

12 The Politics of Transparency in Japanese Administrative Law

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The 1990s will likely be seen as a major turning point in Japanese administrative law. During the decade, Japan adopted three major legal reforms that substantially impact the Japanese administrative system: the Administrative Procedure Act (APA), the Information Disclosure Act (IDA), and the Cabinet resolution requiring public notice of administrative rule making.¹ The first two of these reforms are statutory in character and have received some attention abroad. The Cabinet resolution has received less attention but may prove to be equally significant, especially if it is expanded and strengthened to include provision for judicial review. Together, these three reforms bring Japan into alignment with many other countries of the Organization for Economic Cooperation and Development (OECD) in terms of basic structure of regulation of administrative action and administrative policy making.

This comment seeks to elaborate on some of the political dynamics behind the reforms and to speculate on possible implications. First, I consider the broader political environment. Second, I focus on one mode of procedural requirement that appears in the new legal reforms, namely, the requirement that administrators give reasons to regulated parties under particular circumstances. Third, I consider the impact of the reforms on public demand for administrative transparency.

I. THE BROADER POLITICAL CONTEXT OF ADMINISTRATIVE REFORM

My first theme is that it is important to explain why reforms made sense from the point of view of those political forces that had dominated the postwar system. It is sometimes argued that *demand* from the public is the key factor in legislative change. But academics and others in Japan had argued for greater transparency for many years, to little avail. In fact, legal change did not occur until the Liberal Democratic Party (LDP) fell out of power briefly in 1993. This turned out to be a crucial if short interlude for administrative reform.

While it would be tempting to claim that the Hosokawa government passed the APA to constrain the bureaucracy, it made no substantive changes to a bill that had been sitting on the shelf as drafted by the bureaucracy under LDP scrutiny. The particular provisions of the APA, then, must have been more or less acceptable to the LDP, and they became desirable to the LDP once it fell out of the governing coalition. A party that realizes it cannot govern forever needs transparency during periods when it is out of power. The timing of the adoption of long-standing proposals suggests that underlying the shift toward transparency was a changing relationship between the LDP and the bureaucracy that culminated in the brief fall of the LDP. Whether the reforms will themselves contribute to further deterioration in this relationship remains to be seen.

Another factor underlying the shift toward greater transparency is the changing role of the business community. Keidanren pressure for more transparent administration was very important in catalyzing reforms, a point that is illustrated by the central role played by the Keidanren "hotline" in implementation of the APA.² Here it is arguable that the prolonged recession, combined with numerous bureaucratic failures and scandals, actually strengthened the power of business within Japanese domestic politics. The clear need for reform to restructure the economy has strengthened the hand of those arguing for transparency and government accountability. In the high-growth and bubble eras, there was little need to rock the boat when things were going well. But the economic troubles of the 1990s have contributed to pressure for change.

A final noteworthy point on the political context is that many of the reforms have been organized around the Cabinet office (formerly the prime minister's office). The prime minister has historically been a weak figure in Japan's party-centered political system. But it might make sense for a prime minister who is unable to control independent ministries to expand public account-

ability as a way of reducing the ability of the ministries to hide information. In this regard, it is important that the Management and Coordination Agency,³ one of fourteen external bureaus in the prime minister's office, played an important role in shepherding both the APA and IDA through the legislative process and monitored the line ministries' performance of APA requirements.⁴ The Cabinet office also hosts the IDA Review Board and implemented the recommendation to allow public comments on delegated legislation. Perhaps we are witnessing internal political dynamics *within* the government, whereby the center seeks to exert greater control over the line ministries.

Probably no single one of these explanations is sufficient to explain the developments in administrative law, and elements of all three are at play in the shift toward transparency. The main point is that administrative law reforms reflect underlying political dynamics, in Japan and elsewhere. Although transparency and accountability are slogans that focus on the relationship between government and the public, these reforms would be unthinkable unless they also served the interests of powerful forces in the Japanese governance system. The incentives of the LDP, business, and the Cabinet office all converged on moving toward greater transparency.

II. CONSTRAINING ADMINISTRATIVE POLICY MAKING THROUGH "GIVING REASONS" REQUIREMENTS

Administrative law reforms not only *reflect* political factors, they can shape politics as well, sometimes in unanticipated ways. The Japanese state has historically operated on the basis of broadly worded statutes with large delegations to the administration. While a large amount of administrative policy making is inevitable in any modern state, since bureaucrats fill in the details of statutes, it has been especially apparent in Japan because of broad delegations. Less precise legislation requires more making of new rules by ministries.

