

System Change?

A New Perspective on Japan's Administrative Procedure Law

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Abstract: Japan's Administrative Procedures Law was passed in 1993 with much fanfare, but has not constituted a fundamental change in the system of Japanese postwar governance. This paper considers different theoretical approaches to understanding the passage of the Law, and draws loosely on systems theory to argue that the law constituted a response by the system to threats of external interference in closed patterns of communication.

*If your time to die has come
and you die – very well!
If your time to die has come
and you don't – all the better!*

Zen Monk Sengai Gibon (1750-1837)¹

*They stab it with their steely knives,
but they just can't kill the beast.*

The Eagles (1970-82)²

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1 Y. HOFFMAN (ed.), *Japanese Death Poems* 74 (1986).

I. INTRODUCTION

In 1993, after 38 years of continuous rule, Japan's Liberal Democratic Party (LDP) lost elections for the lower house of parliament.³ The new reformist Prime Minister, *Morihiro Hosokawa*, announced in his initial speech to the Diet his intention to break up the "iron triangle" of postwar politics, made up of the LDP, big business, and the elite national bureaucracy.⁴ In a matter of months after *Hosokawa's* speech, the Diet passed an Administrative Procedure Law (APL) that had been on the drawing board for decades.⁵ This attempt to limit bureaucratic discretion, along with electoral reform, was the very centerpiece of the new government's efforts.⁶

The iron triangle had by all accounts presided over an extraordinarily successful, indeed unprecedented, period of rapid industrial growth.⁷ But as growth slowed in the late 1980s, the system of Japanese capitalism began to show strains, culminating in the fall of the LDP in 1993.⁸ The economic slump has continued unabated since then.⁹ Unfortunately for the reformers, the system has proved more resilient than expected. Within a year, the LDP was again part of the governing coalition as the largest party in parliament.¹⁰ In early 1996, LDP stalwart *Ryutaro Hashimoto* was named Prime Minister, and the LDP has continued to govern since then.¹¹ And although there have been movements toward deregulation and administrative reform, it is unclear how much real progress has been made. Like General *MacArthur*, who won the Korean War but refused

2 "Hotel California" (1976).

3 G. NOBLE, Japan in 1993: Humpty-Dumpty had a Great Fall: 34 Asian Survey 19 (1994).

4 See JEI Report No. 33A, September 3, 1993, at 12. See also M. TSURU, Politics in Japan (1986). Iron triangles refers to government-special interest configurations that exclude others from the policy process. See *e.g.* R. VERNON ET AL., Iron Triangles and Revolving Doors (1991).

5 *Gyōsei tetsuzuki-hō* Law No. 88/1993. For a history of attempts to formulate and pass the administrative procedures law, see L. KÖDDERITZSCH, Japan's New Administrative Procedures Law: Reasons for its Enactment and Likely Implications: 24 Law in Japan 105, 1991 (1994).

6 NOBLE (*supra* note 3) at 22. Along with electoral reform targeting the LDP and the Administrative Procedure Law targeting the bureaucrats, changes in commercial law sought to improve transparency in corporate governance, *id.* Thus all three "legs" of the iron triangle came under pressure.

7 See virtually any book on modern Japan for an account of this process, though the precise role of each of the elements of the iron triangle is the subject of great controversy. See *e.g.* C. JOHNSON, MITI and the Japanese Miracle (1982) [hereinafter JOHNSON, MITI]; JOHNSON/TYSON/ZYSMAN (eds.), Politics and Productivity (1989); K. YAMAMURA/Y. YASUDA (eds.), Political Economy of Japan (1987).

8 The phrase comes from JOHNSON, MITI; see also C. JOHNSON, The Capitalist Developmental State (1995).

9 S. WU DUNN, Japan's Economic Report Card: New York Times, 1/24/97 at A1.

10 M. BLAKER, Japan in 1994: 35 Asian Survey 1, 2 (1995).

11 See New York Times, January 10, 1996, at A8.

to retire, the postwar system of Japanese capitalism has outlived its purpose but resisted attempts to subdue and control it.¹²

Why did the Administrative Procedures Law, so widely anticipated, fail to constrain the bureaucracy? This paper analyzes Japan's APL in light of theories of bureaucratic behavior. It argues that systemic resistance minimized the real impact of the Law and preserved a system of "relational administration" in which the ministries play a crucial role. It uses a systems approach to complement the usual types of explanation prevalent in studies of Japanese governance and economy.

Part I begins with a description of various different approaches to the study of public bureaucracies. Part II describes the Japanese bureaucracy and its position in the political system. Part III describes the new APL statute, discussing its crucial omissions as well as its new requirements. It presents some evidence for how the law has worked in practice since coming into effect in late 1994, and speculates on the likelihood and attractiveness of judicial review of administrative action. Part IV returns to theory and concludes with speculations on the future of Japanese administrative law in its broader political context.

II. THEORIES OF BUREAUCRACY

My purpose in this section is to consider various competing theoretical approaches to the study of bureaucracies. Theories can help us understand the facts of particular cases. I start out the outset not committed to a particular approach; rather, "(n)o single ready made theoretical model can provide all the tools necessary to explain the cases I am interested in, but an eclectic combination offers enough leverage to make a start."¹³ The test of a theory comes in its ability to provide a coherent explanation of the facts in particular cases.¹⁴

1. Rationalism

Scholars seeking to understand bureaucratic behavior have used a number of theoretical approaches. For *Max Weber*, bureaucracies were the quintessential expression of rational-legal mode of authority, in contrast with traditional patrimonial social relations.¹⁵ Bureaucracies have a number of characteristics including a fixed division of labor,

12 See generally M. MATLOFF (ed.), *American Military History* 564 (1973).

13 P. EVANS in: *The Role of Theory in Comparative Politics: A Symposium*: 48 *World Politics* 1, 5 (1995).

14 M. HOLLIS, *The Philosophy of Science: An Introduction* 1 (1994); see also J.P. GOWNDER / R. PEKKANEN, *The End of Political Science? Rational Choice Analyses in Studies of Japanese Politics*: 22 *Journal of Japanese Studies* 363, 364 (1996) (review of J.M. RAMSEYER and F.M. ROSENBLUTH, *The Politics of Oligarchy* (1995)).

15 See MAX WEBER, *Charisma and Institution Building* 47 (1954).

hierarchy, a set of rules that govern behavior, a separation of persons from the office they hold, and selection of personnel based on merit.¹⁶ Crucial to *Weber's* concept of rationality is the orientation toward a specific purpose. Rationalist approaches to bureaucracies thus focus on two characteristics: purposefulness, meaning that organizations are designed to achieve certain goals; and formalization, with rules governing behavior independently of the personalities of those holding offices.¹⁷

Weber's theory came under increasing pressure with the rise of the modern administrative state.¹⁸ Bureaucracies, it turned out, were hotbeds of irrationality and inefficiency. The grand purposes of political actors often failed to be perfectly implemented by large, impersonal public agencies.

In an effort to understand why this is the case, a number of scholars have applied microeconomic tools to the study of bureaucracies in an extension of rationalist approaches. Economic models usually assume maximizing behavior on the part of actors.¹⁹ Unlike firms, bureaucracies are not interested in maximizing profit, so applying economics to the study of public bureaucracy required some adjustments. One of the early responses to this problem was proposed by *William Niskanen*, who argued that bureaucratic agencies were trying to maximize their material self-interest in the form of the budget.²⁰

A slightly different view of bureaucracy comes from those who argue that agencies were not maximizing budgets but rather trying to maximize "slack."²¹ Drawn from the microeconomic theory of principals and agents, this approach sees bureaucrats as the agents of the legislature. Because by hypothesis the policy preferences of bureaucrats and legislatures diverge, the theory predicts bureaucratic agents will try to maximize their independent discretionary input into policy.²² This approach and its cousin known as positive political theory have been used with increasing popularity, and have generated some strong and counterintuitive results.²³

16 *Id.* at 32.

17 W.R. SCOTT, *Organizations* 23 (3rd ed., 1992).

18 See *e.g.* G. FRUG, *Survey of Images of Bureaucracy*, in: T. SARGENTICH (ed.), *Administrative Law Anthology* 412 (1994).

19 But see H. SIMON, *Administrative Behavior* (1945). Simon argues that empirically, "economic man" pursuing his self-interest is constrained by limited vision and cognitive capacity. Hence, he is willing to settle for a less-than optimal solution that is nevertheless satisfactory. Simon calls this "satisficing". *Id.* at 34. See also SIMON, *Rational Decision-making in Business Organizations*: 69 *American Economic Review* 493 (1979). For a critique of the rational choice assumptions in legal theory see E. RUBIN, *Law and the Methodology of Law*: 1997 *Wisc. L. Rev.* 521.

20 W. NISKANEN, *Bureaucracies and Representative Government* (1971).

21 See J. FERREJOHN / C. SHIPAN, *Congressional Influence on Bureaucracy*: 6 *J. Law, Econ. & Org.* 1 (1990).

22 *Id.* at 2.

