Denial of "Interpretative Discretion" in Japanese Law

Is it Really Different from Chevron Deference?

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I. INTRODUCTION

It is a common understanding in Japanese law that "the court has the final say in the interpretation of a statute". In other words, administrative agencies have no discretion in statutory interpretation. This stems from the civil law tradition, especially from the strong influence of German law. To be sure, no judgment of the Supreme Court of Japan clearly states the principle, and not many books or articles discuss the point; but this may be simply because the principle is already taken for granted.

On the other hand, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] one of the most prominent decisions in American administrative law, states that courts must defer to permissible interpretations of the statute by an administrative agency unless the intent of Congress is sufficiently clear. Even before *Chevron*, it had been long taken for granted that the interpretative discretion of the administrative agency was to be

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1 467 U.S. 837 (1984).

recognized in some cases,[2] and the question in *Chevron* was to sort out which cases these were.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.* Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3]

Does this difference in the presence or absence of interpretative discretion mean that Japanese courts conduct much more stringent review of administrative agency actions than U.S. courts? As we will discuss, this is probably not the case.

Peter CANE[4] posits an opposite model. He compares the division of roles between judicial and administrative power concerning statutory interpretation in the common law countries of the United Kingdom, Australia, and the United States. He poses the following three questions, the first and second of which relate to the issue of interpretative discretion.

"First, who has the last word on what a statute or regulation means? Put differently, who is the supreme interpreter? Secondly, what account, if any, must judges take of administrators' interpretations in determining what a statute or regulation means? Thirdly, how should administrators go about interpreting statutes and regulations?"

CANE contrasts a "subordinate judiciary" model (SJ model: the U.K. and Australia) against a "coordinate judiciary" model (CJ model: the U.S.). The SJ model leaves the final interpretation of statutes to the judiciary, while the CJ model leaves it to a cooperation between the judiciary and the executive. However, this does not indicate a particularly strong judicial power in the SJ model. Rather, it reflects the fact that the courts are marginal actors in the governance structure and subordinate agents of the legislature. According to CANE, the courts are but "the servant and mouthpiece of the law" in the SJ model.

"*To summarise so far: under US judge-made common law the power of interpreting statutes and regulations is shared between the judiciary and the executive. Under Eng-*

2 Skidmore v. Swift & Co., 323 US 134 (1944) etc.
3 467 U.S. 837, 843 (1984) (emphasis added).
4 P. CANE, Controlling Administrative Power (2016) 207.

lish and Australian law, by contrast, conclusive interpretation of statutes and regulations is an exclusively judicial function.[5]

[…]

In the SJ model of the judicial function, courts are marginal actors in the system of government and subordinate agents of the sovereign legislature in relation to which their main function is to interpret and apply statute law. Common law is subordinate to statute. Because there is a sharp distinction between making and interpreting law, interpretation focuses on the text and only secondarily on policy and purpose.[6]

[…]

The US CJ model of the judicial function is based on the ideas that (1) sovereignty resides in the People; (2) each of the three branches of government is a delegate of the People with an independent source of authority; and (3) liberty is best protected by creating competitive relationships between the branches, forcing them to cooperate with one another. Within this framework, one of the main functions of courts is to maintain a balance of legal power between the various branches and institutions of government, including the courts themselves.[7]

[…]

Against this background of coordinate institutions and shared powers, it is not difficult to understand the development of rules that share out the power of interpretation between the judiciary and the executive. *Because the Constitution does not expressly allocate interpretive power, judicial 'deference' to administrative interpretation can be understood as constitutional common law* – a judicial gloss on the Constitution designed to give more specific content to the underlying scheme that it establishes for the allocation of public power, namely, division and sharing to facilitate checking and balancing, and to give recipients of power incentives to compromise and cooperate with others who share the power.[8]

[…]

Under English and Australian law, the answer is clear: the UK Supreme Court in England, and the High Court in Australia, is the supreme interpreter of statutes and regulations. This is not because these courts are sovereign amongst organs of their respective government but, to the contrary and consistently with the SJ model, because the Court is the servant and mouthpiece of the law. England and Australia are, in a strong sense, rule-of-law states."[9]

CANE's model is appealing. It deals only with three common law jurisdictions, and civil law jurisdictions are out of his view. However, if we follow this model, Japan may belong to the SJ model.

However, is there really a significant difference between the two models? Does the issue mentioned above, of whether or not there is interpretative discretion, result in a significant difference in practical consequences? Even under the SJ model, which does not allow for interpretative discre-

5 CANE, *supra* note 4, 218 (emphasis added).
6 CANE, *supra* note 4, 220.
7 CANE, *supra* note 4, 224.
8 CANE, *supra* note 4, 229–230(emphasis added).
9 CANE, *supra* note 4, 235.

tion, the collaboration between the judiciary and the government in the process of implementing statutes may play out differently. I will examine this point in accordance with Japanese Supreme Court judgments and theories of administrative law.

As a premise for this discussion, here is a brief primer on Japanese administrative law. Japan basically belongs to the civil law jurisdictions, and the influence of German law has traditionally been the strongest. Since its modernization in the latter half of the nineteenth century, however, Japan in drafting its legal system has referred to not only German law but to many foreign laws, and hence Japanese law has the character of a "laboratory of comparative law".

In particular, under the post-war constitution of 1946, the American concept of judicial power was introduced,[10] and apart from powers specifically granted by statutes, the courts only deal with "legal disputes",[11] which is similar to the American concept of "cases and controversies". Administrative litigation is also understood to be part of the judicial power stipulated in Art. 76 para. 1 of the Constitution. In principle, such litigation only deals with disputes over the legality of an administrative disposition (corresponding to a *Verwaltungsakt* in German law) and other disputes over concrete rights, duties, or legal relations between the parties[12]. There is no *abstrakte Normenkontrolle* litigation such as in Germany. However, in disputing the legality of an administrative disposition, challenges can be lodged among other things over the constitutionality of the statutory law on which the administrative disposition is based or over the conformity of the delegated regulation (i.e., cabinet order, ministerial ordinance, etc.) with the statutory law.[13]

To avoid misunderstanding, I must add the following: When examining the legality of an administrative disposition, the court in principle has the right to thoroughly examine the administrative agency's fact-finding, meaning its determination of bare facts. The substantial evidence rule applies

10 憲法 *Kenpō* [The Constitution of Japan], 3 December 1946, Art. 76 (1): The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

11 裁判所法 *Saiban-sho-hō* [Court Act], Law No. 59/1947, Art. 3 (1): Courts decide on all legal disputes, except as specifically provided for in the Constitution of Japan, and have other powers that are specifically provided for by law.

12 "Legal disputes" in Art. 3 Court Act (*supra* note 11) are defined as "disputes which relate to the existence of concrete rights and duties or legal relations between the parties and which can be finally settled by the application of law" by the Supreme Court. Supreme Court, 7 April 1981 民集 Minshū 35 (10), 1369 (*https://www.courts.go.jp/app/hanrei_en/detail?id=67*).