In addition, the Japanese state has operated primarily through case-by-case ad hoc determinations, made on the basis of flexible "guidance" rather than preannounced rules. In such a circumstance, without legislative clarity or clear rules, private actors have no choice but to cultivate relationships with the bureaucrats who will in fact be making distributive decisions on a discretionary basis. The extent to which this discretion was exercised in the shadow of LDP power need not concern us here. For now, it is sufficient to say that the entire structure of Japanese postwar political economy was reflected in and sustained by the structure of Japanese public law.

The seemingly minor procedural step of requiring bureaucrats to give reasons for decisions, found in both the APA and the Cabinet order (and which also governs the IDA), may in fact become profoundly important in constraining the discretion of bureaucrats. There are at least two reasons for this. First of all, an administrator who must give reasons for his or her actions will be more careful to make more rational, or at least more justifiable, decisions than will a bureaucrat who can exercise purely by fiat. This was the result that was likely contemplated by the drafters of these “giving reasons” requirements: making the bureaucracy more accountable and transparent to the public will tend to improve bureaucratic performance and responsiveness.

Second, comparative experience in both the United States and the European Union indicates that “giving reasons” requirements can become a major beachhead of judicial review.⁵ This is because bureaucrats who must give reasons automatically create a record that can serve as the basis for judicial inquiry. A bureaucrat who makes a phone call “suggesting” an outcome to a private party is much more impervious to review, since there is no record of his or her decision. But once reasons are given, the reasons are open to scrutiny by judges as to whether or not they are adequate. Although the requirement to give reasons appears to be procedural in character, it can easily and naturally lead to substantive evaluation by judges of the reasons proffered by bureaucrats.

This second point is relevant at least as far as the APA and IDA are concerned (the giving reasons requirement in the Cabinet order is not reviewable by courts). And it appears that some version of this dynamic is already occurring in Japan, as evidenced by the fact that two early cases that rely on the APA (both discussed in the chapter by Professor Uga in this volume) drew on the giving reasons requirement of Article 8. Professor Uga notes the significance of Japanese judges choosing to refer to the ministries’ review standards in evaluating the reasons offered by bureaucrats. Once a court can independently evaluate the reasons given in light of the review standards, the notion that giving reasons is merely a procedural requirement becomes a fiction. The examination of reasons is no longer procedural but substantive as well, in the sense that judges will now be able to assert that the reasons did not meet the ministries’ internal standard of review. To make such an assertion the judge will have to examine the facts of the application in light of the standard, a substantive evaluation if ever there was one.

One might welcome this kind of scrutiny by judges. Certainly it means that arbitrariness is constrained at its outer limits: a bureaucrat cannot offer as a reason “because I felt like it” or “because an LDP Diet member told me

so." But comparative experience also suggests that judges involved in reviewing administrative action themselves become deeply involved in policy making. The court that scrutinizes reasons quickly becomes involved in substantive questions of administration. And this leads to the proverbial problem of "who guards the guardians" as bureaucratic discretion is traded for judicial discretion.⁶ In this way, greater transparency involves a shift in policy-making authority within the government, from ministries to courts, and is not merely limited to providing reasons for citizens for greater accountability.

Of course, bureaucrats have many tools at their disposal for resisting judicial control. Once reasons are required, bureaucrats learn what reasons are acceptable to judges. Reasons themselves tend to coalesce around certain formulas that have been found to pass judicial scrutiny. Administrative practice becomes tailored to the requirements of judicially created administrative law. All this reflects a perhaps inevitable process of judicialization once reasons are required, but it is by no means clear that discretion can actually be eliminated.

Another related question is how tight a link judges will require between reasons given for administrative action and statutory language. A requirement of close connection between reasons given and explicitly delegated powers might lead bureaucrats not only to search for justifications in statutory language but ultimately to draft more detailed statutes so as to be able to protect themselves from judicial scrutiny. In such a circumstance, bureaucrats can say to judges "we had no discretion here and were just following the statutory commands." But in fact, those commands may have been planted in the law by the bureaucrats themselves. This further illustrates the difficulty of truly constraining bureaucratic discretion.

Giving reasons can also shape the process of public comments on regulatory rules. The story of how judges turned the "informal rule-making" provisions of the U.S. Administrative Procedures Act into an extensive and formal record-gathering process has been told elsewhere.⁷ One aspect of this involved turning the notice and comment requirement into an enforced exchange, with reasons to be given by the bureaucracy for rejected comments. The Japanese Cabinet order requires such reasons, but without judicial reviewability, there is little potential for judicial scrutiny in this regard.

In conclusion, the fact that Japanese judicial scrutiny has focused on the "giving reasons" requirement at this early stage is not surprising. We do not know, of course, whether the two cases related to the APA described by Professor Uga will be a harbinger of things to come. But the potential bears watching, and, as I have suggested, some of the downstream effects may not have

been contemplated by the drafters of these legal reforms. In particular, these cases might be a sign of a nascent judicialization of Japanese administration.