23 See *e.g.* B. WEINGAST / M. MORAN, *Bureaucrats vs. Voters: On the Political Economy of Resource Allocation*: 93 *Q.J.Econ.* 143 (1979); J. FERREJOHN / C. SHIPAN, *Congressional*

2. *Systems Theory and Organic Analogues*

Rationalist theories focus on the goals of the agency and their interactions with other actors in a political system to achieve those goals. In doing so, they take the boundary of the agency as given. A competing approach to the study of organizations focuses precisely on this boundary, and is known as the “open systems approach.”²⁴ Drawn from biological models and the “general systems theory” of *Ludwig von Bertalanffy*, this approach extends insights from ecology into the study of social systems.²⁵ A social system is analogized to an organism continuously interacting with its environment.²⁶ Like a living creature, organizations and systems are characterized by very complex internal interactions. In contrast with a “rationalist” focus on the formalistic attributes of organizations, this approach “begins by identifying and mapping the repeated cycles of input, transformation, output, and renewed input which comprise the organizational pattern.”²⁷ In this view, an organization such as a corporation, a political party or a bureaucratic agency may not be seeking to maximize anything. Rather it can only be understood as a system of interactions. To the degree a system can be said to having a single goal, it is a defensive one, limited to preserving system autonomy and minimizing interference from the environment.²⁸

The systems approach to bureaucracy is different from the rationalist theories. The most current version of rationalist theory, positive political theory, sees agencies as unitary, purposeful actors engaged in games of power with other purposeful actors like legislatures and courts.²⁹ A systems approach sees all these bodies as defensive, complex organisms in continuous interaction. To truly understand the outcomes of governance, one must look at the internal dynamics of the system and its relationships with the outside world. Social forces constantly impinge on the governance system seeking to gain access to resources or influence policies. The system in turn seeks to resist this interference.

Influence on Bureaucracy: 6 *J.Law, Econ. & Org.* 1 (1990); M. SPITZER, Extensions of Ferejohn and Shipan’s Model of Administrative Agency Behavior: 6 *J.Law, Econ. & Org.* 29 (1990); and S. ROSE-ACKERMAN, Comment on Ferejohn and Shipan’s ‘Congressional Influence on Bureaucracy’, 6 *J.Law, Econ. & Org.* 21 (1990). For related approaches to the study of Japan, see *e.g.* J.M. RAMSEYER / F.M. ROSENBLUTH, *Japan’s Political Marketplace* (1993); and J.M. RAMSEYER / F.M. ROSENBLUTH, *The Politics of Oligarchy* (1995).

24 SCOTT (*supra* note 17) at 25.

25 M. DAVIDSON, *Uncommon Sense* 23 (1983).

26 F. VARELA, *Principles of Biological Autonomy* (1979).

27 *Id.* at 149-50 (quoting D. KATZ / R. KAHN, *Social Psychology of Organizations* [1966]).

28 SCOTT (*supra* note 17) at 52.

29 See K. SHEPSLE, *Positive Political Theory* (1984); M.D. MCCUBBINS / R.G. NOLL / B.R. WEINGAST, *Administrative Procedures as Instruments of Political Control*: 3 *J.L. Econ. & Org.* 243 (1987); M.D. MCCUBBINS / G.W. NOBLE, *Equilibrium Behavior and the Appearance of Power: Legislators, Bureaucrats, and the Budget Process in the U.S. and Japan*, in: P. COWHEY / M.D. MCCUBBINS (eds.), *Structure and Policy in the U.S. and Japan* (1995).

It is clear from even this brief description of the system metaphor that a crucial element in applying the theory to social phenomena is defining the boundary between internal and external elements. Systems interact with their environments by receiving inputs from outside and transforming them into outputs.³⁰ The way in which they do this is neither determined exclusively by external factors (the environment) nor by the system's internal characteristics, but rather by a complex process of exchange and transformation.³¹ But any analysis of a system must specify at the outset what distinguishes the internal and external influences on the system.

One might be tempted to view the state or the bureaucracy itself as a system, since it forms a formal organization distinguished from the society. To do so would be consistent with the public-private distinction that has played such an important role in Western legal thought. If one looks at system dynamics, however, this approach appears problematic. Some parts of the state may have very little interaction with other parts: to assume a unity between a post office and a state-run agricultural finance program seems to put too much credence into the formal boundaries of the government. Similarly, parts of the state may interact quite intensively with actors outside the state in formulating policy. Indeed, this was the point of the "iron triangle" metaphor in its original application: that subgovernments, which might now be called epistemic communities, can dominate policy in particular areas.³² In the analysis that follows, therefore, we will consider the system, broadly speaking, to constitute all those inside the iron triangle: business, government and the LDP.

This seems consistent with accounts that argue that private and public interests in Japan are blurred.³³ Senior bureaucrats, business leaders and LDP leaders have common interests that are forged in the dense networks of social and professional ties. In this view, the state is not an autonomous actor dictating policy, but is embedded in a complex system of interactions with private parties. A growing body of scholarship suggests that this kind of private-public cooperation contributes to the effectiveness of governance.³⁴ Independent of its normative consequences, this system of intense communication seems to capture many aspects of Japanese governance.

30 DAVIDSON (*supra* note 25) at 66.

31 N. LUHMANN, The Unity of the Legal System, in: G. TEUBNER (ed.), *Autopoietic Law: A New Approach to Law and Society* 15 (1988).

32 VERNON (*supra* note 4).

33 UPHAM, The Man Who Would Import: A Cautionary Tale about Bucking the System in Japan: 17 *Journal of Japanese Studies* 323, 333 (1991).

34 See *e.g.* P. EVANS, *Embedded Autonomy* (1995). See also P.B. EVANS, Development Strategies Across the Public-Private Divide: 24 *World Development* 1033, 1034 (1996).

3. *Theories and the Problem of Bureaucratic Discretion*

Bureaucratic discretion is a ubiquitous feature of the modern administrative state.³⁵ The discretion given to bureaucratic organizations flows from the complexity of problems we ask the modern state to deal with: making the workplace safe, controlling factory emissions, awarding many different kinds of licenses, and innumerable other tasks.

Discretion is problematic, both for the public and for top officials. Once a society decides that a particular social problem is worth remedying and creates an organization to do so, we must monitor the agents to whom we assign the task. Similarly, top bureaucrats need to monitor those below them in the hierarchy to ensure they are following orders. Administrative law is one answer to the general problem of bureaucratic discretion.³⁶ Administrative law can help reduce discretion in several ways by formalizing the relationships between state and society. For example, by allowing members of the public access to judicial remedies when agencies abuse discretion, administrative law turns every potential litigant into a monitor, making it less likely that agencies will act wrongfully. Another way in which administrative law can reduce discretion is through the provision of general rules. American law utilizes rulemaking as a means of ensuring adjudicatory fairness and even-handed administration.³⁷ As *John Ely* says in a very different context, “[p]roceeding on the basis of the general rule rather than the ad-hoc determination... reduces the discretion of the decision-maker and this helps protect individual and minority groups from invidious discrimination.”³⁸

Let us briefly consider how the different theoretical approaches to bureaucracy view the formalization of bureaucratic procedures mandated by administrative law. From a Weberian point of view, formalization increases the ability of the agency to achieve its goal and operate purposefully. This is because it eliminates discretionary action. Therefore, we would expect that agencies would welcome rationalization, and that formal procedures would be desirable.³⁹

The rational choice perspective, in contrast, views formal procedures as mechanisms by which the policy principals, such as the legislature and public, seek to constrain their bureaucratic agents. Since bureaucratic agents like to maximize their slack, they would be expected to resist procedural constraints in the form of administrative law. Whether or not politicians want to adopt a strong administrative law regime would depend in part on the other incentives available to them to control bureaucrats. If the politicians felt

35 K.C. DAVIS, *Administrative Law Treatise* 14 (1962).

36 See C. EDLEY, *Administrative Law* 7 (1991); MCCUBBINS / NOLL / WEINGAST (*supra* note 29); J.M. RAMSEYER / M. NAKAZATO, *Japanese Law: An Economic Approach* (1999), chapter on administrative law.

37 Cf. C. SUNSTEIN, *Problems with Rules*: 84 *Cal.L.Rev.* 677 (1996).

38 J.H. ELY, *Democracy and Distrust* 155 (1980).

39 See SCOTT (*supra* note 17) at 29-47.

confident they could control bureaucrats with other mechanisms, administrative law would be undesirable.⁴⁰

Finally, an open systems perspective would view open formal procedures as points of access for actors from outside the system. For example, if an agency is required to provide private parties with notice of a proposed action and respond to private inquiries, outside actors have access to the patterns of communication within the government system. These points of access would limit system autonomy by formalizing its relationships with its environment. As with the rational choice theory described above, we would expect bureaucrats to resist such formalization. Note, though, that proceduralization can also reflect internal dynamics as some actors within the system seek to enhance their own position *vis-à-vis* others. In this sense, the systems perspective is consistent with the rational choice account, in that it could interpret proceduralization as reflecting an effort by politicians or business to restructure internal communication patterns of the system.

