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Functions of the Proportionality Principle in Japanese Administrative Law*

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Abstract

The proportionality principle (hereafter, the PP) was imported from Germany into Japan during the interwar period. The Japanese Supreme Court has never expressly mentioned the PP in its opinion except as obiter dictum. However, several judgments may have applied the PP in essence.

This article questions whether the PP functions "outside" or "inside" of administrative discretion and whether it performs the necessity control or the balancing control. It also builds upon the premise that administrative discretion takes place in the process of the

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application of the law in the narrower sense, distinguished from the interpretation of law and from bare fact-finding, both of which are reserved for the judges.

The Supreme Court employs the rhetorical formula of "generally accepted social ideas" in judicial control of administrative discretion and has integrated "control of the judgment-making process" into this classic framework. This essay also examines the relationship between the PP and its control framework.

Regarding the necessity control, the purpose-means construction as the core of the PP is self-evident. As for the balancing control, the feature of the PP is that a particular interest is placed on one side of the scale and compared with various other interests. The Supreme Court is rather reluctant to perform such types of dual balancing, but does so in certain cases.

Whether such balancing is appropriate depends upon the desirability of judicial review, as well as an understanding of the legal structure in the relevant field. While such dual balancing provides an effective tool for judicial control, it also presents the risk of making the actual diversity of interests among various stakeholders invisible.

KEYWORDS: proportionality principle, administrative discretion, control of the judgment-making process, Japanese administrative law.

Contents

The doctrine known as the "proportionality principle" (hereafter, the PP) was imported from Germany into Japanese administrative law during the interwar period along with a number of other basic concepts and doctrines. This doctrine is now widely accepted as one of the "general principles of administrative law". In this paper, we will first describe reception of the PP and explore discussions over its legal foundation and its scope **(I.)**.

The main area in which the PP has been applied is that of administrative discretion control. We will analyze whether and how the principle is applied in this problematic area, and ask whether it limits discretion from **outside** or if it will control the rationality of the exercise of discretion from **inside (II. A.)**. We will first present the premise of the discussion, namely where we place administrative discretion in the

logical steps of the application of law **(II. B.)**. We will then observe the classic "generally accepted social ideas" control of discretion employed by the Supreme Court **(II. C.)**. We will discuss how the court later integrated "control of the judgment-making process" into the classic framework **(II. D.).**

We will then return to the question as to whether the PP functions outside or inside of discretion in Supreme Court judgments, keeping in mind the above distinction of necessity control and balancing control **(III.)**. The overall summary follows **(IV.)**.

I. Reception and Understanding of the PP

The PP was imported from German doctrine into Japanese jurisprudence before the Second World War, as *Tatsukichi Minobe*, a leading figure of pre-war constitutional and administrative law, explores. He argues that Articles 22 et seq. of the Constitution of the Empire of Japan (*Meiji* Constitution[1]), which guarantee liberties and safety of the subjects, require not only that (i) the infringement must be based on public interest necessities but also (ii) the degree of infringement shall maintain proper balance with the degree of necessities. Infringements which are not proportionate to the public interest necessities are therefore illegal. *Minobe* also mentions several judgments of the Administrative Court[2] as "examples" of his view. However, on closer

1 DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], *translated in* http://www.ndl.go.jp/constitution/e/etc/c02.html (Japan).

2 In the pre-war period, administrative litigations under the enumerative principle were handled by the single Administrative Court in Tokyo. In the post-war period, administrative litigations are handled by ordinary courts, based on the Special Law on

analysis, we find that neither the term "proportionality" nor the underlying logic was used in the judgments themselves. It is not clear whether the main emphasis of *Minobe*'s view is on the application of the PP or on the denial of administrative discretion. Today, the German understanding of the concept (suitability, necessity and proportionality in the narrow sense) is also widely accepted among administrative law academics. They treat the PP as one of the "general principles of (administrative) law".[3] Some statutes can be understood as an expression of the principle (e.g. Police Duties Execution Law[4] Art. 1 para. 2, Law on Substitute Execution by Administration[5] Art.2) However, there is no unanimous understanding about its legal foundation. Some say that it is Art. 13 of the present Constitution,[6] some say that it is the rule of law, others say it is the rule of reason *(jōri)*. While the practical benefits of this "legal foundation" discussion may be doubtful, some argue that it is necessary to find the foundation in the

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Administrative Case Litigation (1948), followed by the Administrative Case Litigation Law (1962).

3 *Hikaru Takagi* mentions the three classical German tests ((1) the suitability test, (2) the necessity test and (3) the proportionality test (in the narrow sense)) in his textbook. HIKARU TAKAGI, GYŌSEIHŌ [ADMINISTRATIVE LAW] 66 (2015)（高木光，行政法，頁66（2015年））. On the other hand, *Hiroshi Shiono* mentions only (2) the "necessity principle" and (3) "proportionality between the purpose and the means (prohibition of excessive regulation (Übermaßverbot)), and omits (1) the suitability test. HIROSHI SHIONO, GYŌSEIHŌ I [ADMINISTRATIVE LAW I] 93 (6th ed. 2015)（塩野宏，行政法 I，6版，頁93（2015年））.

4 Keisatsukan Shokumu Shikko Hō [Police Duties Execution Law], Law No. 36 of 1948 (Japan).

5 Gyōsei Daishikkō Hō [Law on Substitute Execution by Administration], Law No. 43 of 1948 (Japan).

6 "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13, *translated in* http://www.ndl.go.jp/constitution/e/etc/c01.html (Japan).

constitutional text in order for the PP to serve as a basis of judicial review of statutory laws. As in Germany, the PP was first introduced in the field of police law, and as such, there would be little problem in expanding its scope to the area of regulatory administrative activities in general. The principle can also be applied to service-providing administrative activities such as social welfare, where state activity can be understood as an infringement upon the legitimate interests of citizens, for example, and the withdrawal of the livelihood protection allowance (e.g. Judgment of the Fukuoka District Court 26 May 1998[7]). More difficult theoretical problems are: (i) can the principle also be understood to be a general principle that restricts state activities (can the principle function in the direction of limiting social welfare service? How does it relate to the principle of subsidiarity?) (ii) Can the principle also limit **inactions** of the government, when the important interests of citizens are in danger (the inverse proportionality principle)? The Supreme Court of Japan is generally rather reluctant to mention abstract principles in its judgments, although they are in fact based on extensive research activities of the court on domestic and foreign legal academic materials. This is also true of the PP. The court has never mentioned the name of the principle itself in the opinion of the court except as an *obiter dictum* (Judgment of the Supreme Court, Feb. 7, 2006[8]) or in a negative context (Judgment of the Supreme Court, June 4, 1964[9]). Therefore, it is

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7 Fukuoka Chihō Saibansho [Fukuoka Dist. Ct.] May 26, 1998, 1994 (Gyō-Hi) 31, 1678 HANREI JIHŌ [HANJI] 72 (Japan).

