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# Axiology of Administrative Discretion (*gyōsei sairyō*) as Well as Administrative Guidance (*gyōsei shidō*) in Japan from the Perspective of Judicial Control

## *Aksjologia dyskrecjonalności administracyjnej oraz zalecenia administracji w Japonii z perspektywy sądowej kontroli*

SUMMARY

In Japan, the Court often examines the technical aspects of administrative discretion if there was a proper decision-making process. Such control could rely too much upon each judges' viewpoint, which elements in the whole process of administrative discretion have critical gravity to evaluate (*kōryo kachi*). The pre-war legal scholars suggested the best way to increase judicial protection on the citizens' rights endangered by administrative discretion. The need to establish robust legal theory based on it the Court guarantees the balance between smooth enactment of administrative measures and maintenance of social justice is still enormous. Administrative guidance was, for a long time, out of the scope of judicial control. This institution is Japan's original so that its implication well exceeds the standard understanding of mere instruction in other legal cultures. The Japanese Court acknowledges the existence of "forced consent" behind it more frequently in recent years.

**Keywords:** axiology; administrative discretion; administrative guidance; administrative law; administrative litigation; Japanese law; German law; Tatsukichi Minobe; Minamata disease; lawsuits against nuclear power plant; the Oil Cartel Case; ripeness doctrine

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## INTRODUCTION

The author's concern lies in the matter of judicial control over administration in Japan. According to J. Tanaka, there was an extensive discussion in Germany in the early 1920s to what extent the Administrative Court can intervene in administrative discretion if the officers adequately executed the delegated power[1]. Since the pre-war Japanese legal scholars were under the dominant influence of German administrative law, they conducted an academic analysis of administrative discretion intensively. The Japanese judiciary hesitates to acknowledge the unlawfulness of administrative discretion. In the article, the author analyzes the background both from the representative court rulings and legal theories.

The second issue which the author discusses in this paper is the problem of administrative guidance. This administrative measure occupies a specific position in the Japanese administration in practice. As L. Leszczyński pointed out, the Japanese word assigned for it, *gyōsei shidō* implies something advised or instructed fallen from the top to bottom following a given hierarchy. This dependency plays a critical role in understanding this institution in the background of the social culture of Japan. So that the terminology cannot be translated as "pure" hint, remarks or request suggested horizontally in a given organization[2]. The author applies a similar research framework, as in the case of administrative discretion.

## THE ORIGIN OF ADMINISTRATIVE DISCRETION AND ITS RECEPTION BY THE JAPANESE LEGAL SCHOLARS

The Japanese legal theory on administrative discretion (*gyōsei sairyō*) much owes to the Austrian and German judiciary. According to Tanaka, the first law which defined the question of administrative discretion was Article 3 of the Austrian Law on Establishing Single Administrative Court (*Gesetz betreffend die Einrichtung eines Verwaltungsgerichtshofes*) promulgated on 22 October 1875. The law precluded the matters in which administrative authorities are entitled to act at their discretion from the administrative court proceedings.

Following to Austria, the southern German states set up independent administrative courts but excluding the discretion issues (*Ermessensklausel*) from the catalog to be adjudicated by the courts. In principle, the scope of the Austrian judicial control over administration was limited to the legal matters (*Rechtsfragen*).

[1] J. Tanaka, *Gyōsei sōshō no hōri*, Tokyo 1954, pp. 205–262. The original academic paper of Tanaka was published in 1931 in "Kokka Gakkai Zassshi", Vol. 45(3–4).

[2] L. Leszczyński, *Gyoseishido w japońskiej kulturze prawnej*, Lublin 1996, p. 81.

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Data: 20/11/2026 12:01:52



The discretion matters (*Ermessensfragen*) were put outside of the subject heard by the Court.