III. JAPANESE GOVERNANCE: TOWARD A SYSTEMS PERSPECTIVE

1. *State-Centered Approaches*

The role of the bureaucracy in postwar Japanese politics and in shaping the economic boom is a matter of scholarly controversy.⁴¹ On the one hand, there are scholars who believe the state was central to economic growth.⁴² In the title of his famous 1975 essay, *Chalmers Johnson* posed the rhetorical question “Who Governs?” and proceeded to argue that the answer was the elite economic bureaucracy.⁴³ Scholars of this school emphasize the fundamental differences between Japanese state capitalism and Western counterparts. Using a variety of incentives and policy tools – including selective credit allocation, formation of research cartels, and protection from foreign competition – the Japanese state has steered, guided and cajoled private firms into behaving in ways that maximized growth and development. This view is sometimes characterized as the “developmental state” perspective.⁴⁴

40 See RAMSEYER / NAKAZATO (*supra* note 36).

41 For an early summary of this debate, see G.L. NOBLE, The Japanese Industrial Policy Debate, in: S. HAGGARD / CHUNG-IN MOON (eds.), *Pacific Dynamics: The International Politics of Industrial Change* 53 (1989).

42 JOHNSON, MITI (*supra* note 7) is the exemplar of this approach.

43 C. JOHNSON, Japan: Who Governs? An Essay on Official Bureaucracy: 2 *Journal of Japanese Studies* 1 (1975).

44 JOHNSON MITI (*supra* note 7); see also JOHNSON, *The Capitalist Developmental State* (1995).

Others disagree and say bureaucratic power has been over-rated.⁴⁵ Using rational choice tools developed in the context of American politics, they analyze the structure of Japanese politics as being fundamentally similar to that in America.⁴⁶ The positive political theoretic approach begins its analysis with constitutional structure. Because the legislature is the center of the postwar constitutional system, this approach presumes that the real power in Japanese politics rested with the legislature and hence the dominant political party, the LDP. Bureaucrats, in this view, are merely their faithful agents.⁴⁷ Representative is *Samuel Kernell*:

“There are several problems with assertions of bureaucratic primacy as they now stand. Foremost among them, the industrial development policies . . . are not divorced from the economic interests that have actively supported the LDP. Rather they are consistent with the kinds of policies one would expect from thirty-five years of this conservative party’s hegemony. The policies simply do not in themselves favor a case for either bureaucratic or political primacy.”⁴⁸ In between the activist and passive views of the Japanese state are a number of nuanced alternative formulations, including the “network state,”⁴⁹ the “guardian state,”⁵⁰ the “clientalist state,”⁵¹ and the “gatekeeper” state.⁵²

One way to illustrate the two extreme views is to contrast their views on regulation.⁵³ The regulatory state, at least in the Anglo-American context, views its role as essentially negative, corrective and compensatory. Most economic decisions are taken by private actors. The state plays a role to limit, correct, and compensate for “excesses” of the market, but only when these are justified by “market failures,” or the need to provide

45 See MCCUBBINS / G.W. NOBLE (*supra* note 29); S. KERNELL (ed.), *Parallel Politics: Economic Policymaking in Japan and the United States* 326 (1991) (“The Japanese Miracle has occurred in the sectors of the economy where the government has remained relatively uninvolved.”)

46 KERNELL, *id.*

47 See *e.g.* RAMSEYER / NAKAZATO (*supra* note 36). But see C. JOHNSON / E.B. KEEHN, *A Disaster in the Making: Rational Choice and Asian Studies*: 36 *National Interest* 14 (1994).

48 S. KERNELL, *The Primacy of Politics in Economic Policy*, in: KERNELL (ed.), *Parallel Politics* 365 (1991).

49 D. OKIMOTO, *Between MITI and the Market: Japanese Industrial Policy for High Technology* (1989).

50 J. TATE, *Driving Production Innovation Home: Guardian State Capitalism and the Competitiveness of the Japanese Automobile Industry* 35 (1995).

51 B. WOODALL, *The Logic of Collusive Action: The Political Roots of Japan’s Dango System*: 25 *COMP. POL.* 297, 311 (1993).

52 T.J. PEMPEL, *Policy-making in Contemporary Japan* (1987). Pempel focuses on the government’s role in mediating contacts with international forces. By allowing technology in while limiting foreign capital and competition, the gatekeeper state protected fledgling domestic industries and thereby facilitated the rapid expansion of manufacturing. See also M. MASON, *American Multinationals and Japan: The Political Economy of Japanese Capital Controls 1899-1980* (1992).

53 JOHNSON, *MITI* (*supra* note 7) at 19-23.

those public goods that by definition cannot be produced privately. Moreover, in the U.S. context at least, the regulatory state is more likely to utilize private mechanisms to provide public goods than to produce the good itself.⁵⁴ In this sense the regulatory state is underpinned by a liberal ideology, despite the fact that regulation is often critiqued on liberal grounds.⁵⁵ This is because the regulatory state presupposes a broad realm of private economic activity.

In the activist state model, by contrast, the purpose of the state is to advance national economic interests by promoting growth. Proactive “interference in the economy” is the *raison d’être* of the state. Its ultimate aim is not consumer welfare but maximizing national power. This is not to portray the state as a monolithic actor. Different elements of the state have different views of the national and sectoral interests they seek to promote. But the key fact is that despite the plurality of goals, elements of the state know that their purpose is promotion. To summarize these two contrasting models, we can highlight views of discretion and procedural constraint in a simple figure.

	REGULATORY STATE	ACTIVIST STATE
Animating ideology	Liberalism	Nationalism
Purpose of economy	Aggregate welfare	National Security
Rationale for economic intervention	Correction	Coordination, promotion
Favored actors	Consumers	Producers
Regulation for whom?	Diffuse groups	Concentrated groups
Mode of regulation	General rules	Consultative Guidance
Bureaucratic discretion?	Bad	Good
Process values	Adversarial formalism	Hierarchical informalism

2. *Relational Administration*

These two approaches represent ideal-typical extremes: one is state-centered and the other society-centered or LDP-centered. I want to propose a more nuanced view that is not actor-centered, trying to determine whether the state, LDP or business is the most important actor. It is clear that all are important. Instead I want to focus on the connections between actors and on the relationships within the governance system. I view the driving force in Japanese deregulation and administrative reform not as a shift of power

54 P. SCHUCK (ed.), *Foundations of Administrative Law* 10 (1994).

55 See e.g. S. BREYER, *Regulation and its Reform* (1982) (“The justification for intervention arises out of an alleged inability of the marketplace to deal with particular structural problems.”). Even those who support particular pieces of regulation in the U.S. take pains to justify their programs in terms of market failure.

from state to society, but as the preservation of relationships within and across that boundary. It is clear that state action in such a system is fundamentally not “regulation” in the same sense as it exists in the regulatory state. The very word regulation suggests uniform rules and procedures to be applied across all policy areas and for all actors, large and small. In contrast to this universal rule-laden approach, Japanese bureaucrats place tremendous value on preserving relationships with the private sector, resulting in particularistic segmentation of administration. Informal “administrative guidance” is the dominant mode of policy implementation. The following sections describe this view in more detail.

a) *Elite Status and Links with Regulated Parties*

The high social status of the elite national bureaucracy has been well-documented.⁵⁶ It has its roots in the fact that the early civil servants, like the other leaders of the *Meiji* restoration, were drawn from the ranks of the samurai class in *Tokugawa* Japan. Today, as in prewar Japan, elite civil servants are drawn almost exclusively from the ranks of the former Imperial (now National) Universities, with Tokyo University holding special significance as the top university in the country, the pinnacle of Japan’s intensely competitive, centralized, hierarchical education system.⁵⁷ The high levels of academic achievement required to become an elite bureaucrat reinforces the notion that bureaucratic discretion is not an inherently bad thing. After all, they are the best and the brightest in the society.

They also have close links with university cohorts who do not join the government, but instead go into the staffs of the leading corporations. They thus share worldview of the other forces of the ruling troika, namely elite businessmen and members of the LDP. The degree of interpenetration among these three groups is remarkable. Some 25% of LDP members in the Diet are former bureaucrats, totaling 76 of 511 Diet members as of December 1993.⁵⁸

Links between bureaucrats and business are ensured through the institution of *amakudari* (descent from heaven).⁵⁹ As mentioned above, the chief attraction of becoming a bureaucrat is not remuneration but status. However, many bureaucrats enjoyed delayed financial reward through the system of *amakudari*, wherein they retire to private

56 B.C. KOH, *Japan’s Administrative Elite* (1986).

57 ROHLEN, *For Harmony and Strength* (1984). Tokyo University has long had special significance, and was exempted from meritocratic civil service exams. J.M. RAMSEYER / F.M. ROSENBLUTH, *The Politics Of Oligarchy* 32 (1995).

58 See also J. STERNGLD, *Who Really Runs Japan? Stay Tuned: N.Y. Times*, Friday, Dec. 24, 1993, at A3, cited in: D. BOLEN, *Administrative Procedure Law Makes Inroads on Bureaucracy but Leaves Web Largely Intact: 16:7 East Asian Executive Reports* 7 (July 15, 1994), at 3.

