSTANTIVE JUSTICE

The prevailing view in Japan today appears to hold that the doctrine of *shobunsei* is not a barrier to substantive justice but simply a means by which courts can decline review unless a concrete dispute is at issue. According to this view, the courts will grant review only when a citizen's natural liberties are affected by "imperative administrative action" rather than by "formative administrative action."[80] That is, administrative acts that restrict or invade preexisting rights or

76. *Id.* at 103.

77. *Id.* at 101.

78. *See* HŌGAKU (Jurisprudence) 6-7 (S. Imamura & N. Koyama eds. 1965). *See also* J. MERRYMAN, *supra* note 63, at 104-05.

79. *See, e.g.*, T. MIYAZAWA, KŌHŌ NO GENRI (The Principles of Public Law) 3-29 (1967).

80. One Japanese scholar has analyzed this problem in the following terms:

individual interests are not within the discretionary power of the agency, even though administrative acts that confer new rights or interests of individuals are. Correspondingly, although the courts can determine specifically whether the nondiscretionary acts are supported by law, they cannot review a discretionary action unless the agency oversteps or abuses its discretionary power.[81]

The difficulty in this analysis, however, lies in determining the existence and scope of the individual's "natural liberties," as well as of his or her rights and duties. Under the rule of *Hayashi Ken Shipbuilding*, and *Sasaki*, supervisory orders, permissions, approvals, or regulations cannot be litigated because they do not directly create the rights and duties of citizens.[82] They are not imperative administrative actions. Similarly, according to settled precedent and academic opinion, administrative suggestions, encouragement, guidance, and other such expressions of opinion that have no direct legal effect upon a person's rights and duties are not proper subjects of administrative litigation.[83]

Yet, there can be little doubt that in cases like the *Narita Shinkansen Case*, the plaintiffs did suffer harm because of the administrative action. In that former case, the land owners who lived within the designated railroad corridor but whose land was not condemned could never challenge the administrative action. The enjoyment of

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The kind of connection that administrative action has toward private rights has heretofore chiefly been discussed in connection with the "content of administrative action," especially the effect of administrative action. That is to say, if we examine the traditional theory (Tanaka, 1964 edition, p. 301, GYŌSEI HŌ SORON), administrative action is distinguished in terms of its content between imperative administrative action (*meireiteki gyōsei kōi*) and formative administrative action (*keiseiteki gyōsei kōi*). Imperative administrative action is action to command such duties as doing a specific act, not doing it, enduring it, and offering it; or administrative action rescinding these duties. Those administrative actions are ones which have as their object the "natural liberty" that people originally enjoy, and by commanding duties, they limit natural liberty. And when they cancel duties they are said to have the effect of restoring freedom that has been limited.

In contrast to this, formative administrative action is administrative action toward people that establishes, changes, or destroys specific rights, the capacity to possess rights, the capacity to perform legal rights, comprehensive legal statuses, and other legal powers that are not naturally enjoyed. The result of this is that the administrative agency grants or denies to other parties the legal power to oppose the agency. Accordingly, formative administrative action and imperative administrative action are different. There are cases where public rights or other private rights are established or cases where the results or private law legal actions are completed or where there are other such results.

1 GYŌSEI HŌ (Administrative Law) 151-52 (Yamada, Ichihara & Abe eds. 1979).

81. Ogawa, *Judicial Review of Administrative Actions in Japan*, 43 WASH. L. REV. 1075, 1085 (1968).

82. *See* Upham, *supra* note 5, at 236.

83. Ogawa, *supra* note 81. For a thoughtful, scholarly analysis of this issue, see Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

their property, however, was affected by the construction of the railroad.

The *Kubota* decision offers a more extreme example. In that case, the court completely glossed over the aspect of "concrete effect on legal rights and duties" of *shobunsei*. It decided that the government's action was not action by the government at all, or at least not by the proper government official. The obvious reason for this switch in analysis is that a concrete effect on legal rights and duties was much more apparent in that case, and therefore, a different type of rationale was needed to avoid adjudication of the dispute.