In the original text of the above-mentioned Austrian law, we see an expression of "free discretion" (*freies Ermessen*). In the classical legal theory, there was a division between "bounded measures" (*gebundenes Ermessen* / *kisoku sairyō*) and "free measures" (*jiyū sairyō*). The former appears when administrators implement the law mechanically, according to his highest knowledge and conscience (*nach seinem höchsten Wissen und Gewissen*). Thus, the "bounded measures" are the subject of judicial control, and the Court determines if the official employed the law correctly.

On the other hand, the law does not give any outline to be followed by the administrators in the latter case. Therefore, the administrators enjoy the freedom to make an appropriate choice within the scope of entitled power to him, considering its feasibility/appropriateness (*Zweckmäßigkeit*) or fairness (*billig*) in it. According to classical theory, "free discretion" was excluded from the jurisdiction of the Administrative Court[3]. The issue is that there is a thin wall between the two concepts, and sometimes it is hard to judge which group a given measure belongs.

The pre-war Japanese legal scholars tried to solve this question by breaking down the whole process of administrative measures into several stages. At the same time, by doing so, they scrutinized the possibility of judicial review over the administrators' discretionary actions conducted in the scope of delegated authority ("free discretion"). According to H. Shiono, there are following five steps in the administrative measures:

A. recognizing the facts/fact-findings,
B. evaluating the factual status if it fulfills the obligatory conditions required by the law (conducting the official's discretion in exploring conformity with the legal requirements: *yōken sairyō* or "discretion in prerequisites"),
C. selecting appropriate proceedings,
D. choosing the right measure among available options (*kōka sairyō* or "discretion in the results"), and
E. setting up a deadline by when the administrator conducts the above means (*toki no sairyō* or "discretion on timing").

S. Sasaki (1878–1965) advocated that in the administrative disputes, the Court can question the legality of the administration's activities from stage B of the above five phases. In Sasaki's understanding, the judiciary holds a broad range of intervention in the discretion matters. According to him, in phase B mentioned above, if the provisions of the applicable law stipulate the way of executing the administrator's discretion in a general manner, the actions taken by the official are bound by law (thus, the Court can decide its legality). Sasaki provided such

[3] J. Tanaka, *op. cit.*, pp. 207–225.

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Data: 20/11/2026 12:01:52



an example from the legal texts as "corrupting good morals" (*zenryō na fūzoku o gaisuru*). Referring to German, Sasaki called these provisions as "undefined legal concepts" (*Unbestimmter Rechtsbegriff*).

On the contrary, the administration can perform full discretion in the time when the applicable law only gives the ultimate, ambiguous purpose (*shūkyoku mokuteki*) of it. A clause in an act such as "for the public interest" falls into this category. Not to say, as the law provides the authority with a complete delegation of authority (*Blankovollmacht* or carte blanche / freedom to act), the judiciary has no room to examine its legality, according to Sasaki. The boundary he drew was dependent on the wording of each legal text. If it was the rule of the game, the lawgivers could easily manipulate the range of the administration's discretion potentially interfered with by the judiciary.

T. Minobe (1897–1948) paid attention to phase D from the viewpoint of the outcome of the administrative measures. He emphasized that the Court can control the official's appropriateness in phase B, only if the administration infringes or constitutes a limitation on the right/freedom of citizens, or set up an obligation to them in phase D.

While in case the administration establishes a right or provides services/profits for citizens, the authority can act freely in phase B, according to him. In this case, the Court has no right to question the official's discretion. As the administration does not set up any rights nor obligation for citizens by their decisions, it is free from judicial control from the discretionary viewpoints, according to Minobe[4].

The pre-war Administrative Court, as a rule, rendered preferable rulings for the business permit issues, including requiring permission by the police, according to Tanaka's detailed analysis of the court rulings. Minobe supported the concept that freedom of establishment cannot be restricted unless it put public order under at risk[5].

