THE INDEPENDENCE OF EXECUTIVE POWER IN RELATION WITH JUDICIAL POWER

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1.

Article 76, paragraph 2 of the new Constitution, different from Article 61 of the old Constitution, has no provisions relating to the administrative tribunals and provides that no extraordinary tribunals should be established nor should any organ or agency of the executive be given final judicial power. This has subjected administrative cases, as well as all civil cases, to judicial review, and, consequently, it seems that the independence of executive power is not recognized, the administrative organs in cases of litigation hold no higher a position than an ordinary citizen. In England in the 17th century, the replacement of the Star Chamber and other special courts by the common law courts, was the result of the oppression of the rights of the people through the political abuse of the former's powers. In France in the 19th century, administrative power's independence of judicial power was secured by the establishment of the extraordinary tribunals on account of the abuse of judicial power through interference in politics by the judicial authorities in the course of the Revolution, and under the influence of the Montesquieu's principle of the mutual independence of the legislature, the executive and the judicature. Thus, it may be said that whether or not the administrative tribunals are maintained depends upon whether the administrative authorities or the judicial authorities enjoy the confidence of the people more; and that the matter is not dependent upon legal thinking. It seems to me rather, that the system of administrative litigation is indispensable if we should carry through the principle of separation of powers. As a matter of fact, in Britain and the United States the system of administrative commission has so developed that its semi-judicial function tends to become more and more independent of the proper judicial power. Under our Constitution the independence of judicial power and administrative power from each other should also be interpreted. Although the problem of to what extent that should be realised is still open to discussion, we can at least say that it would be unconstitutional by reason of violating the principle of separation of powers, if in administrative litigation the administrative organ be given, in negation of its independence, a

place merely equivalent to that of the defendant in civil cases.

As a reaction to the old Constitution, which entailed dictatorship and the oppression of the rights of the people by the bureaucrats, the new Constitution has strengthened the guaranty of fundamental rights and established the decentralization of power by assuring local autonomy. Consequently, distrust of the Executive is often evident in the interpretation of such provisions in the Constitution. Personally, I would not object to taking the interpretation into consideration in legislation, but I do not think we can regard it as consistent with the spirit of the Constitution.

There is a case, for instance, wherein, in accordance with the disciplinary code of employees a certain company discharged an employee who prejudiced the credit of his company and interfered with the management of its business by publishing an organ paper of a cell. This act was claimed to constitute an infringement upon the freedom of the press. On November 20, 1950, the Court of Appeals of Tokyo, however, ruled that Article 21 of the Constitution merely guarantees that no administrative restriction should be imposed upon publication and that Article 21 does not preclude civil and criminal liabilities in connection with the act of publishing. I understand fundamental human rights, in so far as they are incompatible with the public welfare, could be regulated by law to the minimum extent of necessity. In connection with the case mentioned above, this legal principle was accepted by the Supreme Court in the ruling given by all members of the Court on April 4th, 1951. Even the ruling of the High Court of Appeals of Tokyo, in which the court took the position that regulation of human rights for the sake of public welfare was unconstitutional (See Articles 12 and 13 of the Constitution), admits the constitutionality of limiting these rights in accordance with due process of law owing to the grounds that judicial authorities are better qualified to protect human rights than are administrative authorities, for the Administrative power under party government is quite apt to be abused through organs in charge of a single officer as well as the hierarchy of organs, whereas, judicial power, whose function it is to find and declare what the law requires in relation to a specific case, is attended with no such danger. Furthermore, while the Administrative is vested with the power to take preventive measures, at times when jeopardy to public welfare is not always evident and imminent, judicial authorities, as a rule, inquire into the existence of civil or criminal liability after the act has been committed, and thus, in line with the regulation of the Constitution, minimize restrictions upon human rights. In the event of unlawful exercise of administrative power, the sufferer whose human right was infringed thereby has the right to file a Kōkoku appeal. But no one can repel effectively such illegal restraint upon his rights by means of this type of appeal since the Kōkoku appeal is subject to the principle of preexistence of litigation and by the provisions concerning timelimit for filing

suit. Furthermore, it is a general rule that the effect of an administrative disposition does not cease until a judicial decision nullifying it has become final and conclusive. It is less likely that human rights should be harmed by an illegal judicial decision because it is unexecutable until it has become final.