13 付随的審査 [*fuzuiteki shinsa*, incidental review].

only in exceptional cases where a statute stipulates it.[14] Even in the case of fact-finding that requires scientific expertise, full review by the court is the rule; deference to fact-finding by administrative agencies is exceptional, such as in cases of predictions about the future (e.g., the risks of nuclear power plants) as opposed to facts that occurred in the past.[15]

II. SEMANTICS OF "STATUTORY INTERPRETATION" – THE DISTINCTION BETWEEN "INTERPRETATION" AND "APPLICATION"

An administrative agency issues licenses to restaurants, orders factories to suspend soot emissions, and determines citizens' social security benefits: in Japan, as mentioned above, these activities (i.e., administrative dispositions), which structure (*keisei*: *gestalten* in German) or confirm (*kakunin*: *feststellen* in German) the rights, obligations, or legal statuses of individuals, are the main targets of judicial control of administrative activities.

Statutory laws (including local government ordinances) program these administrative processes. A statute specifies what legal effects (rights, duties, and legal statuses) an administrative disposition will have as well as the necessary or sufficient conditions for implementing the administrative disposition. When a specific case arises, the administration reviews it under the above conditions (subsumption) and makes a determination. Following the traditions of civil law jurisdictions, Japanese lawyers are trained in the above method of legal analysis, which is called the "legal syllogism". The necessity of the legal syllogism is recognized not only in civil and criminal law but also in administrative law.

However, in some cases the mandate or the meaning of the text of a statute is not clear, and the conditions set forth by the text alone are not sufficient to go through this process of subsumption. If subsumption is to be possible, one must then elaborate and make the rules more detailed. *By "interpretation of the law," I refer to the process of deriving detailed general propositions from the text of the statute by way of legal reasoning* (although I am aware that the expression "legal thinking" cannot avoid the criticism of being magic words). "Interpretation of the law" always takes the form of a *general and abstract proposition*, though with varying degrees of detail.

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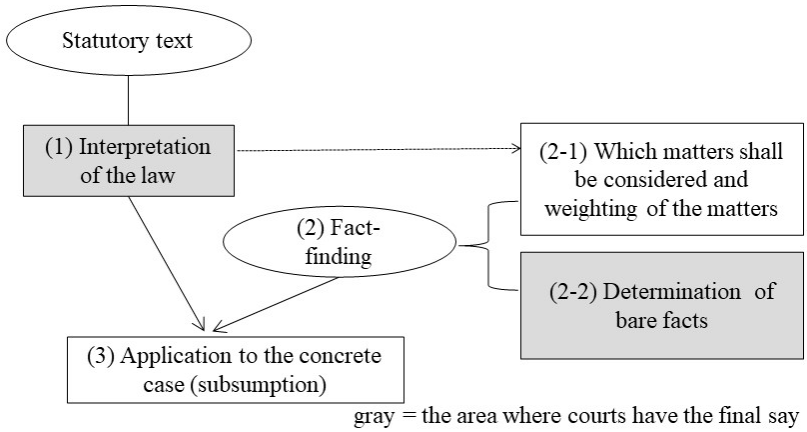
14 E.g. 電波法 *Denpa-hō* [Radio Act], Law No. 131/1950, Art. 99 (1): With respect to litigation under Article 97, the lawful findings of the Radio Regulatory Council are binding on the court when there is substantial evidence to prove that the fact exists.

15 Cf. N. KADOMATSU, Taking "Regulatory Courts" Seriously – A Perspective from Japanese City Planning Law, in: Weaver / Hofmann / Huang / Friedland (eds.), Comparative Perspectives on Administrative Procedure (2017) 213–230, 219–220.

The process of encompassing a concrete case into the legal rules – derived from the text of a statute via the above interpretative process – is then called an "application of the law" (in a narrow sense). Thus, in Japanese legal academia the distinction between *"interpretation of the law = derivation of general propositions"* and *"application of the law = subsumption in individual cases"* is commonplace. And yet the term "application" can be used in two ways: it may refer either to an "application of the law (in a narrow sense)" as described above or to an "interpretation plus application of the law in a narrow sense" (application of the law in a broad sense). Though what I call "interpretation of the law" means engaging in legal thinking to derive any number of general propositions, I must admit that there is no complete consensus on this semantic definition.

The argument of this paper is as follows. (1) As long as the semantics of "interpretation of the law" is limited to the above definition, *the denial of interpretative discretion in Japanese law does not mean that courts have more stringent control over administrative power* than they do in U.S. law, which accepts interpretative discretion. (2) On the other hand, Japanese courts are not necessarily only the servant and mouthpiece of the law but also *cooperate and collaborate with the executive power*. The difference between Japan, which denies interpretative discretion, and the United States, which recognizes it, is not as significant as it apparently seems.



III. ADMINISTRATIVE DISCRETION

1. What Does It Mean Precisely? When Does It Exist?

As in many jurisdictions, the concept of administrative discretion is recognized in Japanese law.

As mentioned above, statutes specify what kind of legal effects (rights and obligations, legal status) an administrative disposition will have, and they specify the necessary and sufficient conditions for making an administrative disposition. Under certain factual circumstances in a given case, the program of such a statute may mandate that the administrative agency has no choice but to take or refrain from taking a particular administrative action *(= Case A)*. In Japan, for example, taxation is understood to fall into this category. As already mentioned, the Japanese judicial power includes the power of fact-finding, so the court will thoroughly examine the legality of the tax levied by the administrative agency and substitute its judgment for that of the administrative agency (判断代置審査 *handan daichi shinsa*, substituted judgment review).

On the other hand, in some cases the "right answer" is not clear from the statute's text as to whether the administrative agency should take a particular administrative action under the specific factual circumstances *(= Case B)*. These cases can be further divided into two categories. In one category, the right answer is not clear from the text of the statute alone. But if we conduct an interpretation of the law (i.e., a "derivation of general propositions through legal thinking"), it clarifies the meaning, and the mandate, of the statute; there is only one right answer (= Case B1). In the other category, not even an interpretation of the law helps us to derive a single right answer through legal thinking (= Case B2*)*. In that case, there is no right answer to be derived from the law. However, the administrative agency is not allowed to make decisions based on arbitrary free will, as private persons do. In line with the administrative responsibility to give effect to the public interest, the administrative agency comprehensively considers various circumstances and makes a judgment as to what should be appropriate (it judges an action's suitability or *Zweckmäßigkeit* in the German legal tradition).

There is no dispute that Case B2 falls under the category of administrative discretion. So when the court examines the administrative decision in such a case, it cannot substitute its own judgment for that of the administrative agency as it could in Case A. The problem is Case B1. Must the court defer to the administrative agency's interpretation of the law in such a case?

Let us state things more precisely: In Case B the administrative agency first interprets a statute to see if there is a right answer. If the agency determines that a right answer exists (= Case B1), it will naturally follow that course. But suppose the agency determines that in this case, no right answer

exists (= Case B2). In that case the agency will render a decision that it believes is most consistent with the public interest; it will decide based not on legal thinking but on a suitability judgment.