## THE POST-WAR COURT RULINGS ON ADMINISTRATIVE DISCRETION TILL THE PRESENT DAY

H. Itō, summarizing 30 years of post-war Supreme Court's activity, mentioned that the Court granted the administration with a wide range of discretion, namely, as it contained highly technological or political aspects. Itō criticized that the post-war legal reform did not contribute to establishing a judiciary that actively determines the unconstitutionality (*iken sei*) of administrative measures or legal acts. He named

[4] H. Shiono, *Gyōsei hō*, Vol. 1, Tokyo 2015, pp. 139–141.

[5] J. Tanaka, *op. cit.*, pp. 288–298; T. Minobe, *Gyōsei saiban hō*, Tokyo 1929, p. 110.

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Data: 20/11/2026 12:01:52



the Japanese Supreme Court as a court with self-control (*jiko-yokusei gata no Saikō Saibansho*) in comparison to its peer of the USA[6].

According to H. Hashimoto, in the first decade after the war (1945–1955), the Supreme Court took a self-restrained stance in controlling the legality of the administration's behaviours in the fact-finding phase. The Court found it to be affirmative to recognize any activity of the administration as unlawful only when the factual basis of the attacked decision was missing at all, or an erroneous interpretation in its assumptions was apparent.

In the 1950s, the Court set a standard to determine when it acknowledges an excess of the discretion. The Court said that the abuse of power qualifies as the administration exercised the discretionary power in a way being outstandingly not compliant with the social norms (*shakai tsūnen jyō ichijirushiku datō o kaku sairyō ken kōshi*). Hashimoto argues that these rigid criteria from the 1950s still bind the current Court's rulings[7].

According to H. Takagi, for decades, the judiciary took a position that it needs to find a "considerable" and "distinct" character in the misuse of the empowered authority to decide it as illegal. This considerable-and-distinct doctrine (*jyūdai meihaku setsu*) was an invention of professor, Tanaka, and it dominated the judiciary for years[8].

T. Fujita criticized that the Japanese courts have in mind to investigate the objective facts (*kyakkanteki na jijitsu*) so precisely and in detail as to an abnormal extent in the administrative litigations in comparison to the civil or criminal law cases. The Nagoya High Court, Branch in Kanazawa, found the defendant guilty in a case the victims of the mass cadmium poisoning (*itai-itai disease*) sued the polluter[9]. According to him, in the ruling cited above, the Court determined that soft evidence acquired from an epidemiological review was enough to establish the causation of the pollution. The Court did not require any pathological, rigid evidence findings in this case.

According to Merrian-Webster Dictionary, pathology is the study of the causes and effects of disease or injury. On the other hand, epidemiology is the study of the distribution (who, when, and where), patterns, and determinants of health and disease conditions in defined populations. The dictionary says that epidemiology shapes policy decisions and evidence-based practice by identifying risk factors for disease and targets for preventive healthcare[10]. Therefore, it is rational that the

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[6] H. Itō, *Iken rippō shinsa to jiko-yokusei gata no Saikō Saibansho*, [in:] *Soshō seido to shihō kyūsai*, ed. H. Wada, Tokyo 1989, p. 61 and 77.

[7] H. Hashimoto, *Gyōsei hanrei to shikumi kaishaku*, Tokyo 2009, p. 52.

[8] H. Takagi, *Gyōsei soshō ron*, Tokyo 2005, p. 374.

[9] Judgement of the Nagoya High Court (Branch in Kanazawa) of 9 August 1972, *Hanrei jihō*, No. 674, p. 25.

[10] *Epidemiology*, www.merriam-webster.com/dictionary/epidemiology [access: 29.03.2020].

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Data: 20/11/2026 12:01:52



Court did not demand the plaintiff to submit pathological data in the trial mentioned above, which in general much harder to obtain than those of epidemiological ones.