8 Saikō Saibansho [Sup. Ct.] Feb. 7, 2006, 2003 (Ju) 2001, 60(2) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 401, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=814 (Japan).

9 Saikō Saibansho [Sup. Ct.] June 4, 1964, 1962 (O) 49, 18(5) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 745 (Japan) (quashing the judgment of the original court that revoked an administrative disposition based on the PP).

always difficult to determine whether a particular court judgment employed the PP or not. For the sake of discussion in this essay, **we find two main functions of the PP:** *necessity control* **and** *balancing control*.[10] **Both functions are based on purpose-means construction, which serves as the core of the principle.** In examining court judgments, we will see how and in what context either or both of the functions may appear.

II. Judicial Control of Administrative Discretion and the PP

A. Outside? Inside?

The first question to be asked is whether (a) the PP lies **outside** of the domain of administrative discretion, namely when the PP forms the boundary of the discretion or (b) the PP functions as an **internal** control directive of the discretion.

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10 "Necessity control" in this paper corresponds to (2) the necessity test (from the three classical German tests) and "balancing control" corresponds to (3) the proportionality test. In the authors' view, (1) the suitability test is a prerequisite for necessity control; if a means is not "suitable" for attaining the purpose of law, then it can never be "necessary". The author employs this dichotomy in order to emphasize the difference in functions of the two controls. *See* Tadasu Watari, *Rieki Kōryō Gata Shinsa to Hirei Gensoku* [*Judicial Review Based on Balancing of Interests and the Proportionality Principle*], 339 HŌGAKU KYŌSHITSU 37, 43 (2008)（亘理格，利益衡量型司法審査と比例原則，法学教室，339号，頁43（2008年））. *Yoko Suto* argues that (2) the suitability test is not important in administrative discretion control, while the test is essential in the review of the constitutionality of statutory laws. YOKO SUTO, HIREI GENSOKU NO GENDAITEKI IGI TO KINŌ [CONTEMPORARY SIGNIFICANCE AND FUNCTION OF THE PROPORTIONALITY PRINCIPLE] 258-259 (2010)（須藤陽子，比例原則の現代的意義と機能，頁258-259（2010年））.

Minobe's classical understanding seems to take the former view. He explains the PP in the framework of the distinction between (i) a fully bounded act (*Kisoku Kōi*), (ii) a legally bounded discretionary act *(Kisoku Sairyō Kōi)*, (iii) and a free discretionary act *(Jiyū Sairyō Kōi)*. The important practical distinction lies between (ii) and (iii). According to *Minobe*, the Administrative Court cannot deal with (iii) as the subject of an administrative litigation. When a suit is filed against such administrative acts, the court should dismiss the case declaring that the case is outside of its competence.[11] On the contrary, the administrative discretion granted in (ii) is the "finding of law" (Rechtsfindung), so that the Administrative Court should review the legality of the administrative act. Hence, it can be said that *Minobe* principally argues on the basis of a dichotomous distinction between fully reviewable judicial acts and non-reviewable discretionary acts.[12] For *Minobe*, the most important standard for the distinction is whether the administrative act infringes upon pre-existing rights, interests or the freedom of the people. If this is the case, "the act cannot be a free discretionary act in any circumstances".[13] Since the *Meiji* Constitution Art. 22 guarantees the freedom and property of the subject, the infringement upon them must always be bound by the law. It is in this context that *Minobe* mentions the PP. Only in the case of (i) and (ii), which is subject to full review by the Administrative Court, can the PP be applied. The judgment as to

11 However, the actual contemporary practice of the Administrative Court seems to have been somewhat different. *Minobe* complains that the contemporary practice of the Court did not dismiss the litigation against discretionary administrative act but let the plaintiff lose on the merit of the case. TATSUKICHI MINOBE, GYŌSEI SAIBANHŌ [ADMINISTRATIVE LITIGATION LAW] 157 (1929)（美濃部達吉，行政裁判法，頁157（1929年））.

12 TATSUKICHI MINOBE, NIHON GYŌSEIHŌ [JAPANESE ADMINISTRATIVE LAW] 929-932 (1940)（美濃部達吉，日本行政法，頁929-932（1940年））.

13 *Id*. at 933.

whether to grant discretion precedes the application of the PP. Therefore, we can observe that the PP functions outside of the (free) discretion in *Minobe*'s theory.

The situation has changed today. As has already been mentioned, the Administrative Court was abolished and administrative litigations came to be handled by ordinary courts based on the Special Law on Administrative Case Litigation in 1948,[14] and subsequently by the present Administrative Case Litigation Law in 1962.[15] Art. 30 of the latter stipulates that the court may revoke a discretionary administrative disposition "only in cases where the disposition has been made beyond the bounds of the agency's discretionary power or through an abuse of such power". This means that the administrative litigations against "discretionary administrative disposition" are not totally outside of the competence of the courts, but instead, they shall regard the litigations as legally valid so long as the other requirements (existence of administrative dispositions, standing to sue, period limitations etc.) are met. It is only that the degree of judicial control will be limited.

From this perspective, the problem of administrative discretion shall not be treated on the basis of dichotomous classification of fully reviewable judicial acts and non-reviewable discretionary acts. Instead, the problem will be **on which issues in the application process of law discretion shall be admitted**.

Before going into this issue, we must first examine the premises of

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14 Gyōsei Jiken Soshō Tokureihō [Special Law on Administrative Case Litigation], Law No. 81 of 1948 (Japan).

15 Gyōsei Jiken Soshōhō [Administrative Case Litigation Law], Law No. 139 of 1962, *translated in* http://www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=02&re=01&new=1 (Japan).

the discussion, namely how Japanese legal theory and practice understands the legal process which leads to administrative disposition.