In some cases, the administrative agency and the court may interpret the law differently. One such case is when both the administrative agency and the court think they are facing an instance of B1, but each differs in its interpretation of the law; hence, they disagree on the right answer (= Situation α). The second such case is when the administrative agency thinks it is facing an instance of B2, but the court thinks it is an instance of B1 (= Situation β).[16] In these cases, the question arises as to whether the court should defer to the administrative agency's interpretation of the law. In neither case does Japanese law compel the court to defer to the agency; in other words, the determination of whether or not discretion exists (= Situation β) is a legal judgment on which the court has the final say. And the same is true for the determination of the right answer when no discretion exists (= Situation α).

Art. 30 of the Japanese Administrative Case Litigation Act[17] stipulates that

> "The court may revoke an original administrative disposition made by an administrative agency at its discretion 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."

Here, following the classical theory, "exceeding" the scope of discretion and "abuse" of discretion are distinct.[18]

Situation β above instantiates exceeding the scope. Regarding the scope of discretion, the court here can substitute its own legal judgment for that of the administrative agency.[19] On the other hand, if the court and the administrative agency agree that it is an instance of B2, i.e. there is no right answer (= Situation γ), then abuse of discretion becomes an issue. Here, the court does not conduct a substituted judgment review; after giving a certain degree of deference to the administrative decision, it examines instead whether the decision can be evaluated as reasonable. This is expressed in the

16 Relatively rare is a further type of situation in which the administrative agency thinks it is a case of B1, but the court thinks it is a case of B2.

17 行政事件訴訟法 *Gyōsei jiken soshō-hō*, Law No.139/1962.

18 Cf. M. KOBAYAKAWA [小早川光郎], 裁量問題と法律問題 [Discretion Issues and Legal Issues], in: Hōgaku Kyōkai [法学協会, Jurisprudence Association] (ed.), 法学協会百周年記念論文集 第 2 巻 [Essays in Celebration of the 100th Anniversary of the Founding of the Hōgaku Kyōkai] (1983) Vol. 2, 331–360, 335–345.

19 The author has previously used the term "boundary control" and "abuse control" (KADOMATSU, *supra* note 15, 211).

Supreme Court's case law as "whether the decision is significantly unreasonable in light of socially accepted norms".

Therefore, when the Supreme Court conducts a judicial review of administrative discretion, it first determines whether discretion exists and why it should be granted. The Supreme Court judgments contain examples of situations in which administrative discretion exists.[20] This question of the existence of discretion is, as I have said, a legal judgment.

2. Reasonability Review of Administrative Discretion

Currently, courts reviewing administrative discretion employ the following formula whereby they may find discretionary dispositions illegal when they:

(1) lack a critical factual basis (the premise is that the courts can exercise de novo review of factual determinations);
(2) are significantly inappropriate in the light of generally accepted social norms because of:
(2-1) an obviously unreasonable assessment of facts, or
(2-2) a failure in the judgment-making process such as a lack of due consideration of matters to be considered.

Japanese courts do not categorically distinguish "discretion" and "margin of appreciation". According to the classical theory of German administrative law, discretion refers to whether the administrative agency will act when the requirements that the statute stipulates for administrative action are satisfied. A margin of appreciation (*Beurteilungsspielraum*) expresses the fact that the court defers to the judgment of the administrative agency in deciding whether the requirements are satisfied.[21] The Supreme Court

20 For example, the Supreme Court granted administrative discretion in a case of disciplinary action against public officials where deference to the judgment of the supervisor familiar with the situation was necessary (Supreme Court, 20 December 1977, 民集 Minshū 31 (7), 1225); renewal of the period of sojourn for foreigners requiring comprehensive consideration of various circumstances including political and diplomatic factors (Supreme Court, 4 October 1978, 民集 Minshū 32 (7), 1223; *https://www.courts.go.jp/app/hanrei_en/detail?id=56*); licensure of atomic power reactors requiring forecasting and technical expertise (Supreme Court, 29 October 1992, 民集 Minshū 46(7), 1174; *https://www.courts.go.jp/app/hanrei_en/detail?id=1399*); urban planning decision requiring comprehensive consideration of various circumstances (Supreme Court, 2 November 2006, 民集 Minshū 60 (9), 3249; *https://www.courts.go.jp/app/hanrei_en/detail?id=863*).

21 O. BACHOF, Beurteilungsspielraum, Ermessen und unbestimmte Rechtsbegriff im Verwaltungsrecht, Juristenzeitung 1955, 97–102, 98: "Dagegen muß grundlegend unterschieden werden, ob das Gesetz einer Behörde für den Fall des Vorliegens ge-

judgments of 4 October 1978 (renewal of the period of sojourn for foreigners) and 29 October 1992 (permitting of atomic power reactors)[22] are typical examples of the Supreme Court granting discretion[23] on the latter.

a) Matters (not) to be considered

The most important part of this formula is "matters to be considered". The court may identify "matters that must be considered" and "matters that must not be considered" by the administrative agency in conducting its discretionary power. *The identification of these matters is a legal judgment.* For example, the Supreme Court's 7 December 2007 judgment (coast occupancy permission judgment)[24] ruled that the prefectural governor's refusal of an application by a quarry operator, for permission to occupy a public coastal area and there to construct a pier from which to transport rock, was illegal.

According to the court, the background facts (i) that the administrative agency had initially disapproved the quarry operator's business but later had to grant permission as the result of an administrative appeal and (ii) that the agency placed importance on the consent of the local community were "matters that must not be taken into consideration" (but were in fact considered).

On the other hand, the facts (iii) that the quarrying business would be considerably more difficult without the sought occupancy permit and (iv) that such occupancy, if permitted, would not have any particular impact on traffic or the environment were considered to be "matters that must be taken into account" by the agency (but were not).

The Supreme Court stood on the premise that administrative discretion is allowed in granting a permit for the occupation of a public coastal area. In other words, there is no right answer, either in the text of the statute or after giving it an interpretation (= Case B2). *However, the court specified the "matters that must be taken into account" and "matters that must not be taken into account" when granting permission for occupancy. This specifi-*

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setzlich bestimmter Voraussetzungen *Freiheit des Handeln* eingeräumt, oder ob der Behörde ein Spielraum *hinsichtlich der Beurteilung der Voraussetzungen* eben dieses Handelns eingeräumt ist. […] Handelt es sich bei der Handhabung des Handlungsermessens um eine Willensentscheidung, so ist die Beurteilung des Sachverhalts hinsichtlich seiner Subsumierung unter einen gesetzlichen Tatbestand – auch wenn für diese Beurteilung ein gewisser Spielraum bestehen sollte – stets ein Erkenntnisakt." (emphasis in the original).

22 *Supra* note 20.