In a medical negligence lawsuit, the Supreme Court said that the evidence required in the court proceedings to establish legal liability was not necessarily the same as such required to the precise scientific verification processes. The purpose of the scientific examination lay on the elimination of any single doubt (and it exceeds the Court's requirements for justice)[11]. As well, in a criminal case, the Supreme Court determined that the recognition of guilt was available in a situation where a contradictional fact could exist solely in the abstract level of possibility. In the same ruling, the Court mentioned that it would also recognize guilt if there was no socially acceptable rational ground to recognize the plausibility of such an opposing fact[12].

The highly specialized and technical discretion (*kōdo no senmon gijyutsuteki sairyō*) is a keyword upon which the Japanese judiciary was divided into two groups: one upheld the perception that the Court can review the legality of such discretion, and another renounced such a possibility. In the past, the Minamata disease, a neurological syndrome caused by severe mercury poisoning, deprived of the lives of many victims in a port town in southern Japan. In one lawsuit brought by a sufferer of the disease, the subject of dispute was the legality of an administrative decision rejecting the plaintiff to qualify him as the patient. As the ground of the unfavorable decision was the fact-findings submitted by a publicly appointed committee to provide a scientific investigation to identify the petitioner as a patient of the Minamata disease, the Supreme Court had to determine if the judiciary reviews the appropriateness of the experts' opinion assumed to be objective.

The Supreme Court reversed the lower Court's decision, which supported the competent committee's rejection of the recognition for a petitioner as a patient of Minamata disease. The lower Court decided it as reasonable from the viewpoint that the committee's decision-making path was compliant with the due process. On the contrary, the Supreme Court actively investigated the case from the view of the synergy between facts and evidence, or a flexible application of the yes-no tests in determining the causal relationship between a particular aspect of the syndrome and the contamination substance, and the like[13].

In December 1956, a few months later from the first detection of the syndrome, Dr. Kitamura at Kumamoto Medical University figured out that the wastewater from a chemical plant is the resource of the fatal contamination of the sea. The polluter, nor the local administration did not reply to his warning. They both insisted that,

[11] Judgement of the Supreme Court of 24 October 1975, *Minshū*, Vol. 29, No. 9, p. 1417.

[12] Judgement of the Supreme Court of 16 October 2007, *Keishū*, Vol. 61, No. 7, p. 677.

[13] Judgement of the Supreme Court of 16 April 2013, *Minshū*, Vol. 67, No. 4, p. 1115; T. Fujita, *Saiban to hōritsu gaku*, Tokyo 2016, pp. 153–156.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 20/11/2026 12:01:52



without specifying the mechanism of pathological consequences or defining a substance causing the illness, no liability should be imposed on the polluter.

Dr. M. Harada (1934–2012) claimed that the liability of the polluter is proven if the epidemiological diagnosis attests that the wastewater is attributable to the mass poisoning. He repeatedly warned that in public contamination cases, preventive actions are the most important to limit the damage to a minimum. It was a fact that the destruction process of the human brain neuron by the organic (methyl) mercury, the causal substance of the Minamata disease was unclear before Dr. Irukayama revealed it in 1963. The administration, as well as the polluter company, kept a stance that while no perfect, scientific proof for the causality of the disease was available, their responsibility should be none.

At last, in 1968, the Ministry of Health and Welfare declared that methyl mercury abandoned by the polluter (Chisso Corporation) caused the Minamata disease. In the same year, following the closure of the polluter's plant, finally, the contamination was ceased. Meaningless 12 years had passed since the epidemiological causality of the pollution was disclosed in 1956[14].

The Minamata disease left a bitter lesson that the judiciary as the last resort of human rights protection cannot stay as a "feeble watch-dog" of the due process in the administrative procedures. The Court should act solidly in controlling the legality of the administration's behaviour, in particular, as the violation of citizens' rights is suspected.