The plaintiffs in *Kubota* sued the mayor for whom they had been working, with whom they had had disagreements, and by whom they had been transferred to different cities. Much to their surprise, the mayor's action did not qualify as a *shobun* because the detachment order did not completely detach the plaintiffs until the receiving mayor signed an order officially assigning them to specific posts. The plaintiffs should have sued the latter mayor. One cannot help but wonder whether the court would not have reached a similar result if the plaintiffs had sued the receiving mayor, because it was the transferring mayor's detachment order that had a concrete effect on the plaintiff's legal rights and duties, and it was his actions that were allegedly motivated by personal ill-will against one of the plaintiffs. Under these circumstances, it is difficult to conceive of any argument that the plaintiffs could have raised in order to attack the actions of the receiving mayor. Thus, they were left with no effective remedy against the improperly motivated transfer.

Rigid application of *shobunsei* presents two problems. The first is that individuals are unable to obtain judicial review of their claims until very late in the administrative process. In *Narita Shinkansen*, for example, the plaintiffs were unable to challenge the government construction until their houses were condemned. A legal challenge at that late stage, however, may be worthless because many courts would be reluctant, perhaps rightfully, to demolish millions of dollars of completed construction work. The net loss to society would arguably outweigh the gain to the individual plaintiff. If, however, a legal challenge were allowed at an earlier stage, a more reasonable accommodation between public interest and private rights would probably result, and *shobunsei* would be less of a barrier to substantive justice.

A second problem resulting from such rigid application of *shobunsei* is that the administrative bureaucracy may become increasingly unresponsive to the public that it is intended to serve. Studies by social scientists suggest that the discipline necessary for obtaining the standardized behavior required in a bureaucratic organization will

show "ritualistic" attitudes that will make officials unable to adjust adequately to the problems they must solve.[84] This discipline entails the development of a strong *esprit de corps* at a group level and creates a gap between the public and the bureaucracy. The behavioral rigidity, difficulties of adjustment to the task, and conflicts with the public that exist within the bureaucracy then reinforce the need for control and regulation.[85]

In sum, bureaucracies suffer from a dysfunctional cycle that causes isolation from and unresponsiveness to the public. Within a bureaucratic organization, the rigidity of task definition, task arrangements, and the human relations network result in a lack of communication with the environment and a lack of communication among groups. Individuals and groups use the resulting difficulties to improve their positions in the power struggle within the organization, because it is the active tendency of the human agent within the bureaucracy to take advantage of all available means to further his own privileges.[86]

When this model of bureaucratic behavior is applied to the Japanese administrative system and the effect of the *shobunsei* doctrine upon it, it is reasonable to conclude that administrative abuse follows. By way of illustration, assume that a given bureaucratic organization, the Ministry of Construction, has responsibility for supervising all construction within Japan. Although the individual agents within the Ministry seek by all available means to further their own personal interests, they have been trained since childhood to a rigid conformity that is augmented by the displacement of goals and by the adoption of ritualistic attitudes inherent in bureaucratic discipline. These factors cause the actors to develop a strong *esprit de corps* at a group level, causing a gap between the public and the bureaucracy.

Let us also assume that there is a need for the construction of a railroad line from Tokyo to Narita. The problem is referred to a particular group within the Ministry that is expert in the construction of railroads. In addition to having the normal bureaucratic isolation and group spirit just described, this group is even more narrow-minded and caste-conscious because it is comprised of specialists. These spe-

84. This discussion is based upon M. CROZIER, THE BUREAUCRATIC PHENOMENON 178-94 (1964), and the studies cited therein.

85. This model of bureaucratic insularity prevails even when technical expertise, rather than simple hierarchical control and standardization, is the operative norm of the bureaucracy. Specialization grows because decisions have to be made on neutral technical grounds. Specialization, however, makes the experts more narrow-minded and caste-conscious while outside economic and social interests and pressures converge with their caste policies. These dysfunctions naturally call for more specialization, and a new vicious circle develops. *Id.* at 190-94.