B. Premises of the Discussion

1. Logical Steps of the Application of Administrative Law

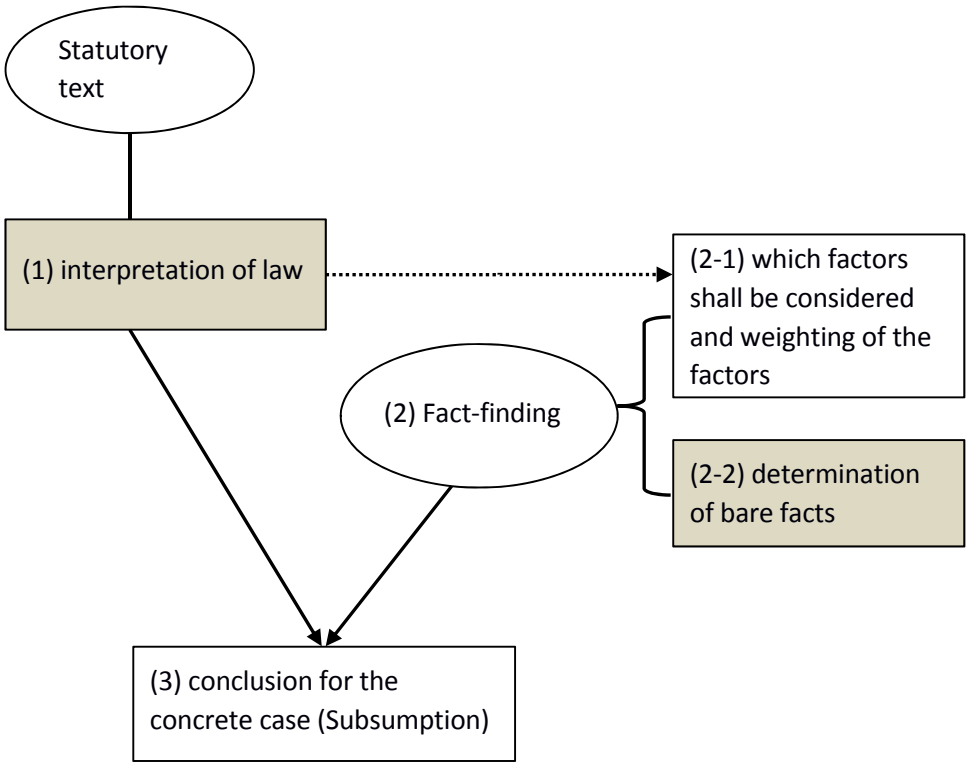
Normally, the application process in cases of administrative dispositions can be classified in the following logical steps (legal syllogism). We can first distinguish (1) legal interpretation of the text of the statute as the basis of the disposition and (2) fact-finding of the circumstances in the concrete relevant case. Based on (1) and (2), the administrative agency will reach the final conclusion, which is understood as the application of a general legal norm to a concrete circumstance (Subsumption) (3). While this whole process can be referred to as "application", this paper uses the term "application" in the narrower sense, in order to contrast the term with "interpretation".[16] Namely, the "application of law" includes (2) and (3).

(2) Fact-finding can further be divided into (2-1) the decision of the

16 The author has written a short memorandum on the distinction of "interpretation" and "application" in administrative law based on so-called "Toulmin model" (*See* STEPHEN E. TOULMIN, THE USES OF ARGUMENT (updated ed. 2003)), although it is still under-developed. *See* Narufumi Kadomatsu, *Gyōseihō ni Okeru Hō no Kaishaku to Tekiyō ni kansuru Oboegaki* [*A Memorandum on Interpretation/Application of Law in Administrative Law*], *in* GENDAI GYŌSEIHŌ NO KŌZO TO TENKAI [STRUCTURE AND DEVELOPMENT OF CONTEMPORARY ADMINISTRATIVE LAW] 383-400 (Katsuya Uga & Hisashi Kōketsu eds., 2016)（角松生史，行政法における法の解釈と適用に関する覚え書き，收於：宇賀克也、交告尚史編，現代行政法の構造と展開，頁383-400（2016年））. In short, the interpretation of law is an effort to present "warrants" as a general proposition, which is minimally necessary to "bridge" "data" and "claim", both singular propositions. Finding "backing" for the "warrants" is also included in the interpretation of law. As such, the interpretation of law is establishing a general legal proposition.

administration as to which factors shall be considered in the relevant case and weighting of the factors,[17] and (2-2) determination of bare facts.

Chart: Logical steps of the application of administrative law



Source: author.

When the court reviews this application of law by an administrative agency, although there is no express legal ground, Japanese legal theory and practice takes it as a matter of fact that neither for (1) the

17 Designing the procedure for judgment also belongs to this category, but will be excluded from consideration in this paper.

interpretation of law[18] nor for (2-2) the determination of bare facts can administrative discretion be granted.[19] The court always performs full review of these issues and substitutes its judgment for the administrative judgment.

Therefore, administrative discretion can only be granted on (2-1) the decision of the administration as to which factors are to be considered and their weighting standard and on (3) reaching the final conclusion for the case (Subsumption), namely how the administration evaluates factors that have been considered and renders its decision after the balancing.

2. Distinction between Judgment on the Legal Requirements and the Judgment on the Choice of Measures

Another premise of Japanese discussion on this issue is the distinction between judgment on the legal requirements and judgment on the choice of measures. Let us examine an example of disciplinary measures based on the National Public Service Law[20] Art. 82. Para. 1 stipulates the following:

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18 To be sure, it is sometimes difficult to distinguish interpretation and application, but the former can be distinguished from the latter in that it is a making of general legal proposition. *See supra* note 16.

19 However, when the determination of facts requires expert technical knowledge across a wide range of fields and future forecasts, administrative discretion may be granted. *Cf.* Saikō Saibansho [Sup. Ct.] Oct. 29, 1992, 1985 (Gyō-Tsu) 133, 46(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1174, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=1399 (Japan) (Ikata Atomic Power Plant).

20 Kokka Kōmuin Hō [National Public Service Law], Law No. 120 of 1947, *translated in* http://www.japaneselawtranslation.go.jp/law/detail/?id=2713&vm=02&re=01&new=1 (Japan).

> *Article 82 (1) When an official falls under any of the following items, the official may, as disciplinary action, be dismissed, suspended from duty, suffer a reduction in pay or be reprimanded:*
>
> *(i) when the official has violated this Law, the National Public Service Ethics Law or orders issued pursuant to these laws . . . ;*
>
> *(ii) when the official has breached the obligations in the course of duties or has neglected duties;*
>
> *(iii) when the official is guilty of malfeasance rendering the official unfit to fulfill the role as a servant of all citizens.*

When an officer with disciplinary authority considers filing disciplinary actions against a public employee, the officer should first determine whether conduct of the employee meets the (i) - (iii) requirements. This process is "judgment on legal requirements". After coming to the conclusion that either of the requirements are met, the authority makes a decision on whether or not it will render disciplinary measures, and if it does, which measures—dismissal, suspension from duty, reduction in pay, admonishment—shall be taken. This process is the "choice of measures".

Unlike the practice of German law, which uses the term "discretion" only for the latter process (choice of measures) and uses "room for judgment" (*Beurteilungspielraum*) for the former (judgment on requirements), Japanese legal theory and practice uses the term "discretion" (*Sairyō*, 裁量) for the both processes.

Given the above-mentioned premises of Japanese legal theory and practice, this paper argues as follows: (1) "Necessity control" functions

primarily on the level of legal interpretation in the form of general proposition, and provides the prerequisites of the exercise of administrative discretion that takes place at the subsumption level. Hence it lies **outside** of the domain of discretion. (2) On the other hand, "balancing control" functions mainly as the control of the subsumption process under concrete circumstances and is therefore an **internal** control. However, the balancing control sometimes accompanies the statement of general legal propositions, which serves as the control from outside. This point will be illustrated in the examination of Japanese judicial decisions.