According to Fujita, another case in which the administration's highly specialized and technical discretion was the subject of dispute was the lawsuits demanding to annul the building permits for nuclear plants. The question was if the Court can judge better than the administration in the costs and benefits assessments of setting up a nuclear plant, deliberating the public interests and potential risks in a proper way. The Supreme Court mentioned that if the Court identifies outstanding errors or omissions in the Atomic Energy Commission's judging, investigating or reviewing processes, it could cancel such a permit[15]. Fujita named it as "judgement process control" (*handan katei no shinsa*)[16].

Article 30 of the Japanese Act of 16 May 1962 – Administrative Litigation Law (*gyōsei jiken soshō hō*: Law No. 139) says that the Court can revoke the administrative discretion only when the Court finds excess or abuse of the delegated power in it. The "judgement process control" was one of the significant tools adopted by the Court to implement the above provision. According to Hashimoto, one of the first cases in which the Supreme Court employed this technique was the

[14] M. Harada, *Minamata byō*, Tokyo 1972, p. 29, 55, 69 and 108.

[15] Judgement of the Supreme Court of 29 October 1992, *Minshū*, Vol. 46, No. 7, p. 1174 – Ikata Newclear Plant Case.

[16] T. Fujita, *op. cit.*, pp. 148–149.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 20/11/2026 12:01:52



Nikkō Tarō Cedar Tree Case[17]. In this court dispute, the Court concluded that the defendants did not evaluate the essential aspects in planning a route for the new public road, i.e. the historical value of the monumental Tarō Cedar Tree and the required environmental protection of the surroundings. The Court pointed out that the defendant, a competent administrative office, commit a fatal mistake in exercising the discretionary power. The Court assessed that the defendant deliberated non-qualified matters such as increasing car traffics in connection to the Tokyo Olympic Games in 1964, and so on.

On the contrary, in the Odakyū Railway Case, the Supreme Court dismissed the plaintiffs' complaint asking to nullify the urban planning based on which an overhead railway of which hight was above the street level was constructed. The plaintiffs claimed that the competent office did not consider the results of the environmental assessment. They also condemned that there was significant negligence in the construction cost analysis to choose a plan between overhead and underground methods. The above-mentioned "judgement process control" (*handan katei no shinsa*) was the subject of the Court's investigation. The Court ruled that there were no fatal omissions in the decision-making process to be scrutinized by the defendant[18].

In the Rinshi no Mori Case, the competent agency treated an expropriation of the private land as a prerequisite in the urban planning to build a public park. The Supreme Court ordered the lower Court to re-examine the rationality of the expropriation in a situation where the administration chose such an option without assessing any other possible solutions[19].

As Hashimoto summarized, the improvement in the judicial control over the proper exercise of the discretionary power is on the way. The Court promotes the review from the viewpoints of selection in the elements to be examined (*kōryo yōso*) or taking an analytical balance in weighting each of them (*kōryo kachi*) in handling the empowered power by the administration. Albeit, he expressed an anxious that this approach would owe much on each judge's subjective screening on the process building in the discretion matters. According to Hashimoto, the *ad hoc* interpretation in the decision-making process would provoke an issue that the depth of the Court's review could differ for each case. He suggests coming back to the traditional point of discussion, i.e. the study of the discretion's legal effects in

[17] Judgement of the Supreme Court of 13 July 1973, *Gyōshū*, Vol. 24, No. 6–7, p. 533.

[18] Judgement of the Supreme Court of 2 November 2006, *Minshū*, Vol. 60, No. 9, p. 3249. In the referred case (the Odakyū Railway Case), the Supreme Court judged it fair to put the urban planning under the judicial control, and it applied the "judgement process control" method in its decision (T. Hino, *Toshi keikaku to sairyō shinsa*, [in:] *Gyōsei hanrei hyakusen*, eds. K. Uga, N. Kōketsu, T. Yamamoto, Vol. 1, Tokyo 2017, pp. 152–153).

[19] Judgement of the Supreme Court of 4 September 2006, *Hanrei jihō*, No. 1948, p. 26.