86. *Id.* at 192-94.

cialists then begin to work on the project, simultaneously trying to further their personal advancement within the organization. Their consideration of the problem is insulated from any public scrutiny or comment because neither the ACLL nor other provisions of law generally allow for public input.

These bureaucrats then publish the plan, enter into contracts with various construction companies (which are also bureaucracies and compete with the Ministry "group" and the public), and send notices to various landowners along the designated route stating what the Ministry believes to be the boundaries of their land. None of the parties who live along the designated corridor, however, can challenge the Ministry's decisions because none of these actions are justiciable *shobun* under settled precedent.

In the meantime, however, the bureaucrats may realize that as soon as they do make a legally cognizable *shobun*, they can be brought into court. They also realize that their personal interests, as well as the goals of their organization, are tied to the ultimate success of the project. Judicial disapproval would, of course, be disastrous. In addition, it would hurt established relationships with the contractors.

Thus, it is not unreasonable to assume that these bureaucrats will take all necessary steps—such as preparing reports that unjustifiably favor their position and destroying evidence damaging to their plan—to ensure the ultimate success of their plan and thus secure their power. Indeed, such actions are typically taken by specialists.[87] The result is that when an administrative plan is finally reviewed by a court, it is a *fait accompli* devoid of public input and deliberately structured to make judicial revocation a virtual impossibility.

IV. METHODS OF ALLEVIATING THE *SHOBUNSEI* BARRIERS: JAPANESE STATE REDRESS LAW VERSUS AMERICAN JUDICIAL REVIEW

The two most noticeable results from the use of *shobunsei* by the Japanese courts are first, that administrative agencies' adjudication of infringement of individual rights is delayed until any judicial review may be futile and second, that delay in adjudication reinforces bureaucratic isolation from the public and allows the bureaucracy sufficient time to generate evidence in support of its actions. Hence, the ACLL is not an effective means for reviewing administrative action.

87. *Id.* at 153. At least one Japanese case supports this contention. *See* Shōnan Setsubi Kōgyō Ltd. v. Mayor of Hiratsuka, 810 Hanrei jihō 3, 7 (Tokyo High Ct. Mar. 30, 1976). In Yamaguchi v. Minister of Transport., 692 Hanrei jihō 30 (Hiroshima Dist. Ct. Jan. 17, 1973), the court conceded that adminstrative action tends to protect the parties who are supposed to be regulated by the agencies rather than the public.

A. THE STATE REDRESS LAW

Many Japanese and others dismiss the ineffectiveness of the ACLL in providing viable judicial review by asserting that the State Redress Law[88] negates any undesirable consequences of the *shobunsei* doctrine. This article contends, however, that the State Redress Law is no more effective in providing judicial review of administrative action than is the ACLL.

The State Redress Law was enacted to effect the purposes of article 17 of the 1947 Constitution. "Every person may sue for redress as provided by law from the state or a public entity, in case he has suffered damage through illegal acts of any public official."[89] Under the State Redress Law, the state is liable generally for its negligent or wilful conduct[90] as well as for any defect in the management of public facilities such as roads and rivers.[91]

The most noted early case in which an allegedly illegal administrative action was challenged under this law is *Tomabechi v. Japan*.[92] In that case, the plaintiff was a member of the Diet when Prime Minister Yoshida dissolved the Diet without a Diet resolution. The plaintiff failed in his effort to have this action reviewed by the courts,[93] and in the subsequent elections the plaintiff lost his bid for reelection. He then sued under the State Redress Law for compensation for the salary he would have received as a Diet member had no election been held pursuant to the dissolution order. Although the Tokyo District Court found in his favor, both the Tokyo High Court and the Supreme Court dismissed his claim on appeal because of the political question doctrine. In the years since *Tomabechi*, damage actions have often been used to review administrative actions indirectly,[94] under the

88. State Redress Law (*Kokka baishō hō*), Law No. 125 of 1947. *See* J. Haley, *supra* note 4, at 20-21.

89. JAPAN CONST. art. 17.

90. State Redress Law, art. 1.

91. *Id.* at art. 2.