59 See U. SCHAEDE, *The Old-Boy Network and Business-Government Relationships in Japan: 21:2 Journal of Japanese Studies* (1995).

sector or to quasi-public autonomous bodies.⁶⁰ Many bureaucrats retire before the mandated age, which at 55 is quite young in any case. Early retirement is encouraged by the unwritten convention that when one member of a group that entered the ministry together rises to the top civil service post of vice-minister, all other members of the group resign to avoid violating hierarchy.⁶¹ Bureaucrats can thus enjoy “second careers” in the very industries they used to regulate. This system further enmeshes industry with their supervising agencies, provides backdoor channels for mutual information flow, and ensures that industry views will be taken into account in policymaking. Furthermore, policy is constrained as younger bureaucrats defer somewhat to the views of former supervisors now ensconced in the private sector, as well as by their own need to look out for potential *amakudari* positions.⁶²

The links between the formal regulators and regulated parties form an old-boys network conducive to informal regulation.⁶³ Information flows easily from one party to another, ensuring industry input into policy and increasing the chance of compliance. As such, it makes little analytic difference whether an actor is inside or outside of the formal structure of government: they are all part of a shared system of governance.

b) Verticality

The close links between bureaucrats and industry ensure a commonality of viewpoints and produces a highly segmented pattern of policy formulation. This is reinforced by the “vertical” organization of the bureaucracy.⁶⁴ Unlike the younger American agencies which have broad mandates to regulate across several sectors (in such areas as worker safety or environmental protection), Japanese ministries typically handle all policy related to their constituent interests.⁶⁵ Conversely, every important national interest has a ministry responsible for it. Farmers have the Ministry of Agriculture, bankers the Ministry of Finance, construction firms the Ministry of Construction. This vertical organization reinforces close links between regulators and regulated. However, it also contradicts the notion of a unified bureaucratic monolith in some accounts of an activist state. Policy triangles or subgovernments predominate, and are often in conflict with each other.

There is relatively little lateral movement among the vertically-organized ministries.⁶⁶ The loyalties of an individual bureaucrat are not to “the bureaucracy” as a whole, but to the particular ministry where he will spend his pre-retirement career. This contrasts with another elite bureaucracy, the French Grand Corps, whose staff members

60 *Id.*

61 YAMAMURA (*supra* note 7) at 21.

62 F. UPHAM, *Law And Social Change In Postwar Japan* 167 (1987).

63 SCHAEDE (*supra* note 59).

64 *Id.*

65 See K. CALDER, *Crisis and Compensation* (1990).

66 But see E.B. KEEHN, *Managing Interests in the Japanese Bureaucracy: Informality and Discretion*: 30 *Asian Survey* 1021 (1990).

are rotated around several ministries in the course of a career. Unlike in France, the internal norms of each Japanese ministry are themselves reinforced by a rotation pattern within the ministry, whereby individuals spend two- to three-year periods in a number of different sections of the agency. Individuals thus become generalists in a policy area with strong vertical loyalties to their organizations.

c) *Drafting Legislation*

Another alleged source of bureaucratic power is its near-monopoly on the drafting of legislation.⁶⁷ Like continental European systems, and unlike the American model, bureaucrats take the lead role in the drafting of legislation.⁶⁸ This is in part because legislators have neither the staff nor expertise to do so.⁶⁹ While the initiative for a new piece of legislation may come from a variety of sources, including Diet requests, media input, proposals by Deliberative Councils (*shingikai*) and interest group pressures, the process of drafting is controlled by the Ministries.⁷⁰

Typically, drafting of legislative proposals may begin in a bureaucratic division and may move up through discussion at the bureau and ministry level. At this point, if the proposal is deemed to be substantial the Ministry will convene a “deliberative council” (*shingikai*) to facilitate the participation of outside expert opinion.⁷¹ In some cases, existing law requires that new legislation-drafting efforts involve such groups.⁷² The ubiquitous *shingikai* play an important role in legitimating the policy process. While their reports are not legally binding, the *shingikai* recommendations guide the work of both bureaucrats and politicians. Agencies cannot and would not attempt to pursue policies in direct contravention of *shingikai* recommendations.⁷³ This has led some observers to argue that the Japanese administrative process is open to outside influence and that *shingikai* constitute a point of access for the public.⁷⁴

It is true that *shingikai* are an important element of the governance system, in that they form one point of interface between government ministries and private actors and are a site of at least some communication across the formal boundary of government.

67 J.M. RAMSEYER / F.M. ROSENBLUTH, Japan’s Political Marketplace 136 (1993).

68 Private bills in France, Germany and the UK are minimal. J. HALEY, Authority Without Power 40 (1991).

69 L. KÖDDERITZSCH, Japan’s New Administrative Procedure Law: Reasons for its Enactment and Likely Implications: 24 Law in Japan. An Annual 105 (1994).

70 M. SEKI, The Drafting Process for Cabinet Bills: 19 Law in Japan 172 (1986).

71 See generally F. SCHWARTZ, Advice and Consent (1998). See also U. SCHAEDE, Co-operative Capitalism 57-60 (2000).

72 SEKI (*supra* note 70) at 176.

73 In the case of deep-cleavage political issues, there may be more than one *shingikai* formed. Each group will have its own position. This illustrates how the legitimating mechanism also provides ammunition for different elements of the bureaucracy in the case of inter-ministerial conflict.

74 See, e.g. KEEHN (*supra* note 66); SCHAEDE (*supra* note 71).

But if one conceives of the system as incorporating more than the formal bureaucracy, *shingikai* look less like a point of entry and more like an internal element of the system itself. *Shingikai* are not truly open to those outside the system conceived more broadly. While access to the *shingikai* is controlled by the bureaucracy, membership always includes representatives of various industries and interest groups affected by the proposal in question.⁷⁵ They also frequently include academics and journalists, precluding negative publicity by co-opting independent monitors. Furthermore, some have asserted that the bureaucracy easily manipulates the *shingikai* reports because participants have so many other obligations.⁷⁶ In this sense the institution of the *shingikai* looks more like a mechanism to control the outside environment rather than an independent source of ideas as input into the system.

The conception of the democratic policy process as one of open communication by which policymakers can deliberate and determine the best possible solution to a problem has been highly influential in American administrative law.⁷⁷ This might lead some outside observers to assume that the process in Japan works roughly the same way. But in fact, all the relevant deliberation and communication occurs within the boundaries of the governmental system broadly conceived. Uninvited public input has not historically played an important role, and when it has occurred it has been channeled into government-sponsored initiatives.⁷⁸

The process of negotiation over legislation with other ministries begins concurrently with internal discussion. These negotiations usually take place from the bottom up, and proceed upward as necessary to resolve conflicts.⁷⁹ Interministerial conflicts are not infrequent, especially on major policy issues. If these conflicts become intractable, the Prime Minister's office can become involved to ensure harmonization. After this stage the legislation is sent to the Cabinet Legislation Bureau.⁸⁰ It is during this stage that the LDP begins to have a say, though the legislation is not formally sent to it before official submission in the Diet. Rather, a series of informal meetings with interested Diet mem-

75 It is true that in recent years some *shingikai* have begun to post their agendas on the internet and even hold some sessions open to the public. It is not clear how widespread this phenomenon is, but it bears scrutiny. See N. KADOMATSU, *The New Administrative Information Disclosure Law in Japan*: 8 *ZJapanR* 34 (1999).

76 O. NOBUYUKI, *Reform Sought in Bureaucrat's Shadow Advisors*: *Nikkei Weekly*, March 7, 1994 at 3.

77 See e.g. C. SUNSTEIN, *Factions, Self-Interest and the APA: Four Lessons Since 1946*: 72 *Va. L. Rev.* 271 (1986); SCHUCK (*supra* note 54).

78 See generally UPHAM (*supra* note 62).

79 See KEEHN (*supra* note 66).

80 This is an agency of the cabinet staffed by fairly senior bureaucrats on loan from other agencies for periods of about five years. They review the legislation for such technical factors as consistency with existing legislation, as well as for substantive matters including effects on the budget.

bers and LDP staff may take place, and the legislation would not be formally sent to the ruling party's PARC until after cabinet adoption.

We thus see a great deal of bureaucratic control over the process of drafting legislation, but only within the context of intensive communication with the LDP and regulated businesses in the policy area. Without consensus among competing policy groups, laws do not get passed. To ensure such consensus, there is an extensive process of informal consultation with interested groups. The Administrative Procedure Law itself followed such a route (see Part III below.)

d) Administrative Guidance

The bureaucratic role in governance extends not only to the drafting of legislation, but also, and more importantly, to its implementation. The bureaucrat has a variety of legal but primarily extralegal tools to ensure his control in the shaping of public policy.⁸¹ The latter are known euphemistically as administrative guidance (*gyōsei shidō*), and comprise by some estimates 80% of Japanese bureaucratic activity.⁸² Administrative guidance is a form of pressure on regulated parties to modify their behavior, and is characterized by its lack of formal legal effect. Frequently implicit, however, is the threat of collateral sanction imposed unofficially on companies that do not follow the guidance. A company that disobeys a ministerial "suggestion" to join a voluntary export agreement, for example, may find itself without a crucial permit for a domestic factory some months later. Private compliance is therefore nominally voluntary, but virtually always obtained.