C. "Generally Accepted Social Ideas" Control of Discretion

Based on these premises, how does the judiciary handle the discretion issue? In a case where the legality of the disciplinary action against a national public employee was questioned, the Supreme Court Judgment Dec. 20, 1977 (Kobe Customs Office Case)[21] granted a wide range of administrative discretion **in the choice of measures**. Provided that the action of a national employee meets the requirements of the disciplinary measures according to National Public Service Law Art. 82 para.1, the disciplinary authority must consider such various factors as the reason, motive, nature and influences of the action in deciding whether or not the action calls for disciplinary measures and what kind of measure should be chosen. "Since such decisions will be done on the basis of comprehensive consideration of such extensive factors, a proper judgment cannot be expected unless we give discretion to those in charge of supervising subordinate employees who have ample

21 Saikō Saibansho [Sup. Ct.] Dec. 20, 1977, 1972 (Gyō-Tsu) 52, 31(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1101 (Japan).

knowledge of the situation in the office".

The Court continues in stating that against this discretion which emphasizes the necessity of a decision based on the comprehensive consideration of various factors by "the person in charge on the spot", judicial control will be limited. When the Court examines the legality of such discretionary decision, the court **shall not substitute its decision for the administrative decision** but the decision can be found illegal only when "it significantly lacks appropriateness **in the light of generally accepted social ideas** so that it shall be seen as abuse of discretion".

Such a concept of judicial control based on "generally accepted social ideas"[22] against discretionary dispositions can also be observed in the following Supreme Court cases. This wording may puzzle foreign observers[23] who may have doubts about the reason why the court can introduce the idea of "society" into "the system of law". The court probably uses the concept in order to explain why it can enforce its judgment against the decision of democratically accountable organs without falling into purely subjective evaluation by the judges. Such

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22 The earliest usages of the phrase "significantly lacks appropriateness in the light of socially accepted ideas" by the Supreme Court can be found at Judgment of the Supreme Court, Saikō Saibansho [Sup. Ct.] July 3, 1953, 1951 (O) 685, 7(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 811 (Japan) (land grant disposition in farmland reform); Saikō Saibansho [Sup. Ct.] July 30, 1954, 1953 (O) 745, 8(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1501 (Japan) (disciplinary action (expulsion from public university)).

23 Ryuji Yamamoto, a professor at the University of Tokyo, confesses that he found difficulty in translating and explaining the concept to German colleagues in his presentation at the Japan-Germany Administrative Law Symposium on Feb. 11 2006. Ryuji Yamamoto, *Nihon ni Okeru Sairyō Ron no Henyō* [*Transformation of Discretion Doctrine in Japan*], 1933 HANREI JIHŌ 11, 15 (2006)（山本隆司，日本における裁量論の変容，判例時報，1933号，頁15（2006年））.

being the case, the degree of control is limited to the case when the administrative decision is "significantly inappropriate". *Hitoshi Murata*, a high court judge, understands this concept to be "a loose application of the PP".[24]

Generally speaking, this "generally accepted social ideas" control has always been criticized as being too deferential toward the administration. But at the same time, the possibility of judicial control is still open. Except for the rhetorical formula of what is "significantly inappropriate", there is no logical limit as to how far the judicial control might go.[25] How loose or stringent the control may be depends not upon a definite principle but rather upon the attitude of the Court.

Another point to be mentioned is that the Kobe Customs Office Supreme Court Judgment grants discretion **only on the choice of measures**. Discretion as to the legal requirements of disciplinary actions was not granted in this case.[26] The court did not defer to the

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24 Hitoshi Murata, *Gyōseihō ni Okeru Hireigensoku* [*Proportionality Principle in Administrative Law*], *in* GYŌSEI SŌSHŌ [ADMINISTATIVE LITIGATION AND ADMINISTRATIVE APPEAL] 79, 87-88 (Masayuki Fujiyama & Hitoshi Murata eds., rev. ed. 2012)(村田斉志,行政法における比例原則,收於:藤山雅行、村田斉志編,行政争訟,改訂版,頁87-88(2012年)).

25 This may be the result of the fact that this control is the variation of "abuse" control as opposed to "boundary" control of discretion. *Cf.* Mitsuo Kobayakawa, *Sairyō Mondai to Hōritsu Mondai* [*Question of Discretion and Question of Law*], *in* 2 HŌGAKU KYŌKAI HYAKUSHŪNEN KINEN RONBUNSHŪ [FESTSCHRIFT FOR 100 YEAR ANNIVERSARY OF THE JURISPRUDENCE ASSOCIATION VOL. 2] 331, 342-344 (1983)(小早川光郎,裁量問題と法律問題,收於:法学協会編,法学協会百周年記念論文集第2巻,頁342-344(1983年)).

26 This does **not** mean that the Supreme Court does not grant discretion on the judgment of legal requirements. On the contrary, it often does so. Judgment of the Supreme Court, Oct. 4, 1978 (Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, 1975 (Gyō-Tsu) 120, 32(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1223, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=56 (Japan) (Renewal of term of sojourn by a foreigner. McLean Case).) and judgment of the Supreme Court Oct. 29,

administrative decision but rendered its **own judgment** that the actions of the plaintiffs (national employees) meet the requirements of Art. 82 para.1 item (1) and (3), although the conclusion is the same. This was done although item (3) employs vague legal concepts (*unbestimmter Rechtsbegriff* in German law) such as "misconduct as to render himself/herself unfit to be a servant of all citizens".

D. "Control of the Judgment-making Process" Regarding Administrative Discretion

1. *Nikkō Tarō Sugi* Judgment

In 1973, the Tokyo High Court rendered a landmark judgment (*Nikkō Tarō Sugi* [27] Judgment)[28] that found dispositions in the process of land expropriation illegal. *Tochigi* prefecture drafted a project plan to expand a national road which included a site owned by *Nikkō Tōshōgu*, a famous and historically significant Shinto shrine located within a special protection area based on Natural Parks Law. Because the shrine refused to sell the land voluntarily, the Minister of Construction authorized the use of land expropriation after it received an application from the prefecture. The shrine filed suit. The issue before the court was deciding if the project plan met the requirement of the Land Expropriation Law,[29] that the plan would "contribute to the appropriate and rational use of

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1992 (Saikō Saibansho [Sup. Ct.] Oct. 29, 1992, 1985 (Gyō-Tsu) 133, 46(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1174, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=1399 (Japan) (Ikata Atomic Power Plant).) are famous examples for granting such discretion.

27 *Tarō Sugi* is the name of the biggest ceder *(Sugi)* in *Nikkō Tōshōgū* Shrine that bears the name *"Tarō"*, a typical name for firstborn sons in Japan.

28 Tōkyō Kōtō Saibansho [Tokyo High Ct.] July 13, 1973, 1969 (Gyō-Ko) 12, 24(6/7) GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 533 (Japan).

29 Tochi Shūyō Hō [Land Expropriation Law], Law No. 219 of 1951 (Japan).

land" (Art. 20 Item 3).