92. 14 Minshū 1206 (Sup. Ct., G.B., June 8, 1960).

93. Tomabechi v. Japan, 7 Minshū 305 (Sup. Ct., G.B., Apr. 15, 1953), *translated in* J. MAKI, COURT AND CONSTITUTION IN JAPAN 366 (1964).

94. For example, between 1950 and 1979, over 400 lower court decisions were reported under this law, with the plaintiffs winning a far larger proportion than in administrative suits. J. Haley, *supra* note 4, at 21. In comparison, 96 suits were newly filed under the ACLL in 1979. A total of 117 cases were resolved and 491 cases remained pending. The 117 that were resolved were resolved in the following manner: there were 71 decisions, the claim was recognized in whole or part in 17 cases, and rejected in 54 cases. A ruling or order was issued in 1 case; 4 cases went to conciliation; and 41 cases were withdrawn or otherwise settled. 32 Hōsō jihō 152 (1980). As for *kōso* appeals of administrative suits in the same year, there were 46 new filings. Out of a total of 30 cases resolved, 25 cases went to decision, with the appellate tribunal issuing a decision in 7 and dismissing the appeal in 18. One case went to conciliation, and 4 cases were withdrawn or otherwise settled. Ninety-two cases remained pending. *Id.* at 153.

belief that the State Redress Law rather than the ACLL will produce changes in the behavior of administrative agencies.[95]

An example of a damage suit under the State Redress Law causing the desired administrative action is *Hosono v. City of Kashima*.[96] In that case, the plaintiff wanted to become a pollution engineer for the local government in Kashima-cho, Ibaragi Prefecture, because a large industrial complex was located there. He took and passed a first examination in October 1975, and with fourteen other people, took a second examination in December 1975. The plaintiff believed that he had done well on the exams, and in fact, a high-ranking Kashima-cho official told a friend of the plaintiff that the plaintiff would be hired.

An investigation of this matter by an environmental group with which the plaintiff was affiliated showed that the labor union, which had had a disagreement with the plaintiff's group about the strategy of the pollution movement two years earlier, pressured the city not to hire the plaintiff. After a trial, the district court found the city liable to the plaintiff for one million yen in compensatory damages. Kashima-cho appealed this award, and upon the high court's recommendation to settle the case, the plaintiff gave up his damages award and Kashima-cho hired the plaintiff.

Although the plaintiff in *Hosono* successfully used the State Redress Law to obtain a reversal of the administrative action, this result is fairly rare. Moreover, this kind of result will probably continue to be the exception rather than the rule for the same reasons that arguably bias litigation under the ACLL in favor of the administration, i.e. bureaucratic mindset. It has been shown that agents within bureaucratic organizations prepare documents favorable to their position and destroy, hide, or alter documents unfavorable to their position[97]—indeed, that is exactly what happened in *Hosono*. Because of this tendency, judicial review of administrative action under either

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These statistics show that at the district court level, the plaintiffs who went to trial were successful only about one-third of the time and that almost as many cases were withdrawn as were dismissed (41 versus 54). On appeal, 72% of the cases were dismissed and 28% were decided by the higher court without a remand. Because the terms of the withdrawal or settlement vary among the substantial number of cases in which a withdrawal or settlement occurred (about 40% of all cases resolved at the trial level were withdrawn or settled), one cannot draw any conclusions about the success of plaintiffs from those cases. Based upon the statistics in which a court decision was issued, however, it is safe to say that plaintiffs were not very successful.

95. This belief has support in more than a few cases. See the SMON (Subacute-Myelo-Optics Neuropathy) drug cases, *e.g.*, Yagi v. Japan, 879 Hanreljihō 26 (Kanazawa Dist. Ct. Mar. 1, 1978) against the Ministry of Health and Welfare under the State Redress Law for injuries due to the use of the drug dioquinol. The damages awarded against the state in just one of these cases was well over $6 million. It is reasonable to expect the Japanese government to become more responsive to its citizens when the courts award damages like these.

96. 999 Hanrei jihō 118 (Miho Dist. Ct., Nov. 20, 1980).