John Haley argues that agencies must rely on such informal means of policy implementation because of the combination of a strong developmental mission with relatively weak formal legal powers of coercion.⁸³ Ministries are assisted in this regard by courts that defer to agencies' informal actions. Indeed, courts' most frequent response to administrative guidance is to hold that since it does not constitute a formal act of the ministry, it is not reviewable. The incentives this approach provides to Ministries are obvious. Ministries will naturally prefer to use informal processes over which they have full control rather than formal ones that are subject to the threat of review.⁸⁴ More importantly, agencies will seek to accomplish their most sensitive and controversial tasks through such a process, for these are precisely the areas in which courts are most likely to interfere with their own perception of the appropriate action.

Informality is at the heart of relational administrative style and it is not surprising that administrative guidance represented a crucial issue in the APL. It has been the source of great criticism from legal scholars, foreigners, businessmen, and others. One

81 HALEY (*supra* note 68) 160-164.

82 M.K. YOUNG, *Judicial Review of Administrative Guidance*: 84 *Columbia L. Rev.* 935 (1984).

83 This is the theme of HALEY, *Authority Without Power* (1991). See *e.g.* 160-164.

84 HALEY, *id.* 164.

line of theoretical critique is that it undermines the rule of law, of which transparency and uniformity are critical elements.⁸⁵ Another is a pragmatic criticism that administrative guidance disadvantages foreigners who cannot know the rules.⁸⁶

e) Administrative Law at the Margins

Generally, if the agency does not administer a formal order, its action is not reviewable. This creates a strong incentive for the ministries to use informal means of regulation such as administrative guidance. Compliance is technically voluntary, and thus the agency cannot be held responsible for its actions. The informal structure itself encourages private parties to comply with agency guidance because they have no legal recourse.

The deferential approach of the judiciary to administrative guidance has been well-documented. Courts do not interfere with administrative guidance generally, and review only indirectly when hearing damage actions under the National Compensation Law. True, when a party makes it absolutely clear that they are not willing to follow the guidance, the courts will protect them from collateral punishment by the ministries. But such pressures can be extraordinarily hard to resist.

This approach by courts, interfering only when a party makes its refusal absolutely clear, is consistent with the approach of Japanese courts in a number of other areas. Japanese courts seem to try to encourage private bargaining in landlord-tenant disputes, marital disputes and other areas of law. Only when it is abundantly clear that private bargaining has failed will courts step in to provide a remedy in many of these cases. This helps us understand why damage actions are key in reviewing administration in areas such as environmental law.⁸⁷ Only when it is clear that the relationship has broken down, and contract-type principles no longer apply, will courts constrain administrative action.

This relationship-enhancing function of law is crucial for creating the appearance of deference to administrative guidance. Thus it is understandable how scholars could ignore the role of law in underpinning administrative guidance, and focus instead on the persuasive powers of the “developmental state.” In fact, however, the law was crucial for constructing the sphere of deference. By intervening only at the margins, the law encouraged private parties to form long-term relationships with bureaucrats, which then gave the appearance of bureaucratic dominance. In reality, the law bounded the system by facilitating, indeed forcing, communication within its contours.

85 See L. FULLER, *The Morality of Law* (1958).

86 BOLEN (*supra* note 58) at 8.

87 See UPHAM (*supra* note 62).

IV. THE NEW ADMINISTRATIVE PROCEDURE LAW⁸⁸1. *Politics*

The 1993 Administrative Procedure Law represents decades of work by several different *shingikai* formed to propose administrative reform.⁸⁹ In its report, the final *shingikai* emphasized the need for uniformity in procedure, and fair and transparent process in dealing with citizens to enhance public trust in the bureaucracy.⁹⁰

It is sometimes said that change in Japan is always initiated from outside, and the passage of the APL was in part prompted by intense American pressure for Japan to increase government transparency.⁹¹ While foreign pressure from the U.S. played a role, however, the timing of the passage can be explained best by domestic factors.⁹² Domestic business appears increasingly unhappy with a choking system of complex regulations. In particular, the powerful Federation of Economic Organizations (*Keidanren*), in 1992 indicated that its members were increasingly frustrated with Japanese administrative complexity.⁹³ Finally, opposition politicians led by *Hosokawa*⁹⁴ felt they could use the APL to strike a blow at a system that had grown stagnant, and had kept them out of power as well.

Internal bureaucratic dynamics were also important. The main agency supporting the bill was the Office of Administrative Management under the Prime Minister's Office.⁹⁵ Line ministries by and large opposed the law, and a group of junior civil servants

88 Two English language analyses of the law are found in BOLEN (*supra* note 58), and KÖDDERITZSCH (*supra* note 69). See also K. DUCK, Now that the Fog has Lifted: The Impact of Japan's Administrative Procedure Law on the Regulation of Industry and Market Governance: 16 *Fordham Int'l L. J.* 1686 (1996).

89 The first was published in 1964, and the second in 1983. On December 12, 1991, the Third Provisional Council for the Promotion of Administrative Reform issued its report, which became the blueprint of the current law. J. CHOY "Uncertain Impact of Administrative Reform Law": JEI Report No. 40B, October 21, 1994, at 3. Thus the current law was drafted under the late period of the LDP, under the "clean" administration of *Toshiki Kaifu*. The 1991 report is available in 1994 *Jurisuto* 61 (1992).

90 BOLEN (*supra* note 58) at 4.

91 See KÖDDERITZSCH (*supra* note 69) at 115.

92 For a consideration of the relative roles of foreign and domestic pressures, see M. ABE, "Foreign Pressure and Legal Innovation in Contemporary Japan: The Case of the Administrative Procedure Act" paper presented at the 1995 Meeting of the International Research Committee on the Sociology of Law, on file with author.

93 BOLEN (*supra* note 58) at 5 notes that 136 *Keidanren Review* 4 (Aug 1992) states "Japan should learn more from the highly transparent U.S. system, carrying out further deregulation and hastening to legislate the administrative procedure law which clarifies administrative guidance in a written manner." On *Keidanren*, see K. CALDER, *Crisis and Compensation 197-98* (1988).

94 See text at note 3.

95 KÖDDERITZSCH (*supra* note 69) at 113.

attacked the proposal as hampering bureaucratic efficiency.⁹⁶ Compromises reduced the scope of the law, but eventually the Ministries agreed to accept its provisions.⁹⁷

2. Provisions

The new statute consists of Six Chapters, with a total of 38 Articles. The first chapter contains General Provisions, and announces that the law “seeks to advance a guarantee of fairness and progress towards transparency in the administrative process.”⁹⁸ The statute applies uniformly to national administrative agencies, except specially listed bodies such as the tax and audit authorities.⁹⁹ The law requires administrative agencies to enact substantive standards¹⁰⁰ and clear time periods¹⁰¹ for evaluating and responding to applications. Government bodies must display these standards and time periods publicly “except in cases of extraordinary administrative inconvenience.”¹⁰² When applications are denied, the agency must provide reasons for their decision.¹⁰³

Chapter 3, “Adverse Dispositions” is the longest section of the statute. It requires hearings when a privilege is being revoked.¹⁰⁴ As in the section on applications, the agency must give reasons for adverse dispositions¹⁰⁵ and provide both notice and an opportunity for a formal hearing process with access to agency records on which the decision was based.¹⁰⁶ The Chapter has extensive provisions on the conduct of hearings, circumstances of continuance, and submissions of written arguments.

There is a separate section, Chapter 4, on “Administrative Guidance” that stipulates that the objects of administrative guidance must be realized solely on voluntary co-operation of the party.¹⁰⁷ Furthermore, non-compliance can not result in negative treatment by the agency.¹⁰⁸ These provisions restate existing law. The agency must provide guidance in writing if so requested, except in cases of “extraordinary administrative inconvenience.”

96 *Id.* at 114.

97 *Id.*

98 Chap. 1, Art. 1 (1)

99 Art. 3.

100 Art. 5 (1).

101 Art. 6.

102 Art. 5 (3).

103 Art. 8.

104 Art. 13 (1).

105 Art. 14.

106 Art. 15, Art. 18.

107 Art. 32 (1).

108 Art. 32 (2); Art. 33.

3. *Analysis*

The new statute clearly represents a compromise. It meets demand for some sort of formalization of administrative procedures, and repeatedly refers to the important goals of transparency and fairness. But in several crucial respects, it reflects the persistence of the relational administration over rule-based regulations.

First, there are no provisions for rule-making. Admittedly, this concern is particularly acute to observers from the American “world” of Japanese law, because rules about rule-making occupy such a central place in U.S. administrative law.¹⁰⁹ From the perspective of the Japanese governance system, the administration of general rules cuts against the grain of particularism that is central to relational administration. For a system composed of subgovernments with intensive and regular communications, there is little need for government to act in a quasi-legislative fashion through rulemaking. While there are some new procedural rules on the outputs of the system (in the form of disposition and hearing requirements), the APL contains nothing to constrain inputs into the system in the way it gathers information. This is consistent with the relational administration view described earlier. Regulators desire first and foremost to preserve their relationships with regulated parties.