23 To be precise, the latter judgment does not use the term "discretion".

24 Supreme Court, 7 December 2007, 民集 Minshū 61 (9), 3290; *https://www.courts.go.jp/app/hanrei_en/detail?id=924*.

cation is also an "interpretation of the law". Therefore, under the premise of denial of interpretive discretion, the court has the final say in identifying the matters to be considered.

b) "Weighting" of the matters to be considered – Collaborative judgment between administration and judiciary?

However, there are not many cases in which the mere identification of matters to be considered makes it possible to render a judgment. In the coast occupancy permission judgment, the mere fact that the administrative agency considered "matters that must not be taken into account" or did not consider "matters that must be taken into account" would not immediately lead to the disposition being declared illegal. *The Court comprehensively considered whether the administrative agency's weighting of each issue was appropriate or not*. Only when such weighting is extremely unreasonable is the exercise of discretion considered to be illegal, that is, "extremely unreasonable in light of socially accepted ideas". There is room for debate whether such a comprehensive judgment is proper to a legal judgment. With "weighting" judgments such as this, it is only possible to examine whether they are "obviously unreasonable" upon a certain degree of deference to the administrative agency. In such areas, the administrative agency and the court engage in collaborative decision-making.

And although the court may present a "weighting" judgment such as this one as a general proposition on some occasions, more often the judgment will concern a specific case. Given this paper's definition of "interpretation of the law", which is limited to general propositions, denial of interpretative discretion is consistent with courts collaborating with administrative agencies.

3. Summary

Under the doctrine of denial of interpretative discretion, Japanese courts have the final say in interpreting the law. Therefore, the court can substitute its own judgment for that of the administrative agency, not only in cases where the only right answer is derived from the text of the statute (= Case A) but also in cases where the right answer is derived with the help of an interpretation of the statute (= Case B1). Also, in a case where one cannot find the right answer, neither in the text nor based on an interpretation of the law (= Case B2), the court has the final say on "what matters must be taken into consideration" when an administrative agency exercises discretion; however, in determining how to "weigh" those circumstances, deference to the administrative agency's judgment will be required. One can see this as the courts engaging in collaborative decision-making with administrative agencies.

IV. ADMINISTRATIVE STANDARDS

So far, we have examined whether administrative discretion is granted in an individual administrative disposition and how to review the reasonableness of such discretion. We have also confirmed that in Japan, the court's judgment on these matters is regarded as an "interpretation of the law". From this point on, we will examine the case of an administrative agency establishing general standards rather than making judgments on individual cases.

Japanese law, again following the tradition of German law, distinguishes two types of general abstract standards set forth by the administration. These are "delegated orders" based on a delegation by statute and "internal standards" which are not given through delegation. The provisions of such delegated orders become sources of law and thus bind the courts so long as they do not violate the statute under which they are promulgated. In contrast, internal standards established by administrative agencies without delegation via statute are not sources of law.[25] In the following, I will first examine delegated orders.[26]

1. Delegated Orders

Administrative agencies are entrusted with enacting delegated orders. Not only do they make legal judgments, but in enacting orders they more importantly make professional judgments based on specialized knowledge as well as policy judgments supported by democratic legitimacy (which they have to a certain extent though it is inferior to the legislature's). These professional or policy judgments are non-legal judgments, and delegating such judgments to the administration is consistent with the denial of interpretative discretion.

However, the courts can review the legality of delegated orders in the form of incidental review. Japanese courts have exercised such review by interpreting the law regarding the delegation's "scope" or "purport".

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25 To a certain extent, this distinction is similar to the distinction in American law between legislative rules and interpretive rules.

26 The pre-war Constitution (the Constitution of the Empire of Japan of 1889, 大日本帝國憲法 *Dai-nihon teikoku kenpō*) recognized independent orders that had an independent constitutional basis apart from statutes, but the Constitution of Japan does not. The current Constitution reserves binding legal rules concerning the rights and duties of citizens to the Diet statutes or local ordinances (Art. 41). The general understanding is that the constitutional basis for the possibility of delegated orders is found in Art. 73 Item 6 of the Constitution.

a) Prison Act Judgment – "Matters to be considered" in enacting a delegated order

For example, the Supreme Court judgment of 9 July 1991[27] ruled that a Ministry of Justice ordinance delegated by the Prison Act was illegal and invalid. The ordinance, as a general rule, did not allow prisoners, whether convicts or pre-sentence detainees, to have an interview with persons under fourteen years of age. According to the judgment, it went beyond the scope of the statutory delegation to enact an ordinance that uniformly did not allow pre-sentence detainees to have interviews with juveniles.

In interpreting the Prison Act, the court limited the "matters to be considered" when enacting a ministerial order to (a) the possibility of escape or destruction of evidence and (b) the maintenance of discipline and order in prison.[28] It then ruled that a delegation order that considered other grounds for action was illegal. Although this is a form of review based on the "purport and scope of the delegation", it has the same structure as review based on "matters to be considered" when reviewing discretionary disposition.[29]

b) "Sword" judgment – Who is in charge of a semantic question?

Next, I will discuss another case concerning the legality of a delegated order. At issue in this judgment was the definition of "sword".

In Japan, possession of firearms and swords is strictly regulated by the Firearms and Sword Possession Control Act (hereafter "FSPCA").[30] In principle, no one may possess firearms or swords unless specially authorized to use them for hunting, fishing, competitions, rituals, theatrical performances, etc. However, antique firearms such as flintlock guns, which are valuable as works of art or antiques, and swords, which are valuable as works of art, may be possessed upon application by the owner and registration with the prefectural board of education. The FSPCA has consigned the details necessary for registration to the Firearms and Swords Registration Ordinance, a ministerial order that limits registration to "Japanese swords".

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27 Supreme Court, 9 July 1991, 民集 Minshū 45 (6), 1049; *https://www.courts.go.jp/app/hanrei_en/detail?id=1542*. The plaintiff of this case claimed tort liability against the state, and the suit thus satisfied the "legal dispute" requirement.

28 This interpretation of the law is based on the Court's understanding of the Constitution that "once outside the restrictions associated with his/her confinement, a detainee is, as a matter of principle, guaranteed freedom as an ordinary citizen".

29 T. NAKAGAWA [中川丈久], 行政法解釈の方法 [Methods of Interpretation in Administrative Law], in: Yamamoto [山本] / Nakagawa [中川] (eds.), 法解釈の方法論 [Legal Interpretation] (2021) 65–123, 83.

30 銃砲刀剣類所持等取締法 *Jūhō tōken-rui shoji-tō torishimari-hō*, Law No. 6/1958.

In this case, the owner of a saber purchased in Spain applied for registration to the Tōkyō Metropolitan Board of Education, which refused to register the saber on the grounds that it did not fall under the category of "Japanese swords". The owner filed a lawsuit seeking rescission of the refusal. The issue here was whether the ministerial ordinance limiting registration to "Japanese swords" was contrary to the purport of the delegation.

The Supreme Court's judgment of 1 February 1990[31] ruled that the ordinance did not go beyond the purport of the delegation and hence was not invalid.