97. *See* M. CROZIER, *supra* note 84, at 153.

ACLL or the State Redress Law can attain a full and impartial knowledge of the relevant facts only to the extent that the agency is inept in covering its tracks, as in *Hosono*, or so short-sighted that it fails to take such steps. In short, if an agency is not inept, it is very difficult under Japanese law for an injured citizen to obtain effective judicial relief from allegedly illegal administrative action.

B. THE U.S. APPROACH

Because U.S. administrative law principles initially were very similar to current Japanese administrative law principles, the changes in the U.S. methods of combating bureaucratic tyranny provide an instructive contrast.

The first U.S. method—the traditional one—was to allow judicial review of administrative actions because it was believed that the combination of legislative supervision, popular opinion, and bureaucratic tradition were inadequate to ensure a tolerable degree of agency compliance with legislative directives.[98] Judicial review was made available as an additional assurance that agencies did not exceed their authorized powers.[99] The difficulty inherent in judicial review of administrative action, however, lies in judicial competence. Judges seldom have the training necessary to resolve difficult factual questions or to evaluate the legitimacy of inferences from the facts.[100]

Over time, U.S. courts took two opposing approaches to this problem. The first was to defer to agency action. Such deference could still be seen sporadically in the early 1970s.[101] The second, and increasingly frequent, response, however, was vigorous substantive judicial review. In comparison to the Japanese practice, the most notable feature of substantive review is that it occurs at a comparatively early stage in the administrative process.

Many of the Japanese cases involving pre-enforcement challenges to administrative regulations would be decided differently under the U.S. standard of standing even though that standard is admittedly applied inconsistently. This standard, despite its inconsistent applica-

98. *See* Fleming v. Moberly Milk Prod. Co., 160 F.2d 259, 265 (D.C. Cir. 1947). *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Note, *Regulatory Analyses and Judicial Review of Informal Rulemaking*, 91 YALE L.J. 739 (1982). The following discussion largely draws upon these works.

99. *See, e.g.*, United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 489 (1942).

100. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 393 (1974).

101. *See, e.g.*, Camp v. Pitts, 411 U.S. 138 (1973) (per curiam) (upholding denial of bank charter despite minimal and conclusory explanation of rule); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 748-49 (1972) (upholding rule promulgated by ICC by employing highly deferential standard of review).

tion permitting the courts to take or reject a case on arguably irreconcilable grounds,[102] generally requires that the litigant need not demonstrate more than injury in fact and the substantial likelihood that the judicial relief requested would prevent or redress the injury claimed.[103] When this standard is compared to the Japanese *shobunsei* standard, the conclusion is that judicial review can occur much earlier in U.S. administrative process.

For example, if the U.S. standard had been used in the *Narita Shinkansen* case, it is likely that the court would have granted review of the plan because its effect upon the landowners living within the designated corridor would have caused significant hardship to them. In addition to adversely affecting the local environment, the railroad would no doubt have seriously affected property values within and along the corridor. In declining to review the plan, however, the Japanese court never began to consider "the hardship to the parties of withholding consideration." It is in this respect that the U.S. and Japanese systems differ most.

The second response which the U.S. legal system developed to counter bureaucratic isolation and unresponsiveness was to allow for public involvement in the rule-making process.[104] The central feature is publication of proposed rules in the Federal Register, with an invitation to interested parties to make written comments. The agency's staff then considers the comments and revises the rules. The rules are then published but do not become effective for thirty days after publication. Thus, further protests can be directed to the final version. The results show that this process is generally effective. As one noted

102. At first, the Supreme Court held that declaratory orders and formal findings were not ripe for review. *See* Shanahan v. United States, 303 U.S. 596 (1938); United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299 (1927). Later, however, the Court allowed such a review. In the seminal case of Frozen Food Express v. United States, 351 U.S. 40 (1956), the Court reviewed an ICC determination that certain of the products carried by the plaintiff were not agricultural commodities falling within a statutory exemption to ICC jurisdiction. The Supreme Court reversed the district court's holding that the order was unreviewable because it did not command anything to be done. The Court reasoned that the ICC determination was not abstract, theoretical, or academic; rather, it was a declaratory order "which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done." *Id.* at 44. Under this type of reasoning, several of the Japanese cases this Article discusses, *e.g.*, *Hayashi Ken Shipbuilding*, would have different results.