III. CHANGING DEMAND FROM THE PUBLIC?

Whether these new legal tools will be widely utilized by the public remains to be seen. Professor Uga is no doubt correct when he suggests that the bureaucrats' "culture of secrecy" will not be transformed overnight. But the very passage of these laws may change behavior, even if formal constraints on the bureaucracy are still limited. We must remember that laws can be expressive, meaning that they can be effective independent of the formal sanctions attached to their provisions.⁸ From this perspective, the mere passage of a law signals a change in expectation to both regulators and regulated parties and can change behavior significantly. Professor Uga's emphasis on the symbolic value of including transparency in the purpose provisions of the APA seems to contemplate this kind of mechanism.

Another example is the APA's approach toward administrative guidance. With the exceptions of some slight formalization (e.g., the requirement that guidance be given in writing if requested), the APA mainly restated existing law. Existing law allowed firms to refuse to follow guidance, but few did so. If more firms begin to refuse to follow guidance, as did the "Internet" firm described in Professor Uga's chapter, the passage of the law may be effective in changing the power relations between government and governed simply by informing parties of their legal rights.

We have an indication of changing demand from the public in the number of requests for information disclosure in the first two years of the IDA's operation. These numbers are surprisingly high, though we do not yet know if they reflect many years of pent-up demand or will remain at a high level. By one estimate, roughly 80 percent of requests for information disclosure under the IDA have come from reporters. Some of the more prominent documents obtained under the IDA include minutes from the meeting of the Financial Rehabilitation Committee, details on *amakudari* appointments disclosed by the Cabinet office in 2001, and documents on the San Francisco Peace Treaty. Reporters were behind some of these prominent disclosure requests.

Of course, the lack of standing limitations in the IDA makes it a more likely tool of ensuring transparency than the APA, which is still subject to the limited framework of the still-unreformed Administrative Case Litigation Act. The early cases handed down on the IDA so far support this preliminary assessment that it will be a more effective mechanism for the public.

In December 2001, the Nagoya District Court rejected the Ministry of Economy, Trade and Industry's (METI) assertion that information on the planning for the 2005 World Expo fell within the "business information" exception under the IDA.⁹ While this case is still on appeal, it shows that courts may be willing to closely scrutinize ministry claims of non-disclosability.

One other initiative mentioned in passing by Professor Uga, but which may also become important, is the E-Government initiative. In 2001, the Japanese government adopted an "E-Japan strategy" that aims to make all government-related transactions, such as registration, application, and procurement procedures, electronically available over the Internet. As a separate matter, some *shingikai* are now making available their meeting agendas and minutes over the Internet. Thus, information from the Japanese government is clearly becoming more accessible to the public, and there are signs that transparency is becoming not merely a slogan but a reality in Japan, at least for routine government matters. This can also contribute to changing expectations on behalf of the public, leading to demand for more effective and accountable government.

IV. CONCLUSION

The major shifts of the 1990s in Japanese administrative law will have important and perhaps unanticipated effects on Japanese governance for many years. Although the APA has been criticized by many (including this author) for not going far enough, creative judges may have a window for greater scrutiny of administration through the giving reasons requirement of Article 8.¹⁰ Subsequent reforms, especially the IDA and the Cabinet order, have had more obvious and immediate impact, and revision of the Administrative Case Litigation Act will also be an important step, should it occur. All of these reforms will change the dynamics of relationships among the business community, the bureaucracy, the LDP, and the public and will create new pressures for reform or retrenchment of Japanese governance in the years ahead.

NOTES

1. These are described in Katsuya Uga, "Development of the Concepts of Transparency and Accountability in Japanese Administrative Law" (this volume).
2. On the other hand, in the case of the IDA, early data indicate that requests for information are not primarily drawn from businesses. This contrasts with the

U.S. Freedom of Information Act (FOIA), which has become primarily a tool for business.

3. The Management and Coordination Agency has subsequently been restructured into the Ministry of Public Management, Home Affairs and Posts and Telecommunications.

4. See APA Databook (2000).

5. See Martin Shapiro, "The Giving Reasons Requirement," *University of Chicago Legal Forum* 1992 (1992): 179, 179–220.

6. See Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988).

7. See generally Peter Schuck, ed., *Foundations of Administrative Law* (New York: Oxford University Press, 1994); and Christopher Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (New Haven, CT: Yale University Press, 1990).

8. Richard McAdams, "A Focal Point Theory of Expressive Law," *Virginia Law Review*, 86 (2000): 1649.

9. Nagoya Citizen Ombudsman v. METI (Nagoya Dist. Ct., Dec. 13, 2001), *Hanrei taimuzu* 1083 (2001): 310.

10. See also Tom Ginsburg, "Dismantling the 'Developmental State?'" *American Journal of Comparative Law* 49 (2001): 585, 602.