Both the first-instance court (Utsunomiya District Court)[30] and the Tokyo High Court found the disposition by the minister illegal, but the methods of reasoning were different. Both judgments interpret the above requirement of Art. 20 Item 3 as follows: it requires a comparative balance between the public benefits to be gained by use of the contested area by the particular project and the harms suffered by such use (this harm includes not only private interests but sometimes also public interests). Only when the former benefits exceed the latter harms will the requirement of Art. 20 Item 3 of the Land Expropriation Law be met.[31] Since then, this interpretation has been almost unanimously followed in judicial/administrative practice and by academics.

However, while the first-instance court did not admit administrative discretion of the Minister of Construction, the Tokyo High Court acknowledged it. Nevertheless, the court submitted the following standard of review for such discretionary dispositions.

> *"There may be cases when the minister, in making judgment over the above requirement, unjustly and carelessly makes light of various elements and values which shall deserve the utmost regard from the outset, with the result that it lacks due consideration. There may also be cases when the minister considers factors that should not be considered or overvalues less significant factors. When the judgment of the minister is*

30 Utsunomiya Chihō Saibansho [Utsunomiya Dist. Ct.] Apr. 9, 1969, 1964 (Gyō-U) 4 & 1967 (Gyō-U) 2, 20(4) GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 373 (Japan).

31 The text is quoted from the Tokyo High Court judgment, but the understanding of the first-instance court is virtually the same.

influenced by such improperness, the decision will be found illegal because of the error in the manner and process of discretionary judgment."

Based on this standard, the court examined the actual judgment-making process of Tochigi prefecture in making the project plan and the examination process over the plan by the Minister of Construction. It reached the conclusion that the decision of the minister (i) unjustly and carelessly underestimated cultural values and the importance of environmental protection, factors which shall deserve utmost regard, therefore lacking due consideration, (ii) considered the prognosis of the increase of traffic due to the Tokyo Olympic Games (1964), which was a factor not to be considered because the increase would only be temporary, (iii) overestimated the risk of tree fall that may be caused by typhoons and the present weakening of the growing condition of the trees. Thus, the court summarizes the "manner and process" of discretionary judgment by the minister as "erroneous". The court concluded that "if the judgment had been done without such errors, the minister might have reached the final conclusion" and held the disposition to be illegal.

The judgment of the Tokyo High Court captured the attention of the academic community. Contemporary case commentaries understood the judgment to have introduced "a new method of judicial control" regarding discretionary administrative activities from the perspective of control of the judgment-making process instead of just ratifying the administrative decision or giving the court the power of substantial decision on issues that confront the diversification of values in

contemporary society.[32] However, it should also be noted that some commentaries in later years doubt whether the approach taken by the High Court does not limit itself to control of the judgment-making process but instead has a tendency to enforce the courts' substantial value judgment.[33]

While the *Nikkō Tarō Sugi* Judgment and its "control of the judgment-making process" *(Handan Katei Shinsa*[34]*)* approach received extensive attention, there have not been many judicial decisions that have used this approach and have subsequently found administrative activities to be illegal until recently.[35]

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32 *See, e.g.*, Naohiko Harada, *Hanhi—Tōkyō Kōhan Shōwa 48nen 7gatu 13nichi* [*Case Comment—Judgment of the Tokyo High Court, July 13, 1973*], 565 JURISUTO 41, 43 (1974)(原田尚彦，判批(東京高判昭和48年7月13日)，ジュリスト，565号(昭和48年度重要判例解説))，頁43(1974年); Hiroshi Shiono, *Hanhi—Tōkyō Kōhan Shōwa 48nen 7gatu 13nichi* [*Case Comment—Judgment of the Tokyo High Court, July 13, 1973*], 178 HANREI HYŌRON 21, 25 (1973)(塩野宏，判批(東京高判昭和48年7月13日)，判例評論，178号，頁25(1973年)).

33 YASUTAKA ABE, GYŌSEI SAIRYŌ TO GYŌSEI KYŪSAI [ADMINISTRATIVE DISCRETION AND ADMINISTRATIVE REMEDY] 126, 128 (1987)(阿部泰隆，行政裁量と行政救済，頁126、128(1987年)).

34 I assume that "control of the decision-making process" forms a more natural expression in English, however, since the original Japanese *"Handan"* has a more cognitive rather than voluntaristic aspect, I chose "control of the judgment-making process" as the translation.

35 One of the exceptions may be the *Nibutani* Dam Judgment (Sapporo Chihō Saibansho [Sapporo Dist. Ct.] Mar. 27, 1997, 1993 (Gyō-U) 9, 1598 HANREI JIHŌ [HANJI] 33 (Japan).) which declared the land expropriation disposition (Land Expropriation Law Art. 47-2) for a project to construct a large dam which would also destroy the "sacred places" of Japan's indigenous Ainu people. (English translation of this judgment by Mark Levin can be found at Mark Levin, *Kayano et al. v. Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'*, 38 INT'L LEGAL MATERIALS 394, http://ssrn.com/abstract=1635447.)

2. The Supreme Court: Integration of "Control of the Judgment-making Process" into "Generally Accepted Social Ideas Control"

On the other hand, the Supreme Court seems to have incorporated some elements of "control of the judgment-making process" into its decisions. In a Supreme Court Judgment on Mar. 8, 1996 (the Jehovah's Witness case),[36] the court ruled that the expulsion disposition[37] of a municipal technical college student was illegal. In this case, the student had refused to take *Kendō* (Japanese fencing) practice in a physical education course for reasons of his religious faith. Therefore, he failed to receive credit for the course, which was a compulsory subject. At the end of the school year, the school principal presented a disposition against him to retain him in the same grade for another year. In the next year, the situation remained the same and the student was expelled from the school according to the school policy. The student filed a revocation suit against the disposition.

In judging the case, the court stood on the premise that the school principal has a discretion over such dispositions and that those dispositions can be found illegal only "when they have no foundation in fact or when they lack appropriateness in the light of generally accepted social ideas so that it shall be seen as beyond the bounds of discretion of

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36 Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 1995 (Gyō-Tsu) 74, 50(3) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=294 (Japan). Here and for other Supreme Court Judgments, the author uses the provisional translation on the website of the court, but these sometimes differ in the use of equivalents, which is necessary for the consistency of this article.

37 A disposition against the same student to retain in the same class for another year was also found to be illegal.

abuse of discretion".

However, after employing the above traditional rhetorical formula, the court emphasizes that disposition of expulsion should be chosen "only if it is deemed unavoidable to expel the relevant student from school from an educational viewpoint. In determining the requirements therefore, utmost care should be taken, involving yet more prudence than when other types of disposition are chosen". The utmost care should also be taken for the disposition to retain in the same class for the next year.