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Data: 20/11/2026 12:01:52



the citizens' rights, as well as deepening our understanding of the proportionality principle in the impact analysis of the discretionary power.

The Japanese Act of 9 June 2004 – Law on Administrative Litigation Law (Law No. 84) gave a new competence to the judges to request the administrative agency standing as a defendant to submit any source materials provided and used as the basis of issuing the attacked decisions. In this way, the burden of proof in the administrative litigations partially moved from the appellants to the administration (Article 23 (2) of the Act). We witness the opening of a new horizon in democratizing the judiciary in this field.

## ADMINISTRATIVE GUIDANCE AND THE COURT RULINGS

*Gyōsei shidō* or administrative guidance, according to Shiono, was historically speaking not a legal terminology but used in the mass media or the legal practices. In practice, the administration expresses it as guidance (*shidō*), recommendations (*kankoku*), or advice (*jyogen*), but not limited to these descriptions. By giving it, the authority expects the addressee to act, or choose an option of inaction in line with its anticipations. According to the Japanese Act of 12 November 1993 – Law on Administrative Procedure (*gyōsei tetsuzuki hō*: Law No. 88), the administrative guidance does not consist a part of the legally effective administrative measures (*gyōsei shobun*) such as decisions (Article 2 (6) of the Act).

That being said, in Japan, the administrative guidance prevails on a broad scale. Shiono points out, in Japanese society, preference for the paternalistic approaches observed both in the administration-private person relationships or between the private persons. According to him, in Japan, the informality comes as the first choice than the formality. This socially accepted norm would be the most plausible explanation behind the paternalistic approaches mentioned above.

According to Shiono, in the modern society where an elastic reaction to the changing circumstances predominates, the informal means, not the formal means as the administrative legislation, administrative measures or administrative contracts would work rightly. By implementing the informal means, he insists, that the administration can expect to form a smooth consensus among all parties involved[20].

On the other hand, the dangerous feature of the administrative guidance exists when its addressees' "voluntary accords" are, in fact, a disguise. According to H. Hashimoto and K. Sakurai, often it is the case that the recipients follow the guidance against their will in an unequal relationship with the administration backed by overwhelming authority[21]. Before the enactment of Law on Administrative Pro-

[20] H. Shiono, *op. cit.*, pp. 220–221.

[21] H. Hashimoto, K. Sakurai, *Gyōsei hō*, Tokyo 2011, p. 140.

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Data: 20/11/2026 12:01:52



cedure in 1993, the administration often refused to receive the applicant's petition if he or she did not follow their suggestions over the office counter (*madoguchi shidō*).

The municipality office, out of the scope of the empowered authority, asked a developer to diminish the number of stories of the planned condominium expecting to avoid predictable disputes with the surrounding inhabitant as a preventive measure. Followingly, the officer in charge "recommended" the petitioner to organize dialogues with a group of the neighboring dweller. Otherwise, he or she did not receive the application for the building permit. It was a typical depiction of showing what administrative guidance in practice was[22]. The Administrative Procedure Act resolved this issue, at least at the legislative level. In essence, the prohibition of further provision of the recommendation as the petitioner expresses his or her will not to follow it (Article 33), and the principle of commencing the review upon the arrival of the application (Article 7).

In the context of the post-war vibrant economic growth of Japan by the 1980s, the domestic and foreign scholars, including lawyers, political scientists, and economists, gave great attention to the administrative guidance. M.K. Young took note of various examples. The METI's (Ministry of Economy, Trade, and Industry) attempts to encourage mergers among car component makers in the 1960s, the same ministry's recommendation aimed at some 80 steel producers to limit production and coordinate prices in 1965, or the same regulator's impose on the car manufacturers to restrict car exports in the outbreak of a trade war between Japan and the USA in the early 1980s, and so forth. He mentioned as follows:

> To assume voluntary compliance and substantial cooperation, agencies engage in practices designed to increase the informal, generally unreviewable input of parties into the regulatory process. Indeed, agencies that engage in administrative guidance undertake extensive consultations with regulated parties – which may include industry representatives – about the need for regulation and the form it will take[23].