Second, Article 27 expressly states that Dispositions are not reviewable under the Administrative Complaints Investigation Law of 1962.¹¹⁰ Under that law, appeals are limited to formal dispositions and must be carried out inside the agency itself. Thus there is not even the hint of reviewability by ordinary courts.¹¹¹ When combined with provisions on judicial review, this means that courts will likely continue to play a minor role in reviewing administrative action. The lack of an independent system of review and appeal means that the bureaucracy retains control over the process of appeal and therefore over its own affairs.

Third, the law maintains procedural sovereignty. Although there are some requirements that procedures be regulated, and where possible published, the ministry remains in control of procedures. For example, Art. 17 allows outside intervenors “having an interest in the anticipated Adverse Disposition,” but only on the decision of the “presiding official.” This means that non-governmental organizations (NGOs) are likely to continue to be denied access to decisions of interest to them, and removes litigation as a strategy for NGO development.¹¹² Most importantly, it preserves the privacy of the rela-

109 See U.S.C. Sec. 553. Americans would do well to remember though, that the Administrative Procedure Act’s section on rulemaking is really quite brief. Most of the law about rule-making is in fact judge made law created by courts in the 1960s and 1970s. See M. SHAPIRO, *Administrative Discretion: The Next Stage*: 91 *Yale L. J.* 1487.

110 Law No. 160.

111 See R.W. DZIUBLA, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*: 18 *Cornell Int’l L. J.* 37 (1985).

112 See UPHAM (*supra* note 62).

tionship between regulator and regulated and inhibits anything that might upset that delicate balance.

Fourth, the statute includes many vague terms, stipulating that the government will endeavor to perform certain actions, where possible, except in case of administrative difficulty.¹¹³ These vague terms provide easy escape clauses for bureaucrats to avoid the new requirements. Without an independent appeals body, such good-faith provisions have little impact.

Finally, although the law purports to regulate administrative guidance, it is difficult to imagine that this will be the case. Recall that administrative guidance is “advice or direction by government officials carried out voluntarily – that is, without formal legal coercion – by the recipient. By definition it does not involve either formal legal action on the part of the government.”¹¹⁴ What might it mean to apply formal rules to informal modes of regulation?

This conceptual puzzle is related to issues in American administrative law. The puzzle comes from the possibility of agency exit from the newly formalized process toward more informal alternatives. If one views procedures on a continuum from more formal to less formal,¹¹⁵ we can assume agencies try to avoid complicated procedures by using informal methods where available. Indeed, one of the effects of the onerous procedural requirements for formal rulemaking in the U.S. Administrative Procedure Act was to encourage agencies to use the informal, “notice and comment” alternative.¹¹⁶ So if the intent of formalizing is to ensure that the agency always complies with more stringent procedures, it may be doomed to failure.

By establishing formal rules for what is by definition an informal process, the Japanese APL statute codifies the euphemisms by which administrative guidance is understood. That is, everyone knows that the compliance with Administrative Guidance is “voluntary.” Furthermore, it must come as a great relief to parties to know that a ministry will not treat it negatively in another area for refusing to comply. The crucial question is who determines the meaning of these terms. Suppose Ministry X “suggests” to Company Y that it join a cartel limiting exports of motorcycles to the U.S. Suppose further that Company Y has pending an application to expand its factory in Kawasaki. If Company Y refuses to join the cartel, and later finds its permit denied, who is to connect the two events when the Ministry insists they are unrelated? The refusal of the permit is expressly unreviewable in Court.

A second critique is that “guidance,” being an informal tool rather than a legal term, is inherently ambiguous. Let us suppose that Company Y above responds to the Ministry’s

113 See J. CHOY, *Uncertain Impact of Administrative Reform Law*: JEI Report No. 40B, Oct. 21, 1994, 5.

114 HALEY (*supra* note 68) at 160-161.

115 P. STRAUSS, *The Rulemaking Continuum*: 41 *Duke L. J.* 1463 (1992).

116 See M. SHAPIRO, *The APA at 50*, *Regulation* Nov. 1996.

“suggestion” by saying that they will consider complying, but would like the guidance in writing so that they understood the terms of the bargain clearly. If the Ministry is wary of the legality of its suggestion, it may say that its suggestion was not administrative guidance after all and hence there is no need for a written position. Simply put, this codification of administrative guidance actually encourages opaqueness in administration, as new euphemisms for informalism will come into play to avoid the old one.

4. *Impact*

Some scholars assert that the APL left the law exactly as it was.¹¹⁷ Although it was prompted by decades of complaints from foreign and domestic business interests, the text of the APL suggests that the statute will not go far to address these concerns.¹¹⁸ It does however slightly change the dynamics of communication within the system.

Despite the idiosyncrasies and shortcomings in “legalizing the alegal,” the statute will improve the relative bargaining positions of industry and other regulated parties. Company Y can now impose additional costs on Ministry X in a number of ways: through demands for hearings, written guidance, reasons for dispositions, etc. To the degree that these things become burdens on the agencies, the company’s bargaining position is slightly improved. Hence Y can say to X, “let’s bypass these costly formal procedures. We know each other well and trust you. But about that permit ...” In this subtle way, the bargaining power has changed.

This example also illustrates how formalizing procedures structures informal bargaining in the shadow of the law. The effect of new procedures is not simply what is written on the page, but how it structures informal incentives, which comprise a vastly higher proportion of human activity than does formal rule-driven activity. The formal and informal are not exclusive modes of procedure, but mutually constitutive. The APL represents a slight readjustment of the relationship between state and society, in favor of societal interests.

How has it worked in its two years of operation? Because the law provides few opportunities for judicial review, it has not led to much new litigation, if any. I was unable to identify a single legal case involving the new APL. The main result of the law was a “hotline” set up by *Keidanren*, the business association that had lobbied intensively for the law.¹¹⁹ The hotline invited companies to call in with complaints of APL violations. *Keidanren* then pursued the complaints with the relevant supervisory ministry in Tokyo. According to its director, the hotline received 72 complaints in its first year of operation, but only five companies pursued them further.¹²⁰

117 RAMSEYER / NAKAZATO (*supra* note 36).

118 S. WU DUNN, (*supra* note 9) at A1.

119 See also B. FULFORD, Japan: Law to Limit Bureaucratic Rule Fizzles *Nikkei Weekly*, Apr. 8, 1996.

120 *Id.*

Two examples are a drugstore chain that applied for permission to sell drugs at a new shopping center location.¹²¹ The Ministry of Health and Welfare forced the company to show that there was no medical facility in the center, since the Ministry asserted a drugstore could not sell drugs under the same roof as a medical facility. The company defied the Ministry, and succeeded. In another example, a gas company asked MITI to expand its natural gas sales area and was refused.¹²² Pointing out that there was no legal reason they should not be able to expand, the company complained to *Keidanren*. The ensuing publicity forced the Ministry to back off.

5. *A Social Science Fiction: the APL as Tool of a New Judicial Activism?*

We have seen how Japanese administrative law takes a hands-off approach to administrative discretion, and thus encourages the use of administrative guidance and informal means of regulation. It forms a sort of protective armor for agency policy-making, while constraining truly arbitrary discretion at the outermost extremes.¹²³

Most commentators on the new APL have assumed that the Art. 27 denial of the right to appeal unfavorable dispositions is the end of the matter.¹²⁴ Indeed, newspaper reports indicate that the chief impact of the APL in practice has been the “APL hotline” set up by *Keidanren*, which accepts complaints from the public and forwards inquiries to the relevant agency. Instead of decentralized citizen activism at the grassroots, the APL has become an arrow in the quiver of the central voice of the business community.

Could courts use the APL in a more proactive fashion? Japanese courts have a reputation for political passivity in public law.¹²⁵ For a moment, however, let us engage in a bit of social science fiction and imagine Japanese courts had the inclination to control the bureaucracy. The American experience shows that, in certain conditions, courts can lead the way in requiring more formal procedures from agencies. In the 1960s, using the same Administrative Procedures Act that had done little to constrain agencies since its passage in 1946, courts became much more aggressive in overturning agency action under the hard look doctrine.¹²⁶ There are a couple of alternative routes activist courts take in prying open the administrative process.

The “giving reasons” requirement has served as an important tool for expanding judicial control of administration, both in North America and more recently in Europe.¹²⁷ The APL has giving reasons requirements in Art. 14 (1) and Art. 8 (1). Courts cannot

121 *Id.*

122 *Id.*

123 With regard to this last point, few have accounted for the apparent lack of corruption in the Japanese bureaucracy. It is unlikely that administrative law plays as much of a role here as internal norms.

124 BOLEN (*supra* note 58) at 9; KÖDDERITZSCH (*supra* note 69).

125 See UPHAM (*supra* note 62).

126 M. SHAPIRO, *Who Guards The Guardians?* (1986); SHAPIRO (*supra* note 116).

127 M. SHAPIRO, *The Giving Reasons Requirement*, University Of Chicago Legal Forum (1992).

review dispositions, but they potentially could find that the reasons given by the bureaucracy were insufficient and ask for further reasons. While this does not directly strike at the proffered reasons, it does so in an indirect way. Note that even if reasons are not reviewable, the requirement does constrain bald bureaucratic arbitrariness somewhat.