The court further held that (i) *Kendō* practice may not be a requisite for technical colleges and the educational purpose of physical education can also be accomplished in alternative ways, and (ii) the reason why the student refused to participate in *Kendō* practice was closely related to the core of his faith, while a consequence of his refusal to participate was gravely disadvantageous.[38]

The student had repeatedly requested his teachers to provide alternative activities, such as writing reports and the like, but the technical college bluntly refused the requests. The Court says:

> *"In light of the above nature of each of the said dispositions, . . . sufficient consideration should have been*

38 The court first confirms that the case is not about direct restriction of religious freedom (NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20, para. 1 (Japan). "Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority" *per se,* because neither of the dispositions oblige the student to "take action incompatible with the doctrine underlying his faith as far as its contents are concerned". However, according to the court, they are of such a nature that the student "had no choice but to participate in *Kendō* practice, which was an activity in conflict with the doctrine underlying his faith, to avoid grave disadvantages inflicted by these dispositions.

given to the rightness of offering any alternative activity[39]*, the way and manner thereof, if any, and so on before each of the said dispositions was handed down, but there is no proof of any such consideration being given in this case."*

In conclusion, the court found that the judgment of the school principal in carrying out the above dispositions, based on the evaluation by the teacher who did not give ample consideration to alternative activities and "fails to take into account the matters to be considered, or obviously falls short of rationally evaluating the facts under consideration", to be illegal "beyond the bounds[40] of discretionary authority."

Here the Supreme Court employs a method of judicial control that examines whether the administration has appropriately measured and evaluated the "matters to be considered", although the decision does not use the term "judgment-making process". The court also interprets the law and shows perspectives for this examination, namely (i) the dilemma between expulsion from the school or remaining in the same class on the one side and other disciplinary dispositions imposed on the other, and (ii) the analysis of the situation of the student from the viewpoint of religious freedom.

In a Supreme Court Judgment on Nov. 2, 2006[41] over the approval

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39 As a premise, the court also confirms that taking alternative measures will not be a violation of Article 20, para. 3 of the Constitution which guarantees the separation of religion and the state.

40 Here the court uses "beyond the bounds of discretion" instead of "abuse of discretion".

41 Saikō Saibansho [Sup. Ct.] Nov. 2, 2006, 2004 (Gyō-Hi) 114, 60(9) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3249, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=863 (Japan).

of a city-planning project of the Tokyo Metropolitan Government related to the elevated structure of an urban high-speed railroad, the court established a clearer formula for reviewing discretionary administrative dispositions.

> *"Therefore, when the court examines the legality of the decision to adopt a city plan on city facilities or of the content of the change of the plan, the court should regard such decision or change as an exercise of the discretionary power granted to the administrative authority, and should find illegality in such decision or change only where the administrative agency's decision or change can be regarded to go beyond the bounds of discretionary power or constituting an abuse of such power by reason that the decision or change (1)*[42]*lacks a critical factual basis due to errors in fact-finding based on which the decision was made, or by reason that the decision seems (2)significantly inappropriate in light of the generally accepted social ideas because the agency's (2-1)assessments of facts is obviously unreasonable or (2-2)the agency has not taken into consideration the matters that should have been considered in the judgment-making process."*

Here the court integrates control of the "judgment-making process" into the traditional "generally accepted social ideas" formula.[43]

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42 Numbers in parentheses are inserted not by the court but by the author of this essay.

43 *Hiroyuki Hashimoto* claims that there is at least one significant theoretical difference in the premise of the *Nikkō Tarō Sugi* Judgment type of control and the present Supreme Court control formula. Since the former judgment by the Tokyo High Court revoked the decision of the minister, focusing on the "erroneous manners and process" of the discretion by the minister, there is at least a theoretical possibility that the minister will reach the same conclusion again, this time after a deliberate

Discretionary dispositions may be found to be illegal by the courts when they:

(1) lack a critical factual basis (the premise is that the courts can exercise *de novo* control of fact finding)

(2) are significantly inappropriate in light of the generally accepted social ideas

because of

(2-1) obviously unreasonable assessment of facts

or

(2-2) failure in the judgment-making process such as the due consideration of matters to be considered

The above Supreme Court judgment did **not** find the approval of the city planning to be illegal. However, employing similar formulae, the Supreme Court has found two discretionary dispositions concerning permission of use of public facilities for other purposes.[44]

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consideration (Mitsuo Kobayakawa, *Hanhi—Tōkyō Kōhan Shōwa 48nen 7gatu 13nichi* [*Case Comment—Judgment of the Tokyo High Court, July 13, 1973*], 103 BESSATSU JURISUTO 118, 120 (1989))（小早川光郎，判批（東京高判昭和48年7月13日），別冊ジュリスト，103号（街づくり・国づくり判例百選），頁120（1989年））. *Hashimoto* seems to be skeptical that the Supreme Court formula, however, will allow such a possibility of repetition. *Cf.* HIROYUKI HASHIMOTO, GYŌSEI HANREI TO SHIKUMI KAISHAKU [ADMINISTRATIVE LAW CASE PRECEDENTS AND SYSTEMATIC INTERPRETATION] 152 (2009)（橋本博之，行政判例と仕組み解釈，頁152（2009年））. On the other hand, some authors expressly affirm such a possibility. *Cf.* HIROSHI SHIONO, GYŌSEIHŌ II [ADMINISTRATIVE LAW II] 187 (5th ed. supplemented 2013)（塩野宏，行政法 II，5版補訂版，頁187（2013年））; KATSUYA UGA, GYŌSEIHŌ GAISETSU II [ADMINISTRATIVE LAW TEXT, VOL. 2] 282 (5th ed. 2015)（宇賀克也，行政法概説II，5版，頁282（2015年））; Yukio Okitsu, *§33*, *in* JOKAI GYŌSEIJIKEN SOSHŌHŌ [COMMENTARIES OF ADMINISTRATIVE CASE LITIGATION LAW] 661, 674 (H. Minami et al. eds., 4th ed. 2014)（興津征雄，第33条，南博方等編，条解行政事件訴訟法，4版，頁674（2014年））.

44 Saikō Saibansho [Sup. Ct.] Feb. 7, 2006, 2003 (Ju) 2001, 60(2) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 401, *translated in* http://www.courts.go.jp/app/hanrei_en/

III. Discretion Control and the PP

A. Outside/Inside and Necessity/Balancing

We have described so far the development of the judicial control formula of administrative discretion in Japan. Now let us return to the first question at the beginning of this paper. Does the PP function **outside** or **inside** of the domain of administrative discretion?

As has been stated, the present administrative discretion control of the Supreme Court integrates the "control of the judgment-making process" method into the formula of "generally accepted social ideas". Is this type of discretion control an application of the PP? The answer to this question depends upon how we understand the PP.

As mentioned above, we find two main functions of the PP, **necessity control** and **balancing control**. We also hold the premise that administrative discretion can only be granted for either (i) the decision as to which factors are to be considered and their weighting or (ii) reaching the final conclusion for the case (Subsumption).[45] The question of discretion is separated from the question of interpretation of law.

Under this premise, the classic "generally accepted social ideas" formula of the Supreme Court can be understood to perform a type of **balancing control**. It also functions not on the level of interpretation of law but in the application in the narrower sense. In this regard, this

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detail?id=814 (Japan). Saikō Saibansho [Sup. Ct.] Dec.7, 2007, 2005 (Gyo-Hi) 163, 61(9) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3290, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=924 (Japan) (permission for the occupancy of a public seacoast area).