For facilitating the dialogues, the ministerial officials set up numerous joint councils with the representatives of the particular industry, which will be affected by new regulations (such commissions are referred to as *kyōgi kai* or *shingi kai*).

In one of the extreme court cases, the METI requested to the Petroleum Federation, an industry trade association, to allocate specific production shares among its members without legal grounds. As well, the ministry officials intervened in the determination process of the consumer oil price among the members of the asso-

[22] See the Shinagawa Condominium Case – judgement of the Supreme Court of 16 July 1985, *Minshū*, Vol. 39, No. 5, p. 989.

[23] M.K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, "Columbia Law Review" 1984, Vol. 84(4), DOI: https://doi.org/10.2307/1122384, pp. 926–927, 939, 947, 949.

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Data: 20/11/2026 12:01:52



ciation. The Supreme Court ruled that there is no ground to declare administrative guidance in dispute as illegal. According to the Court, the aim of the guidance was pursuant to the ultimate purpose of the Anti-Trust Law, i.e. to ensure the general consumer interests, or to promote the democratic and robust development of the national economy. On the contrary, the Court determined that the illegality of the oil price cartel does not preclude even if it was formed on the ground of the administrative guidance[24].

In recent years, the number of court decisions determining that administrative guidance not pursuant to the law is increasing. In the Musashino Condominium Case, the Supreme Court decided that the rejection of the mayor of Musashino City to provide running water to the condominiums of which structures were not compliant with non-binding building instruction unlawful[25]. In the same city, the city council requested the developers to incur expenses for the public educational facilities. To some of the developers who did not follow the request, no running water was supplied as a sanction. The Supreme Court ruled that the plaintiffs suing the city council have a right to put their case, that the city council is obliged to compensate their damages for abuse of power in the administrative guidance[26].

The Supreme Court determined that the administrative guidance had a binding character in some cases. According to the Court, the Quarantine Office's notice on the violation of the provision of the Food Safety Act brings a legal effect, since as a consequence, the importation of the relevant goods becomes impossible for the addressee of such notice[27]. As well, the Court ruled that the recommendations given based on the Medical Act possess a binding effect since the entities who do not follow the administrative guidance "are robbed of the possibility to build hospitals"[28].

There are lawsuits in which the court judges if an administrative plan (*gyōsei keikaku*) is binding. For many years, the Japanese courts dismissed plaintiffs' pleas to claim urban planning (*tochi kukaku seiri keikaku*) unlawful. In one of the rulings, the Supreme Court called urban planning as a "blueprint" (*ao jyashin*), which does not bring any legal effects. The Court judged that the standing to sue for plaintiffs was not applicable since the subject of disputes is not riped enough to be heard by the Court[29]. The initial intention of Kenzō Shiraishi, a judge of the Tokyo Regional Court who suggested referring to the American ripeness doctrine (*seijyuku-sei riron*) was to make the mandatory court rulings available in the administrative litigation.

[24] The Oil Cartel Case – judgement of the Supreme Court of 24 February 1984, *Keishū*, Vol. 38, No. 4, p. 1287.

[25] Judgement of the Supreme Court of 8 November 1989, *Hanrei jihō*, No. 1328, p. 16.

[26] Judgement of the Supreme Court of 18 February 1993, *Minshū*, Vol. 47, No. 2, p. 574.

[27] Judgement of the Supreme Court of 26 April 2004, *Minshū*, Vol. 58, No. 4, p. 989.

[28] Judgement of the Supreme Court of 15 July 2005, *Minshū*, Vol. 59, No. 6, p. 1661; H. Hashimoto, K. Sakurai, *op. cit.*, pp. 149–151.