According to the judgment, the FSPCA requires that registration be made based on an appraisal by registration screening board members with expert knowledge and experience, because expert study is necessary in order to define the scope of "swords" as items appropriate for registration as having cultural property value in Japan. At the same time, the FSPCA delegates an ordinance to set appraisal standards based on the idea that setting such standards is, in itself, within the domain of expertise.

> "Consequently, it is reasonable to consider that the competent administrative authority is granted a *certain scope of discretion from an expert perspective* to define the standards for such appraisal under the Ordinance,[32] as long as such discretion does not go beyond the bounds of the purpose of delegation by the Act". (emphasis added)

Now the Court examines whether the limitation to "Japanese swords" exceeds the bounds of the purport of delegation by the FSPCA:

> "In light of the aforementioned purpose of the Act which pays attention to the cultural property value of swords and opens up the way for their registration, even in the process of deciding what kind of swords are valuable as works of art and eligible for registration, consideration must be given to the cultural property value that the swords in question have in Japan.
>
> […]
>
> The Ordinance provides, as the appraisal standards for swords with cultural property value, that an appraisal is to be made only with regard to Japanese swords that have cultural property value as works of art as explained above, while limiting the scope of subjects eligible to be registered as having such value in Japan only to those that comply with these standards, and this provision should be deemed to have set the appraisal standards that are reasonable in line with the purpose of Article 14, paragraph (1) of the Act."

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31 Supreme Court, 1 February 1990, 民集 Minshū 44 (2), 369. *https://www.courts.go.jp/app/hanrei_en/detail?id=1654*

32 For the sake of consistency, I made a minor change from the translation by the Supreme Court website (*https://www.courts.go.jp/*) from "Regulation" to "Ordinance" as the translation of "規則".

We can better understand the meaning of the above majority opinion of the Court by comparing it on one hand with the dissenting opinion and on the other hand with the judgment of the Court of Appeals.

The dissenting opinion of two Justices employs a strictly literal interpretation of the law:[33]

"Literally, the term 'swords' referred to in Article 14, paragraph (1) of the Act is interpreted as including foreign swords (see Article 2, paragraph (2) of the Act). *It is reasonable to consider that the purpose of the registration system prescribed in Article 14, paragraph (1) of the Act is to promote the preservation and utilization of swords which have value as works of art and exist in Japan, by treating them as cultural properties in Japan, without distinguishing between Japanese swords and foreign swords*. This means that *the Act acknowledges that there may be foreign swords that have value as works of art*, and hence, the Act requires that in the process of establishing the Ordinance based on the delegation under paragraph (5) of the same Article, the matters set forth in the same paragraph should be prescribed both for Japanese swords and foreign swords. It is hard to imagine that the Act expects or allows the Regulation to exclude foreign swords from the scope of subjects eligible to be registered." *(emphasis added)*

In addition, the dissenting opinion leaves "basic matters" that belong to a "policy decision" to the Diet and not to the administration:

"To put it differently, in the first place, *basic matters of the registration system such as the scope of subjects eligible to be registered must be prescribed by the Act*, and it is unlikely that the Act may delegate the Ordinance to decide anything that would result in modifying the basic matters of the registration system, such as limiting the scope of subjects eligible to be registered only to Japanese swords, without indicating any guidelines. In addition, a decision to limit the scope of subjects eligible to be registered only to Japanese swords and exclude foreign swords from this scope even if they have value as works of art should be regarded as a *policy decision*, and we consider that it is inappropriate to understand that the Act delegates the Ordinance to make such a decision." *(emphasis added)*

On the contrary, the judgments of the first and second instances held that "swords" in the FSPCA are limited to Japanese swords, as follows:

"Taking into consideration the history of the establishment and operation of the registration system, the existence of Article 3, Paragraph 1, Item 10 of the FSPCA and the production approval ordinances based on it, and the purpose of the provisions of the Act for the Protection of Cultural Properties, the FSPCA was intended to give special protection to Japanese swords as cultural properties through the two systems of registration and production approval. […] It is reasonable to assume that the swords that are protected as 'valuable as works of art' under Article 14(1) of the FSPCA mean 'Japanese swords' that have been made using traditional Japanese techniques and that should be protected as cultural assets."

33 See NAKAGAWA, *supra* note 29, 103.

In contrast to these earlier judgments, the majority opinion of the Court understands that the purport of the FSPCA's delegation of the appraisal standards to the ordinance is to leave it to the minister's expert technical judgment. The delegation includes the decision whether to include Western swords or limit it to Japanese swords.[34]

In this case, the first- and second-instance judgments, the dissenting opinion of the Supreme Court, and the majority opinion of the Court have all given different interpretations of the meaning of "sword" in the FSPCA: "[t]he Act limits the term to Japanese swords" (Interpretation A); "[t]he Act includes both Japanese and Western swords" (Interpretation B); and "[t]he Act delegates to the administrative agency whether the term includes both Japanese and Western swords or only Japanese swords" (Interpretation C).

Apart from the implausible interpretation of "limited to Western swords", all the logically possible interpretative options are represented here. *To resolve this case, the court must provide the "right answer" as to which interpretations should be adopted. The court does so by way of legal thinking, and it is obliged to answer and is not permitted to refrain from it. Nor is the court to defer to the views of the administrative agency on this question*. This is what the "denial of interpretative discretion" means in Japanese law. We should also note that the *"denial of interpretative discretion" does not preclude a position such as Interpretation C above,* which gives room to administrative discretion in enacting orders.

CANE's book, cited at the beginning of this paper, states the following:

> "England and Australia are, in a strong sense, rule-of-law states. The first question, it will be recalled, concerns the identity of the supreme interpreter. *Coupled with the related doctrine that there is only one correct answer to any question of law, the highest court's function as supreme interpreter explains why courts must not defer to administrative interpretations.* Under US law, by contrast, there is no single supreme interpreter of statutes and regulations. The power to interpret is shared, at least between the judiciary and the executive. This explains why US courts are required to defer to administrative interpretations."[35]

So far as the above type of legal question is presented – "which of the interpretations A~C is correct?" – Japanese law, as well as that of England and Australia, take the position that the supreme interpreter is the highest court; there is only one "right answer" to the above legal question. *The highest court does not defer to administrative interpretation. However, this*

34 However, given that the court's opinion also provides a history of the enactment of the FSPCA, and given that its operation was limited to Japanese swords, it cannot be denied that the Court thought that limiting it to Japanese swords is a more reasonable interpretation.

35 CANE, *supra* note 4, 235 (emphasis added).

is not inconsistent with allowing administrative discretion in enacting delegated orders and issuing individual administrative dispositions.