Another route for courts is that the statute is full of language declaring certain exceptional circumstances such as “administrative difficulty” under which ordinary rules will not apply. Clearly the statute intends that agencies themselves can decide where or when a condition such as this does exist. But there is no reason a court could not attack such a finding. Technically, such a finding would not be reviewing a negative disposition, and would not violate the terms of Art. 27.

V. JAPANESE ADMINISTRATIVE LAW AND THEORIES OF BUREAUCRACY

The above exercise in “social science fiction” notwithstanding, the APL has not had revolutionary impact on state-society relations in Japan. Why then was the APL passed at all, if it represents only a slight proceduralization of the administrative process? The different theories of bureaucracies discussed in Part I each have slightly different answers based on different interpretations of the meaning of proceduralization. In this section I use the evidence of the APL to evaluate the theories of governance and argue that systems theory provides a useful perspective.

1. *Weberian Approaches to Proceduralization*

The Weberian approach to bureaucracies emphasizes their ability to engage in purposeful action. Procedural law enhances the ability of the superiors in the administrative hierarchy to direct their inferiors by limiting discretion in implementation. Hence under Weberian assumptions we should not expect any resistance to the kind of procedural constraints embodied in a code of administrative procedures.

As mentioned above, Weberian theory has been under attack from many fronts in the study of organizations and bureaucracies.¹²⁸ *Weber's* approach has little explanatory power regarding the APL, which was after all drafted by bureaucrats and fails to implement many procedural controls. If bureaucrats wanted to rationalize their operations and constrain themselves, they could have done so by adopting a more substantial law.

2. *Rational Choice and Proceduralization*

Rational choice theory offers a more coherent approach to understanding proceduralization.¹²⁹ A core assumption of existing rational choice approaches is that bureaucrats are

128 See SCOTT (*supra* note 17) at 76.

129 See T. GINSBURG, *Dismantling the Developmental State? Administrative Procedures Reform in Korea and Japan*: Am. J. Comp. L. (2001).

not in control, but rather serve their political masters.¹³⁰ Politicians, like all “principals” need to monitor their “agents,” who will otherwise fail to follow orders. One way for politicians to control bureaucrats is by using career promotions and incentives. A political party in power for a long time will learn how to manipulate career incentives to control the bureaucracy.¹³¹

Because it was electorally successful for many decades, the LDP had little desire for costly procedural controls on its agents, which might hamper bureaucratic efficiency in achieving the goals desired by the politicians.¹³² Politicians without such mechanisms to control their agents, however, might look for help from other actors. A logical place to look for help in monitoring would be those who must deal with the bureaucracy, namely regulated parties. By creating a procedural right, politicians invite the public to monitor the bureaucrats, and use the courts as a quality control system in judging whether the monitors’ claims have merit. Principal-agent theory thus generates a prediction: parties likely to be in power a long time want minimal procedures, parties likely to lose want extensive procedures.¹³³

This appears to conform to the story of the APL’s adoption. During the 38 years of uninterrupted LDP rule, the Party had little desire for strict procedures. When a new, more fragile political coalition came into power under Hosokawa, it needed help from third party monitors and chose to pass the APL. But the coalition was not strong enough to force a redrafting of the law by the bureaucracy. In this account, the APL’s passage illustrates the different techniques for monitoring preferred by dominant parties (career manipulation) versus weak coalitions (procedural transparency). This provides a parsimonious theory of the shape of the APL, though it does not explain why the law was passed in the first place.

3. *The Systems Approach*

Although not as analytically simple, I argue that the systems approach also provides insight into the actual politics behind, and shape of, the APL. The differences between the approach described here and the rationalist approach are twofold. First, the systems approach de-emphasizes the formal barrier between public and private that is so central to both the regulatory and activist state models. Simply put, one cannot always assume that actors outside the government are principals and those inside the government are agents as rational choice theory suggests. Nor should one assume that government is controlling outside actors, as advocates of the “developmental state” model argued. In reality, the arrows of attempted influence and control run in both directions.

130 RAMSEYER / ROSENBLUTH, *Politics of Oligarchy*, 56, 73.

131 See RAMSEYER / NAKAZATO (*supra* note 36).

132 *Id.*

133 J.M. RAMSEYER, *The Puzzling (In)Dependence of Courts*: 3 *J. Legal Studies* 655 (1994).

Second, the rational choice approach sees actors as seeking to maximize substantive policy preferences. A systems view, on the other hand, does not see the bureaucracy as acting purposefully. Rather, it sees the outputs of the agency as the products of a series of complex interactions. The goal is to minimize outside interference, and to maintain as much procedural control as possible.

The particular cycles of input and output analyzed in systems theory may vary across similar systems. For example, the American bureaucracy may be characterized as relatively insulated from business, with a somewhat antagonistic relationship.¹³⁴ Thus the assumption of divergent preferences in the principal-agent approach seems well-founded. The Japanese bureaucracy has close links with business and repeated interactions that allow for more informal relationships, so when looking at the governance system of Japan we should not assume divergent preferences among the bureaucrats, the leading politicians and big business groups that are all “inside” the system. Successful bureaucrats continue join the political elite, so as to mitigate potential conflicts of interest. One can characterize this process as agents becoming principals, but it seems more descriptively accurate to see this as a chance for interchange among elements of the system.

a) Dynamics

The internal patterns of communication that constitute the Japanese governance system seemed to function well for many years. The LDP would provide pro-business policies and intervention with the bureaucracy in exchange for financial support from the business community, the bureaucrats got to run day to day policy in the areas in which the LDP had no strong preferences, and the business community enjoyed a stable business environment with access to information on regulatory policy. The key element was constant communication across the formal boundary of government.

For various reasons, business has grown increasingly unhappy with this system in recent years. One factor was evidence of bureaucratic mismanagement of the economy with the bursting of the 1980s bubble economy, symbolically captured by slow government response to the 1995 Kobe earthquake. Another was the economic slowdown itself, which put greater pressure on the bottom line. Thus one leg of the iron triangle, the branch connecting business and bureaucracy, suffered serious strain.

The APL seems to address business concerns more than those of average citizens. For example, by providing specified periods within which dispositions had to be issued and by providing for a giving reasons requirement, business was given a more predictable environment to operate in. This made particular sense given the temporary defeat of the LDP, which business had relied upon to obtain particular regulatory benefits. In a more uncertain political and economic environment, some marginal formalization served business needs. This account also explains why it was that the APL did not open up the

134 See R. KAGAN, *Adversarial Legalism and American Government*: 10 *J. Policy Analysis and Management* 375 (1991).

policy process through notice-and-comment type rulemaking. Assured of some policy access through *shingikai* and informal consultation processes, there was no need to truly open up decision-making to the public.¹³⁵

The implementation of the APL through the *Keidanren* “hotline” seems to support this account. Complaints about violations of the law are not brought to court, but filtered through the peak business association, *Keidanren*. If any institution can be considered an “insider,” it is *Keidanren*.¹³⁶ The association plays an important role in channeling business views to government, and the largest firms in the country are members. As an insider, *Keidanren* can use the complaints of external actors in its own relationships with the bureaucracy. If the claims are meritorious, *Keidanren* will communicate with the agency involved directly, threatening to go outside the system by publicizing the problem if the bureaucracy does not respond. One wonders what the result would be if the claim is found to threaten the big producers who make up *Keidanren*’s membership. Essentially, through its advocacy of particular cases identified by hotline calls, *Keidanren* can filter out communications that don’t serve business interests collectively. From the perspective of the bureaucracy this also minimizes staff time that would be spent on filtering communications from outside the core elements of the iron triangle.

This mechanism means that the APL created not a public right of action, but a mechanism by which the system itself can control the resolution of complaints through internal communication. There is no public opportunity for aggrieved parties to voice their complaints and thereby alter the communication processes of the governance system. This method of implementation also illustrates the slippery boundary between public and private actors in the governance system. *Keidanren* is an ostensibly private body, but its leadership is often from highly regulated industries such as energy.¹³⁷ Such industries span the public-private divide in every system. By informally mediating disputes under the APL, *Keidanren* and the bureaucracy ensure that there is no articulation of general principles, embodied in laws and court decisions, that will dismantle the continuing dialogue of the elite governance actors.

135 Note, however, that in 1999 a Public Comment procedure was introduced for regulatory law-making. Despite this opening of the process, it remains the case that formal rules play a relatively unimportant role in the Japanese administrative process.

136 See K. CALDER, *Crisis and Compensation* (1987). But see L. DE ROSARIO, *Big Business Blues: Keidanren No Longer Calls the Political Shots*: Far East Economic Review, Sept. 24, 1992, at 25.

137 The mid-1990s appointment of Toyota CEO *Shinichirô Toyoda* marked the first time a manufacturing executive had been named to head it. See L. DE ROSARIO, *Toyota to the Top*: Far East Economic Review, Oct. 3, 1995, at 25.

b) *Preserving Autonomy*

Systems of governance, like systems of communication and like living beings, strive to minimize external interference with system operation.¹³⁸ The “system” is under constant threat of incursion from other actors who seek to manipulate the “outputs” of governance. Those inside the system seek to resist this pressure as much as possible, not so much to achieve particular policy goals as to preserve the equilibrium of the system.¹³⁹

In this view, if forced to do so an agency might tolerate some external controls on its outputs, since the outputs of a system do not threaten its procedural autonomy. But we would expect agencies to fiercely resist any controls on system inputs, for that would go directly to the procedural autonomy of the system. Input interference would threaten the equilibrium of the system. The systems view would see the Japanese bureaucracy as maintaining procedural control above all other goals. Where necessary, the system will sacrifice substantive goals to maintain procedural autonomy.