[29] Judgement of the Supreme Court of 23 February 1966, *Minshū*, Vol. 20, No. 2, p. 271.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 20/11/2026 12:01:52



He had in mind that the ripeness test could be a criterion to judge if the judiciary can change the contents of the original administrative decisions[30]. In practice, as a result of preparing urban planning, the authority based on it, in the later stage, can issue an order for the landlords to move to another place. Therefore, there was a persistent doubt that urban planning, in reality, merely was equal to "blueprints".

At a later date, the Supreme Court reversed the previous rulings. It said that the residential owners in the urban planning area have a position to receive a binding decision to move to substitutional land in the future. Therefore, the planning has a direct impact on the legal status of such owners, and their right is the subject to be adequately protected[31].

As we have seen above, the Japanese courts have recognized that the administration could force the citizen to follow their will by imposing administrative guidance. The courts gradually expand their control over administrative guidance.

## CONCLUDING REMARKS

In this paper, the author scrutinized the issue of administrative discretion and administrative guidance in Japan, and researched legal transplantation of the administrative discretion from the Western countries to Japan. An in-depth survey of the post-war court judgements followed.

On the other hand, the author did not conduct a full-scale analysis of the origin of administrative guidance. As K. Ōyama highlighted, the Japanese word of *gyōsei shidō* appeared and used as a legal term since the 1960s, during the time of Japan's fast economic growth[32]. He mentioned that the controlled economy during wartime, as well as the post-war French mixed-economy, formed the backbone of administrative guidance initiated by the substantial lead of the Ministry of Economy, Trade, and Industry (METI) in the early 1960s[33].

The better appreciation of this issue in the future would help the author to find an organic path-through between administrative guidance and court rulings.

Backing to the topic of administrative discretion, the author positively assessed that the Japanese judiciary step by step broadened the scope of its control. This paper may contain limitations here that the author fails to indicate the general direction of the Japanese courts on the discretionary issue: how they would develop a proper approach in this field. Further research would shed light on these questions.

[30] N. Harada, *Uttae no rieki*, Tokyo 1973, pp. 70–71.
[31] Judgement of the Supreme Court of 10 September 2008, *Minshū*, Vol. 62, No. 8, p. 2029.
[32] K. Ōyama, *Gyōsei shidō no seiji keizaigaku*, Tokyo 1996, p. 7.
[33] *Ibidem*, pp. 116–121.

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## STRESZCZENIE

W Japonii sąd często bada techniczne aspekty dyskrecjonalności w administracji, o ile miał miejsce właściwy proces decyzyjny. Taka kontrola może w zbyt dużym stopniu opierać się na poglądach każdego z sędziów, a te elementy w całym procesie mają krytyczną wagę dla oceny (*kōryo kachi*). Przedwojenne szkoły prawnicze sugerowały najlepsze sposoby zwiększania ochrony sądowej praw obywatelskich zagrożonych przez dyskrecjonalność administracyjną. Potrzeba ustalenia solidnej teorii, na podstawie której sąd gwarantuje równowagę między łagodnym wprowadzeniem środków administracyjnych a utrzymaniem sprawiedliwości społecznej, jest nadal ogromna. Wytyczne administracyjne przez długi czas znajdowały się poza zakresem kontroli sądowej. Instytucja wytycznych w Japonii ma oryginalny charakter, więc jej implikacje znacznie przekraczają standardowe rozumienie zwykłych instrukcji w innych kulturach prawnych. Japoński sąd przyznaje, że istnienie „przymusowej zgody" na te instrukcje częściej stwierdza się w ostatnich latach.

**Słowa kluczowe:** aksjologia; dyskrecjonalność administracyjna; wytyczne administracyjne; prawo administracyjne; spory administracyjne; prawo japońskie; prawo niemieckie; Tatsukichi Minobe; choroba Minamata; procesy sądowe przeciwko elektrowni jądrowej; sprawa kartelu naftowego; doktryna dojrzałości