2. Administrative Internal Standards

As mentioned above, in addition to delegated orders the administration sets forth internal standards that are not delegated by law and are in the nature of abstract and general propositions. Without a statutory delegation, such internal standards are not a source of law, but they are often indispensable for the stable operation of administrative activities.

a) Interpretive standards and discretionary standards

Internal administrative standards can be divided into interpretive standards (解釈基準 *kaishaku kijun*) and discretionary standards (裁量基準 *sairyō kijun*) in light of their contents. Interpretative standards indicate the administrative agency's interpretation of a statute or a local ordinance while discretionary standards indicate the standards for the exercise of discretion by the administrative agency where administrative discretion is granted.

When these internal standards are contested in a lawsuit,

> "as for interpretative standards, the question is whether the interpretation given therein is correct or not, and if the court determines that it is incorrect, the interpretation that the court considers correct shall be applied to the case. In contrast, concerning discretionary standards, the court should make a judgment in two steps: […] the reasonableness of the discretionary standard and the reasonableness of its application to the case".[36]

The principle of denial of interpretative discretion is also adhered to here.

b) Minamata disease certification judgment

An example of the conflict between the internal standards set by administrative agencies and interpretation of the law is the Supreme Court's judgment of 16 April 2013[37] concerning the administrative certification of Minamata disease.

Minamata disease is one of the "four major pollution diseases" that occurred during the period of Japan's rapid economic growth. It is "an en-

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36 S. NAKAHARA [中原茂樹], 基本行政法 [Basics of Administrative Law] (3rd ed., 2018) 160. NAKAHARA limits an interpretative standard to "cases where discretion is not recognized for the relevant administrative disposition," but my understanding is different. There may be cases when the administration sets a standard that stipulates the matters (not) to be considered (see III.2.a)). If such a standard is derived as an interpretation of the statute, the standard is an interpretative standard.

37 Supreme Court, 16 April 2013, 民集 Minshū 67 (4), 1115; *https://www.courts.go.jp/app/hanrei_en/detail?id=1196.*

cephalopathy and peripheral neuropathy caused by daily intake of fish and shellfish highly contaminated by methylmercury. Through gills and gastro-intestinal tracts, fishery products such as fish, shrimp, crabs, and shellfish take in methylmercury discharged from chemical plants into rivers and seas. [Carnivorous] fish that eat those contaminated fish also accumulate the toxic substance (food web). Thus accumulated methylmercury in sea-food [poisons] people who have eaten a lot of such seafood daily".[38]

Minamata disease was discovered in 1956, but it was not until 1968 that the government's unified view was confirmed that the cause of the disease was methylmercury compounds emitted from the Chisso Minamata factory. To this day, lawsuits concerning the disease continue.

One of the key issues in the lawsuits is whether the plaintiff actually has Minamata disease. When the disease first emerged, attention focused on patients with acute symptoms. However, there are also chronic and mild cases of methylmercury poisoning. The question of whether or not these cases belong to Minamata disease has been raised in civil and administrative lawsuits.

The main issue in administrative lawsuits is administrative certification under the Pollution Health Damage Compensation Act (1974)[39] (hereafter, "PHDCA") and its predecessor, the Act on Special Measures for the Relief of Health Damage Caused by Pollution (1969)[40] (hereinafter the "Relief Act"). The initial criteria for administrative certification (1971) were relatively loose; the Environment Agency tightened them in 1977. According to the new criteria (hereinafter the "1977 Standards for Determination"), only cases with "multiple" symptoms were to be certified in principle as Minamata disease.

The plaintiff in the above judgment applied for certification of Minamata disease based on the PHDCA in 1978, but in 1980 the prefectural governor dismissed the application. In response, the plaintiff filed a request for administrative review, but in 2007 this application too was dismissed,[41] so the plaintiff filed an administrative lawsuit seeking revocation of the dismissal and mandating certification.

The appellate court, Ōsaka High Court, took the following approach:[42]

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38 *http://nimd.env.go.jp/archives/tenji/a_corner/a01.html*.

39 公害健康被害の補償等に関する法律 *Kōgai kenkō higai no hoshō-to ni kansuru hōritsu*, Law No. 111/1973.

40 公害に係る健康被害の救済に関する特別措置法 *Kōgai ni kakaru kenkō higai no kyūsai ni kansuru tokubetsu sochi-hō*, Law No. 90/1969 (abolished in 1973).

41 The fact that it took such an unbelievably long time from the filing of the review to the dismissal is also due to circumstances unique to Minamata disease; but we will omit that here.

42 Ōsaka High Court, 12 April 2012, 訟務月報 Shōmu Geppō 59(2), 119.

"A judicial review and determination in the suit to seek revocation of the Disposition should be made from the perspective of whether or not there was something unreasonable with the determination made by the governor of Kumamoto Prefecture on the basis of the medical, scientific and technical research, deliberation and determination conducted by the Kumamoto Prefecture Council for Certification of Pollution-related Health Damage. The governor's determination should be deemed to be unreasonable and the Disposition should therefore be judged to be illegal if, in light of the latest level of medical knowledge, there is something unreasonable with the 1977 Standards for Determination, which were applied as the specific examination standards when conducting the abovementioned research and deliberation, or there was any error or omission that must not be overlooked in the process of research, deliberation or determination conducted by said Council, in which the Council concluded that the claim for certification failed to meet the 1977 Standards for Determination, and it is found that the governor's determination was made on the basis of said Council's determination."

In other words, based on the premise that discretion was to be granted, the court understood the 1977 Standards for Determination as a discretionary standard. It adopted the method of judicial review described above (IV.2.a)) for when the discretionary standard is in question: review of the reasonableness of both the standard and its application to the case.[43]

On the other hand, the Supreme Court understood the meaning of "Minamata disease" in the PHDCA as follows:[44]

(1) "The PHDCA etc.[45] do not contain any particular provision defining what kind of disease Minamata disease is. " […] (In light of the social awareness of Minamata disease at the time of the legislation and the documents referred to by the legislator) "it is appropriate to construe that Minamata disease, as set forth in the PHDCA etc., refers to a *nervous system disease caused by oral intake of methylmercury accumulated in fish and shellfish*. There are no such circumstances suggesting that the PHDCA etc. defined Minamata disease as a disease that is different from Minamata disease that existed as an *objective phenomenon* with such pathogenic mechanism that was actually observed."

(2) "Even through the general review of the legislative history and provisions of the PHDCA etc., we cannot find any proper legal grounds for interpreting particularly narrowly the definition of Minamata disease as prescribed in these laws and regulations and the subject matter of review by the administrative agency concerned in terms of whether or not the claimant is afflicted with this disease, compared with the interpretation of Minamata disease as an objective phenomenon and the objective fact as to whether or not the claimant is afflicted with this disease as mentioned […] above".

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43 The appellate court adopted the framework of the Supreme Court judgment of 29 October 1992 (*supra* note 20) concerning atomic reactors.