45 *See* pp. 209, 212 of this paper.

formula can be considered as a type of the PP loosely applied,[46] which functions "inside" of the discretion.

What about the "control of the judgment-making process", which has been recently integrated in the "generally accepted social ideas" formula? The essence of this control lies in the determination of which factors shall be considered, and in the weighting standard of the factors (2-1 in the Chart[47]). The court oversees whether the administrative agency has conducted this process properly. The court may establish a general legal proposition as to which factors shall be considered. A factor may be classified as (i) factors that must be considered, (ii) factors that should not be considered, or (iii) factors that may be considered depending on the circumstances. This classification itself is the process of interpretation of law, therefore it lies "outside" of the discretion.

The court may further control the weighting of the factors. If the court establishes a general priority rule in the weighting standard as a general legal proposition, this is a balancing control, but it logically precedes actual balancing and functions "outside" of the domain of discretion.

B. Cautiousness of the Supreme Court in Setting Priority Rules

However, generally speaking, the Supreme Court is rather cautious in setting clear priority rules among diverse interests that leads to stringent discretion control.[48] In a Supreme Court judgment[49] over the

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46 *See* Murata, *supra* note 24.

47 *See* p. 213 of this paper.

48 RYUJI YAMAMOTO, HANREI KARA TANKYŪSURU GYŌSEIHŌ [EXPLORING ADMINISTRATIVE LAW THROUGH JUDICIAL PRECEDENTS] 227 (2012)（山本隆司，判

refusal of permission for the use of a public school facility for purposes other than the original purpose, the court declared the refusal illegal, but refrained from setting a general rule on putting weights on a particular interest.[50]

Let us take another example: a case where the legality of a city planning project by the Tokyo Metropolitan Government to enlarge a public park was questioned. This became the subject of dispute when a decision was made to use private land in the enlargement plan when public land was available. The first- instance court,[51] the Tokyo District Court, found the city plan to be illegal.

> *"When either privately owned land or its adjacent publicly owned land is available for a certain public purpose, it goes without saying that the fact that one of them is owned privately is a factor to be considered in the choice of which land to use. In such a case, the public authority may use the private land only when, for example, the public land is already used for another administrative purpose and such use is indispensable because there is no alternative, so that the necessity of attaining another administrative purpose surpasses the necessity of the park."*

Here the District Court clearly applies the necessity control of the

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例から探究する行政法，頁227（2012年）).

49 Saikō Saibansho [Sup. Ct.] Feb. 7, 2006, 2003 (Ju) 2001, 60(2) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 401, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=814 (Japan).

50 YAMAMOTO, *supra* note 48, at 227, 242-43.

51 Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 27, 2002, 1997 (Gyō-U) 47, 1835 HANREI JIHŌ [HANJI] 52 (Japan).

PP. The second-instance court,[52] the Tokyo High Court, reversed the first- instance court's decision in favor of the defendant, but the Supreme Court once again quashed and reversed the decision of the Tokyo High Court.[53] However, the Supreme Court does not share the view of the first- instance court that the use of private land is allowed only when public land is not available. Rather, the court emphasizes the need for the rationality of "situating facilities of adequate scale at necessary locations".[54] The choice between public land and private land is only one of the factors that **may be** considered. Here we can observe the court's attitude that it is very careful in the establishment of a certain principle for necessity control or priority rules in balancing control, because such principle or priority rules might lead to reduction in the flexibility of the administration. As such, the Supreme Court did not talk about the PP in this case.

The evaluation of the Jehovah's Witness Judgment of the Supreme Court[55] is difficult in this context. The court analyzed the situation from the standpoint of constitutional interpretation. Based on such interpretation, the court emphasized that the double-bind situation of the student—"he had no choice but to participate in *kendō* practice, which was an activity in conflict with the doctrine underlying his faith, to avoid

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52 Tōkyō Kōtō Saibansho [Tokyo High Ct.] Sept. 11, 2003, 2002 (Gyō-Ko) 234, 1845 HANREI JIHŌ [HANJI] 54 (Japan).

53 Saikō Saibansho [Sup. Ct.] Sept. 4, 2006, 2003 (Gyō-Hi) 321, 1948 HANREI JIHŌ [HANJI] 26 (Japan).

54 *Cf.* Toshi Keikaku Hō [City Planning Law], Law No. 100 of 1968, art. 13, para. 1, item 11, *translated in* http://www.japaneselawtranslation.go.jp/law/detail/?id=1923&vm=02&re=01&new=1 (Japan). The law itself was not applied in the court decision since the city plan had been decided before the law took effect, but the court applied it as an unwritten principle.

55 *See* p. 223 of this paper.

grave disadvantages"—is a matter that should be considered seriously. The judgment of the school principal, however, "fails to take into account the matters to be considered, or obviously falls short of rationally evaluating the facts under consideration", according to the court. Whether this ruling of the court can be understood to have established a general priority rule is open to question.

C. *Kimigayo* Disciplinary Action Case

We will also examine this point by analysing a recent Supreme Court case that is said to have clearly applied the PP (Judgment of the Supreme Court. Jan. 16, 2012 (*Kimigayo* Disciplinary Action Case)).[56] This was a judgment concerning a disciplinary action against public school teachers in Tokyo who refused to stand up and sing *Kimigayo*, Japan's national anthem, during school ceremonies (entrance or graduation ceremonies). Some Japanese people, including school teachers, consider *Kimigayo* and *Hinomaru*, Japan's national flag, to be closely connected to Japan's history of militarism and imperialism. On the other hand, since the late 1990s, the Ministry of Education has felt it to be important that the *Hinomaru* be raised at public school ceremonies and that *Kimigayo* is sung. In 2003, the Tokyo Metropolitan Government Board of Education issued a circular to public school principals that they should issue an official order against the protesting teachers, forcing them to stand up and sing *Kimigayo* during ceremonial occasions. The circular also noted that disobedience of the official order would lead to disciplinary action. Although not expressly mentioned in the circular, the Board of Education has a policy of issuing an "admonition" for the first

56 Saikō Saibansho [Sup. Ct.] Jan. 16, 2012, 2011 (Gyō-Tsu) 263 & 2011 (Gyō-Hi) 294, 2417 HANREI JIHŌ [HANJI] 139 (Japan).

occurrence of disobedience, "reduction of salary for one month" for the second occurrence, "reduction of salary for six month[s]" for the third, and "suspension from duty" for the fourth. The practice was "uniform . . . and automatic"[57]. The plaintiffs were those teachers who suffered disciplinary actions as a result of this circular.

The plaintiffs in this case suffered from "suspension from duty" disciplinary dispositions. They argued, among other things, that the official order to stand up and sing was an infringement of freedom of thought and conscience (Art. 19 of the Constitution of Japan),[58] but the Supreme Court had already ruled in prior decisions that it is constitutional.[59] The Court ruled that the act of standing in ceremonies, has a nature of a customary and formal behavior not inseparably connected to the view of history or the view of the world itself, therefore the order does not directly constrain an individual's freedom of thought and conscience. However, at the same time, the court also noted that requiring a person to perform an act that has an expression of his/her respect of certain objects that he/she negatively evaluates (*Hinomaru*, *Kimigayo*) could be "indirect constraint" to freedom of thought and conscience.