This pattern of response, allowing controls on outputs but not on inputs, is precisely the story of the Japanese APL. In the pre-1993 system of Japanese governance, the bureaucrats were procedurally sovereign. They structured the *shingikai* committees where policy was formed and law drafted; they used administrative guidance to cajole private negotiations.¹⁴⁰

Threatened with outside interference, the system’s insiders used their control over law-drafting to draft a fairly toothless procedure law. All the APL does is require agencies to explain in advance when dispositions will be made and according to what principles. The APL continues to allow bureaucrats to structure the input into policy and the procedures for reviewing dispositions. Without rulemaking provisions, it has no impact at all on the substance of policy and very little on the procedural aspects. The Japanese bureaucracy maintains control over who participates in drafting legislation and policy, but does so under the influence of other “insiders” in the business community and LDP. In this way, the system ensured its continued equilibration.

It is too early to say at this writing, but it is possible that the Freedom of Information Law which has recently taken effect will have the same fate as the APL.¹⁴¹ Although the Law does require much information to be disbursed to private parties, critics have noted that it provides for exceptions that are, in some cases, subject to determination by senior bureaucrats.¹⁴² It is not without question that, like the American Freedom of

138 See K. VON WOLFEREN, *The Enigma Of Japanese Power* (1991). VON WOLFEREN critiques the Japanese “system” without giving a complete account of what its components are or its internal operating dynamics.

139 SCOTT (*supra* note 17).

140 UPHAM (*supra* note 33).

141 *Gyōsei kikan no hoyū suru jōhō no kōkai ni kansuru hōritsu*, Law No. 42/1999. See N. KADOMATSU, *The New Administrative Information Disclosure Law in Japan*: 8 *ZJapanR* 34 (1999).

142 Art. 5.

Information Act of 1966, the Japanese act will be primarily utilized by business interests. If this is so, it can also be interpreted as a re-equilibration of interests within the governance system rather than as an opening up of the policy-making process as implied by slogans such as transparency and accountability.

c) *The APL as Autopoietic Act*

The German sociologist *Niklas Luhmann* articulates an important branch of systems theory that is relevant here.¹⁴³ He argues that social systems are “autopoietic,” meaning they are self-reproducing and self-generating.¹⁴⁴ The central focus of this analysis is communication.¹⁴⁵ Social systems, including the legal system, are defined by circular modes of communication wherein new norms and rules refer to old ones. In this way, the law maintains its boundary as a relatively closed system of communication.¹⁴⁶

This is particularly relevant to the Japanese case because by all accounts the governance system involves intense patterns of communication. Those inside the system are involved in cycles of communicative patterns through the process of consensus building, *nemawashi*. Decisions can take an extraordinarily long time as the internal process of debate and deliberation proceeds. Despite all this information flow, outsiders often have trouble learning about government policy or views.

If one views the governance system as a closed system of communication, the APL itself can be seen as an autopoietic act (re-)constituting the autonomy of the governance system. The law was undoubtedly a product of the system, and self-consciously refers to earlier dynamics of the system such as administrative guidance. The system is thus “speaking to itself,” but the purpose of this communication is to defend the system, for it changes the rules only marginally. The APL directly structures future communications between the system and outsiders in a way that minimizes interference. Insiders in the governance process – large firms, bureaucrats and LDP politicians – have little need to rely on formal law to structure their interactions, which are already embedded in well-established patterns and routines. Outsiders, on the other hand, desperately needed some sort of procedural lever to enter the closed world of policy, but received little help from the APL.

143 A useful summary of LUHMANN’S systems theory, with discussion of secondary sources, is given by L. NOTTAGE, *Proceduralization of Japanese Law in Comparative Perspective: Product Liability and Contract*; paper presented at the annual meeting of the Law and Society Association, Chicago, May 27-30, 1999 (with a draft at <http://www.law.kyushu-u.ac.jp/~luke/lisa99.html>).

144 See G. TEUBNER, *Introduction to Autopoietic Law*, in: G. TEUBNER (ed.), *Autopoietic Law: A New Approach to Law and Society* 3 (1988).

145 *Id.*

146 See LUHMANN, *Law in Society* (1981).

d) Other Evidence

Empirical studies validate this view of the Japanese governance system as striving to minimize outside interference. For example, *Frank Upham's* account of social change in postwar Japan utilizes four case studies to argue that bureaucratic elites in Japan co-opt and particularize social movements to ensure that they do not grow into broader challenges to bureaucratic rule.¹⁴⁷ Two of *Upham's* case studies describe social movements that relied on litigation to push for social change.¹⁴⁸ He points out that these movements, though successful in their goals, failed to change the structure of the system. Their procedural innovations which opened up the policy formation process to the general public were essentially shut down by bureaucrats so that other groups could not follow in their footsteps.

In each case, the bureaucratic response was similar:

- (1) establish a strict legal regime, and
- (2) reassert bureaucratic control over policy through establishment of some sort of mediation system.¹⁴⁹

Social protest became a means for establishing further control by the system. The state is able to particularize the problems through what *Upham* calls bureaucratic informality.¹⁵⁰ Informality, in *Upham's* view, allows particularism across the social system. Thus, whether found in the administration of industrial policy or in judicial invocation of broad social norms such as harmony and order, particularistic conceptions of conflict abound.¹⁵¹ Similarly, *Steven Vogel's* study of financial regulation in Japan argues that the Ministry of Finance "re-regulated" the industry, even when it appeared to deregulate.¹⁵² The system fiercely resisted attempts to open it up, and continues to do so.¹⁵³

Viewing the system as a pattern of communication resonates with the important role of bargaining by insiders. *Rosenbluth's* study of financial regulation showed that private interest bargaining is the normal mode, with the Ministry of Finance playing a mediating role.¹⁵⁴ The Ministry's role is "more one of mediating and equilibrating the interests of politically powerful interest groups than of formulating policy objectives or controlling policy outcomes."¹⁵⁵

147 UPHAM (*supra* note 62) at 209-21.

148 *Id.* at 37-53, 129-44.

149 *Id.*

150 *Id.* at 21-27.

151 *Id.*

152 S. VOGEL, *Freer Markets, More Rules* 12 (1996).

153 A. POLLACK, *Too Many Rules, But Not For All*: *New York Times*, Nov. 17, 1996, 14.

154 F. MCCALL ROSENBLUTH, *Financial Markets in Contemporary Japan* (1989).

155 *Id.* at 13.

VI. CONCLUSION

This chapter has used the Administrative Procedures Law to illustrate a systems perspective on Japanese governance. The view articulated here conflicts with traditional accounts of the state as an autonomous actor, and provides a different perspective from rational choice images of the bureaucracy engaged in strategic optimization through games of power. Governmental actors, in Japan at least, can be conceived as elements of a system of communication system seeking to minimize outside interference and to preserve order. The Japanese state does not impose its preferences on private parties; rather it structures the bargaining arena, and allows carefully selected private parties to proceed to work out policy. Whatever bargains private parties will agree to are “orderly,” as long as they do not threaten to spawn challenges by other powerful groups outside the direct negotiation, which might impinge on the procedural sovereignty of the system.

To understand policy outcomes in such an environment, one must look carefully at the private interests involved, but also at the bureaucratic role in structuring the bargaining process. A systems view is useful in this regard, for it highlights the permeability of the public-private distinction, while illuminating the systemic drive for procedural autonomy. The APL is an example of the system appearing to change, but in fact preserving a closed system of communication.

ZUSAMMENFASSUNG

Die Verabschiedung des Gesetzes über das Verwaltungsverfahren im Jahr 1993 wurde seinerzeit als großer Modernisierungsschritt gepriesen. Der Beitrag nimmt das Gesetz zum Anlaß für eine kritische Analyse der Ausübung von Herrschaft durch die japanische Obrigkeit und kommt zu dem Ergebnis, daß kein grundlegender Wechsel in der japanischen Verwaltungspraxis bewirkt worden sei. In einem systemtheoretischen Ansatz zeigt der Verfasser, daß die politischen Akteure in Japan vielmehr ein „geschlossenes“ System der Kommunikation in Form einer von ihnen kontrollierten diskursiven Arena entwickelt hätten, in der wenige ausgewählte private Akteure unter Berücksichtigung der strategischen Interessen der Bürokratie Handlungsalternativen entwickeln könnten, ohne daß diese hoheitlich qua Gesetz oder Verordnung durchgesetzt werden müßten. Das entscheidende Element sei die Strukturierung des Verhandlungsprozesses durch die Verwaltung, die es erlaubt habe, eine drohende Einmischung von außen zugunsten des Machterhalts der Verwaltung abzuwehren.

(die Red.)