44 Supreme Court, 16 April 2013, *supra* note 37 (emphasis added).

45 The judgement uses the term "the PHDCA etc." to include the PHDCA, the Relief Act, and the by-laws of both.

Thus, after mentioning the public perception at the time of the legislation, the perception of the legislators, and the structure of the PHDCA,[46] the Supreme Court held that Minamata disease in the PHDCA refers to "nervous system diseases caused by oral intake of methylmercury" as an "objective phenomenon" and that there is no reason to understand the Act as having any limitation. In addition, the Court considered that neither the administrative practices after the enactment of the Act nor the laws enacted thereafter would change the interpretation of the PHDCA described above.[47]

Based on the above interpretation of Minamata disease under the PHDCA, the Supreme Court denied discretion in the administrative certification. Instead of examining the reasonableness of the discretionary standard and the reasonableness of its application to the case, the Court held that a substituted judgment review should be conducted.

"When issuing certification as a disease designated under the PHDCA etc., the prefectural governor is to determine whether or not the claimed disease has been caused by the influence of the air pollution or water contamination in the designated area, while hearing opinions from the Council for Certification of Pollution-related Health Damage or the Council for Certification of Pollution Victims. In this case, the governor needs to make a comprehensive examination as to whether or not the claimed disease has been caused by the influence of the air pollution or water contamination, *while giving full consideration not only to medical judgments on each patient's conditions, etc. but also to the patient's experience of being exposed to the causative substance, as well as various epidemiological information and research results*. This also applies to the process of issuing certification as a Minamata disease patient under the PHDCA etc., in which the governor is required to make an examination from a multilateral and comprehensive perspective as necessary.

Issuing the abovementioned certification is itself an action of *confirming the objective fact*, as mentioned […] above, which is presently or was previously definite as to whether or not the claimant is afflicted with Minamata disease as an objective phenomenon, and *it is inappropriate to leave it to the discretion of the administrative agency concerned* to make a determination on this point due to its nature. […] *(J)udicial review and determination should be made through the approach wherein the court makes a comprehensive examination of the circumstances concerned and the relevant evidence*

46 Although a detailed explanation is omitted from this paper, the Supreme Court also emphasizes the distinction between "(i) non-specific diseases whose causative contaminant has not yet been proved, such as chronic bronchitis and bronchial asthma", and "(ii) specific diseases which have a specific relationship with the causative contaminant thereof and are therefore considered to be unlikely to occur without such contaminant, such as Minamata disease and Itai-Itai disease" in the PHDCA.

47 "[T]he meanings of the system and provisions of the PHDCA etc. would not be changed by any administrative measures implemented after the enactment of these laws and regulations, nor can anything that would change the meanings of the system and provisions of the PHDCA etc. be found in the provisions of the abovementioned Special Measures Act."

on a case-by-case basis and in light of the rule of thumb, and reviews matters such as whether or not there is any individual causal relationship between individual specific symptoms and the causative substance, thereby making an individual and specific determination as to whether or not the claimant is afflicted with Minamata disease."[48]

c) HARASHIMA's criticism[49]

The majority of administrative law scholars are probably amenable to the Supreme Court's understanding of the proper interpretation of "Minamata disease" under the PHDCA and its rejection of administrative discretion in certification. Professor Yoshinari HARASHIMA, however, has developed a forceful criticism of it.[50]

AS HARASHIMA argues, "[a]ccording to the legislative history, the Relief Act was drafted as a social security system to take stopgap measures in response to the pollution damage. This point is different from the PHDCA, which relates to civil liability. The judgment (of the Fukuoka High Court) seems to aim at a broader relief based on the Relief Act because of the legislative history. However, if one needs to 'comprehensively examine the applicant's specific circumstances' as this judgment does, the prompt relief may be hampered. Moreover, if the causal relationship will be examined using epidemiological conditions, there will be the same difficulty as in pursuing the civil liability of the causal agent."[51]

Administrative agencies take the position that (1) to realize prompt relief, the administrative certification of Minamata disease under the Relief

48 Supreme Court, 16 April 2013, *supra* note 37 (emphasis added).

49 The following comment overlaps with the author's article N. KADOMATSU [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 [Memorandum on the Distinction Between Legal Interpretation and Application in Administrative Law], in: Uga [宇賀] / Kōketsu [交告] (eds.), 現代行政法の構造と展開 [Structure and Development of Modern Administrative Law] (2016) 383–400, 397–399.

50 Y. HARASHIMA [原島良成], 公害健康被害救済法制における指定疾病（水俣病）の認定が義務付けられた事例 [Comments on a Judgment that Mandates the Certification as the Designated Disease (Minamata Disease) in the Relief Act], 新・判例解説 Watch, Shin-Hanrei Kaisetsu Watch 11 (2012) 301–304 (hereafter HARASHIMA 2012); Y. HARASHIMA, 公害健康被害救済法制における指定疾病（水俣病）認定の司法審査 [Judicial Review of the Certification as the Designated Disease (Minamata Disease) in the Relief Act], 新・判例解説 Watch, Shin-Hanrei Kaisetsu Watch 14 (2014) 321–324 (hereafter HARASHIMA 2014). To be precise, HARASHIMA's criticism is not directed against the above-cited Supreme Court Judgment but instead against a Supreme Court judgment issued on the same day with almost the identical content (HARASHIMA 2014) and against the judgment of the appellate court (the Fukuoka High Court) (HARASHIMA 2012). In addition, the judgments concern not the PHDCA but the Relief Act.

51 HARASHIMA 2012, *supra* note 50, 304.

Act (and under the PHDCA) should be based on medically clear and objective criteria; and (2) administrative and legislative remedies other than the Relief Act and the PHDCA are to be provided to victims of methylmercury poisoning who do not meet the criteria. HARASHIMA shows understanding to this position taken by the agencies. I do not agree with HARASHIMA on this point, but his argument indeed has a certain persuasiveness.

This paper will not examine whether the Supreme Court's interpretation or HARASHIMA's interpretation is more appropriate. Instead, it is interested in HARASHIMA's reasoning, whereby he refers to *Chevron* deference, which is exceptional in Japanese discourse.

According to him:

> "It may be possible to interpret the Remedy Act in a way that encompasses all methylmercury poisoning as a target of remedies, as this judgment does. However, the administrative interpretation of the Remedy Act is not in clear conflict with the text of the Act or its legislative history. The content of the interpretation also has a certain amount of reasonableness. In this case, I would argue that we should not dare to exclude the administrative interpretation and let the court's interpretation prevail. Doing so could undermine the administration's professional and broad perspective on how it implements the Act. It could undermine the allocation of political responsibility between the executive and legislative branches built into the Act."[52]

In a footnote, HARASHIMA cites a Japanese article that analyzes *Chevron* deference in U.S. case law.[53]

To put it simply, the issue here is as follows: Does the concept of Minamata disease in the Acts mandate that all methylmercury-derived neurological diseases should be covered (interpretation A)? Or, for reasons such as prompt relief, can the administrative agency limit the scope of the definition of the disease under the Act to those cases that can be judged by uniform conditions based on medical knowledge, rather than having it cover all methylmercury-derived neurological disease (interpretation B)?