103. A doctrine closely tied to standing, and one that often is difficult to distinguish, is ripeness. As with standing, the standard for ripeness in adminstrative litigation in the United States is considerably more liberal than in Japan. *See, e.g.*, Abbott Laboratories, Inc. v. Garder, 387 U.S. 136 (1967) (upholding pre-enforcement review of a food and drug regulation requiring that the established name accompany each appearance of a proprietary name on labels and advertisements because the regulation had a significant direct and immediate impact).

104. Section 553 of the Administrative Procedure Act delineates the rulemaking procedures. 5 U.S.C. § 553 (1982).

author writes, "The procedure is both fair and efficient. Much experience shows it works beautifully. Good agencies are more and more tending to use this rulemaking procedure even when they are not required to."[105]

If these two procedures for constraining administrative action—greater judicial review of all administrative action, including rulemaking, and public involvement in the rulemaking process—were available in Japan, most of the inequities that we have seen resulting from the application of the *shobunsei* doctrine would probably disappear.[106] Also, if the early public involvement and judicial review in the administrative process that is found in the U.S. system were possible in Japan, the bureaucratic infighting that occurred in *Kubota* or the foreseeable injury to the reputation of the shipbuilding company in *Hayashi Ken* would have been avoided.

CONCLUSION

The foregoing review of the *shobunsei* doctrine shows that although access to judicial review of administrative action has become more available since the Tokugawa era, judicial review has not been very effective in resolving conflicts between administrative agencies and citizens. Leading theories of bureaucratic behavior and the development of U.S. administrative law system show that in order to counter bureaucratic isolation and the resulting disregard for public concern, it is necessary to allow public involvement in, and judicial review of, administrative action at an earlier stage than is currently possible in Japan.

There is no single reason why Japan has not developed a more effective system for early judicial review of administrative action. Perhaps it is because government administrators, as heirs to the samurai,[107] have benefited from a residual respect of the "commoners" for their superiors. Any such deference, however, is augmented by several more concrete reasons. First, Japanese judicial review of administrative action is generally by a trial *de novo*.[108] Therefore, if a Japanese court does not dismiss a case brought under ACLL, a full trial occurs, and, given the possibility that the first trial alone will take up to ten

105. K. DAVIS, ADMINISTRATIVE LAW TEXT 139 (3d ed. 1972).

106. As one scholar has noted, the practical effect of the *shobunsei* doctrine "is to postpone judicial scrutiny until the policy is implemented rather than to make it available at the planning stage when the review would be most effective." Upham, *supra* note 5, at 238.

107. Craig, *Functional and Dysfunctional Aspects of Government Bureaucracy*, in MODERN JAPANESE ORGANIZATION AND DECISION-MAKING 3, 4 (E. Vogel ed. 1975).

108. Hashimoto, *supra* note 13, at 261.

years[109] (not to mention two appeals of right), that imposes a significant burden upon both the agency and the court. Second, Japanese judges are much less inclined than their U.S. counterparts to create law. They feel themselves closely bound by statutory provisions in the field of administrative law and are unlikely to develop innovative interpretations of a statute to handle a particular problem.[110] Finally, statutory and case law concerning administrative procedure is still undeveloped.[111] As Japanese social scientists, lawyers, and legal scholars develop a greater understanding of the dangers to a democracy posed by unfettered administrative action, perhaps the situation will change.

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109. *See, e.g.*, Ino, *Diary of a Plaintiffs' Attorneys' Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136 (1975).

110. *Id.* at 270-71. *But see* Young, *Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation*, 17 LAW IN JAPAN 120, 121 (1984) (Japanese administrative law practice after World War II has been strongly influenced by American practices and procedures; "Japanese judges may attempt simply to replicate what they consider to be the foreign result.")

111. *Id.* at 271.