It was against this backdrop that the Supreme Court Judgment on Jan. 16, 2012 was issued. The court first refers to the prior judgment of the court to confirm the constitutionality of the official order. It then

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57 Quoted from the supplementary opinion in the Judgment written by Justice Tatsuko Sakurai.

58 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 19 (Japan). Freedom of thought and conscience shall not be violated.

59 *E.g.* Saikō Saibansho [Sup. Ct.] May 30, 2011, 2010 (Gyō-Tsu) 54, 65(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1780, *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=1106 (Japan).

quotes the Kobe Customs Office Case[60] and other precedents in order to show that there is administrative discretion in the choice of measures when the disobedience took place.

However, the court goes on to point out that the refusal to stand up and sing brings about a contradiction between the action required by the official order and the external conduct that originates from her/his world views. The court also points out that mere refusal to stand up without active disruptive conducts would not hinder the performance of the ceremony, at least physically.

Based on this analysis, the court makes a distinction between "admonition" and other disciplinary measures such as salary reduction and more severe measures such as "suspension from duty" in this case. "Careful considerations" are required for the latter. "Suspension from duty" dispositions shall only be allowed when concrete circumstances are found that can serve as a basis of appropriateness of the choice of disposition in view of balancing between the necessity of preserving discipline and order, and disadvantages to the subject person. Mere repetition of not standing up will not suffice for finding such concrete circumstances.

We can observe here an argument similar to the Jehovah's Witness case. The situation surrounding the plaintiffs in relation to constitutional rights is analyzed so that "careful considerations" are required. Although not quoting expressly, the court surely has an "indirect constraint" argument in the prior judgment in mind. As a result, the court makes a distinction among different disciplinary actions. It draws a line between

60 Saikō Saibansho [Sup. Ct.] Dec. 20, 1977, 1972 (Gyō-Tsu) 52, 31(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1101 (Japan).

"admonition" and other more severe disciplinary measures. Here the court establishes a general legal proposition in the balancing control, which can be legitimately referred to as an application of the PP.

While establishing a general legal proposition, it should also be noted that the court also delivered a warning sign against "uniform . . . and automatic" practice of disciplinary actions. Some authors evaluate this warning sign from the perspective of the PP.[61]

Here we can observe two different orientations of the PP in regard to balancing control. On the one hand, it seeks establishment of a general legal proposition by giving priority to a certain interest. On the other hand, the principle tries to avoid being over-inclusive by setting a general rule and seeks an adequate judgment in individual particular circumstances.

IV. Summary

This essay has examined the PP, whether it functions "outside" or "inside" of administrative discretion and whether it performs the necessity control or the balancing control. It also builds upon the premise that administrative discretion takes place in the process of the application of the law in the narrower sense, distinguished from the interpretation of law and from bare fact-finding, both of which are reserved for the judiciary.

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61 *E.g.* Takayoshi Tsuneoka, *Shokumu Meirei Ihan ni Taisuru Chōkai Shobun to Shihō Shinsa (1)* [*Disciplinary Actions against Disobedience to an Official Order and Judicial Review (1)*], 89(8) JICHI KENKYŪ 27, 36 (2013)（常岡孝好，職務命令違反に対する懲戒処分と裁量審査(1)，自治研究，89巻8号，頁36（2013年））.

The Japanese Supreme Court employs the rhetorical formula of "generally accepted social ideas" in the judicial control of administrative discretion, which is sometimes understood as a loose application of the PP. The control tends to be lax, but there is no inherent limit on the degree to which it is applied.

The court later integrated the "control of the judgment-making process" method into the "generally accepted social ideas" formula. In this method, the judiciary extracts (i) factors that must be considered, (ii) factors that should not be considered, or (iii) factors that may be considered depending on the circumstances as a result of legal analysis. It may further designate weighting of factors.

Needless to say, the core of the PP is the purpose-means construction. Regarding necessity control, this construction is self-evident. As for balancing control, whether the court focuses on a special weighting of a particular interest is the issue. The feature of the PP in balancing control is that a particular interest is placed on one side of the scale and compared with various other interests.[62] We have confirmed that the Supreme Court is rather reluctant to perform such types of dichotomic balancing, but does so in certain cases.

Whether such balancing is appropriate depends upon a determination of the desirable degree of judicial review, as well as an understanding of the legal structure in the relevant field. We should be aware that while such dichotomic balancing will provide an effective

62 Such priority of a particular interest must be derived either from the Constitution or from the (interpretation of) the law. *See* Ryuji Yamamoto, *Gyōsei Sairyō no Handan Katei Shinsa* [*"Control of the Judgment-making Process" Regarding Administrative Discretion*], 14 GYŌSEIHŌ KENKYŪ 1, 11-12 (2016)(山本隆司,行政裁量の判断過程審査,行政法研究,14号,頁11-12(2016年)).

tool for judicial control, it also presents the risk of making the actual diversity of interests among various stakeholders invisible. The issue of the legal governance of urban space can illustrate this risk.[63]

63 *Cf.* Narufumi Kadomatsu, *Legal Management of Urban Space in Japan and the Role of the Judiciary*, *in* COMPARATIVE ADMINISTRATIVE LAW 497 (Susan Rose-Ackerman et al. eds., 2d ed. 2017).

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比例原則在日本行政法的功能

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摘要

日本在兩次世界大戰期間，從德國引入比例原則。除了作為傍論之外，日本最高裁判所從未明白在判決中提及比例原則。然而，有一些判決實質上應用了比例原則。本文的主要問題是：比例原則是否對於行政裁量的範圍內外均有所作用，以及是否進行必要性與狹義比例原則審查。本文的論證基礎預設了行政裁量發生於行政機關適用法律的最狹義過程中，無關乎解釋法律或發現事實的過程，蓋後二者屬於司法審查的範疇。最高裁判所在審查行政裁量時採用「一般社會通念」的公式，並在此一經典的公式中融入了「審查決策過程」的概念。本文也檢視比例原則與此一審查架構的關係。關於必要性審查，目的—手段的結構作為比例原則核心乃不證自明。至於狹義比例原則的審查，其特色在於將特定的單一利益放在天平的一端，與其他各式各樣的利益進行比較。最高裁判所毋寧排斥進行這種二分式的利益衡量，但仍在特定案件中進行比較。這種衡量是否妥適取決於司法審查的可欲程度以及對該領域中法律結構的理解。這種二分式的衡量雖然提供司法控制一個有效的工具，但也凸顯了一種論證上的風險：將各種利害關係人的多元利益結構變成隱形不察。

關鍵詞：比例原則、行政裁量、控制決策過程、日本行政法。

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