Needless to say, interpretation B can only be established on the premise of negation of interpretation A, which commands that "all methylmercury-derived neurological diseases" be covered. *These two interpretations are incompatible with each other.* However, if we were to apply *Chevron* doctrine literally here and compel the court to give deference *because the administration has adopted interpretation B*, it would mean that when the administration adopts one of two mutually incompatible interpretive propositions, the court should defer to the administration unless one of the interpretations is evidently correct. *Given the basic premise of Japanese law that denies interpretive discretion, such a position would be untenable*.

52 HARASHIMA 2012, *supra* note 50, 304.

53 HARASHIMA 2012, *supra* note 50, 304, note 3.

Therefore, it must be the responsibility of the courts to decide whether interpretation A or B should be adopted as the "right answer".

One question to be distinguished from the above is what kind of interpretative methodology the court should adopt in order to derive such a "right answer". The Supreme Court judgment drew its conclusion by referring to the social understanding of "Minamata disease" and to the materials consulted by the legislator when it enacted the relief. Naturally, the adequateness of such a methodology should be discussed. There may also be room to object to the idea that administrative procedures after the enactment of the law and any subsequent legislation should not be considered.

And there is another, related question. Interpretation A above does not allow the administrative agency room to formulate policy on Minamata disease while interpretation B does. *Under what conditions should the court adopt the latter interpretation, which gives the administration more room to act? This is not a literal understanding of* Chevron *deference, which means: "the administration has taken interpretation B, so we should defer to it". Rather, it is a question of considering the text and structure of the statute, the nature of the matters governed by the law, and the principle of separation of powers.*

The *Sword* judgment discussed above (IV.1.b)) involved a conflict between one interpretation, that "the statute includes both Japanese and Western swords" and another, that "the statute delegates to the administrative agency whether to include both Japanese and Western swords or only Japanese swords". The structure of this issue is the same.[54]

Let us restate the question: When is it the court's responsibility to interpret a statute in a way that gives the executive more latitude? The answer may not be so different from the kind of deference to an agency's interpretation in *Chevron*. The denial of interpretative discretion in Japanese law makes it impossible to adopt *Chevron* deference literally; but substantial similar issues are often the subject of legal debate. It is possible to hold open an appropriate forum for discussion even while maintaining (i) the semantics of "interpretation = general proposition" as premised on the legal syllogism and (ii) the traditional doctrine of denying interpretative discretion.

V. CONCLUSION

Japanese law gives the courts final authority over the interpretation of statutes and denies interpretative discretion. However, this is not inconsistent

54 However, the potential reasons for giving the administration more leeway differed. In the *Minamata disease* case, it was a policy judgment; in the *Sword* case, it was expert knowledge.

with deferring to administrative judgments in some instances. If the meaning of "interpretation of the law" is limited to formulating general propositions (II.), giving the courts the final authority on this does not contradict the existence of administrative discretion regarding individual cases. However, whether the statute recognizes administrative discretion is still an interpretation of the law (III.1.). If administrative discretion is granted, the court and the administrative agency will work together in controlling whether the discretion was reasonably exercised or not. The court may specify the "matters to be considered" in the discretion, which is also "interpretation of the law". However, it is rarely possible to determine whether the exercise of discretion was reasonable only by identifying the matters to be considered. In many cases, it is necessary to consider the weighting given to each matter. In this way, the administrative agency and the court will collaborate (III.2.).

Even for administrative standards as general propositions set by the administration, the denial of interpretative discretion is not inconsistent with deference to the administration. First, for binding delegated orders, there are cases where the law authorizes the administration to set standards based on policy decisions or professional expertise. Since such standard setting is not a legal judgment, delegating it to the administration is not inconsistent with the denial of interpretative discretion. However, understanding the statute's scope and purport of delegation is a legal judgment. The court has the final authority for such interpretation. The court must choose between a narrow or broad interpretation of the room for administrative actions (IV.1.). Even for non-binding internal standards, the choice between interpretations that allow discretion to the administration and those that do not is problematic (IV.2.).

The denial of interpretive discretion in Japanese law and *Chevron* deference in American law (which literally presupposes interpretative discretion) are formally opposed to each other. However, according to our considerations so far, there is no substantial difference between the two doctrines. Thus the true question should be: when is it appropriate for courts to adopt an interpretation that gives the executive wide latitude to act? Then the two doctrines become mutually compatible (IV.2.).

Another notable difference between Japanese and American law is that in Japanese law, fact-finding is understood as one of the essential components of judicial power, and the use of the substantial evidence rule is minimal. The denial of interpretive discretion and the court's fact-finding authority need to be discussed in relation to each other. Such a discussion requires the performance another difficult task: that of comparing the two in light of the distinction between questions of law and questions of fact.

SUMMARY

*It is a common understanding in Japanese law that administrative agencies have no discretion in statutory interpretation (the denial of interpretative discretion). On the other hand, U.S. case law (*Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*) states that courts must defer to an administrative agency's permissible interpretations of a statute unless the intent of Congress is sufficiently clear. The two doctrines are seemingly incompatible.*

This paper starts from the premise that the semantic meaning of "interpretation of the law" should be limited to formulating abstract and general propositions. It then analyses the semantics of administrative discretion from that perspective and examines Japanese Supreme Court judgments concerning administrative standards and discretion in administrative dispositions. It turns out that there may be no substantial difference between denying versus recognizing interpretative discretion. Instead, the true question should be, when is it appropriate for the courts to adopt an interpretation that gives the executive wide latitude to act?

ZUSAMMENFASSUNG

*Im japanischen Recht gilt der Grundsatz, dass die Behörden kein Ermessen bezüglich der Auslegung von Gesetzen haben, sondern dass dies allein den Gerichten zusteht. Im Gegensatz dazu geht das US-amerikanische Fallrecht (*Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*) davon aus, dass die Gerichte an zulässige Auslegungen von Gesetzesvorschriften durch die Verwaltung gebunden sind, wenn und soweit kein eindeutiger Wille des Gesetzgebers erkennbar ist. Diese beiden konzeptionellen Ansätze erscheinen als unvereinbar miteinander.*

Der Beitrag formuliert zunächst einmal den Grundsatz, dass die sprachliche Interpretation des Begriffs „Gesetzesauslegung" auf die Formulierung von abstrakten und allgemeingültigen Feststellungen beschränkt werden sollte. Darauf aufbauend setzt er sich sodann mit dem Begriff des Verwaltungsermessens auseinander und analysiert verschiedene Entscheidungen des Obersten Gerichtshofes, in denen es um verwaltungsrechtliche Standards und Ermessensspielräume in Verwaltungsanordnungen geht. Dabei zeigt sich, dass möglicherweise gar kein wesentlicher Unterschied zwischen Anerkennung und Verneinung eines normbezogenen Auslegungsermessens für die Verwaltung besteht. Vielmehr ist die eigentlich relevante Frage, wann es für die Gerichte zulässig ist, der Verwaltung im Wege der Gesetzesauslegung einen weiten Ermessensspielraum für ihr Handeln einzuräumen.

(Die Redaktion)