Restriction upon human rights by the judicial authorities presupposes similar restraints by the legislative body; but it is wholly groundless to say that the formation of civil or criminal laws and regulations affecting human rights is constitutional whereas the enactment of administrative laws and regulations governing those same rights is not. Undoubtedly, the infringement upon human right imposed by prior preventive measures would be more serious than that produced by subsequent corrective actions. However, under circumstances wherein public peace and order are in such a chaotic state that ordinary control would not be contradictory to the Proportion Principle. This principle was endorsed when the Legislative Bureau withdrew its former view that no by-laws for the control of mass marches and mass demonstrations should be deemed constitutional if they required prior authorization over and above notification, and announced that the licence system ought not to be regarded as unconstitutional *ipso facto*.

Lack of confidence in administrative power and respect for judicial power are manifest in the Local Autonomy Law which does not recognize administrative supervision of local subdivisions by the Government but rather allows the Mandamus suit with respect to the Government's control over affairs directly entrusted to the heads of such local subdivisions. This law contains instructions as to the standard of the auxilliary organs and the increase of efficiency of service. It is not fully justifiable to say that such control over local autonomy in the form of legislation is constitutional while like control by the administrative authorities constitutes a violation of the principle of local self-government. It is true the term "control" in the Local Autonomy Law was deleted when the law was amended last year, but that did not alter the fundamental relation between the Government and the local subdivisions. In my interpretation, however, it is not unconstitutional that administrative authorities are empowered to watch the legality of the action of the local subdivisions. It appears that a subsequent redress of an illegal act of local administration can be attained only through judicial channels, but the only resort actually available is administrative control since no one is in general permitted to file a suit until the occurrence of actual infringement upon one's rights. It is for the Legislative to decide to what extent control by the Administration over local autonomy should be excercised.

2.

By providing that the rights of the people should be supremely respected,

Article 13 of the Constitution has guaranteed the sufferer whose right has been violated by an illegal administrative disposition the right to sue for the annulment of the disposition. It is, however, highly questionable whether the sufferer from an illegal act of the Administration is entitled to request an execution against the State. I understand that the execution against public property would in all probability not be permitted. Moreover, no execution, in my opinion, is allowable in administrative cases since there is little need for it, the administrative organs being bound to abide by the final judgment in administrative cases in accordance with Article 12 of the Special Rule *infra*.

However, if the people were not allowed to institute action for the annulment of an illegal disposition, it would imply that the rights of the people were not being given supreme consideration. In respect to subjective judgment which stands for relieving rights violated, under Article 3 of the Court Organization Law all the legal disputes are brought within the jurisdiction of the Court is proper and right. But if it were generally possible to bring objective action such as an inter-organ action and a people's action, the Court would go beyond the proper scope of its judicial power and transgress the power of administration, thus running counter to the principle of separation of powers as provided in the Constitution. Inter-organ action is concerned with legal disputes between executive organs. Thus, an action of the Assembly for annulment of the dissolution of a local assembly in contravention of the chief executive officer of the local political subdivision, is an inter-organ action, but is not legitimate because of the lack of provisions permitting the bringing of such an action (cf. Decision of the Matsuyama District Court, March 16, 1950). On the other hand, an action instituted by a member of an Assembly for declaration of nullity of the dissolution of that Assembly on the ground of nullity of the non-confidence resolution is admissible since it seeks to safeguard the right to participate as a member of an Assembly in the government (Dicision of the Matsuyama District Court, April 20, 1950). Next, the people's action is one which can be brought by the electors or the people at large in order to rectify illegal administration. Article 243-(2) of the Local Autonomy Law provided for the restriction or prohibition of illegal acts of executive personnel or the annulment or rescission of illegal acts. However, an action for the retirement of a prefectural governor or for the dismissal of executive personnel is inadmissible, since it is a people's action not supported with legal provisions (Yokohama District Court, May 29, 1950).

3.

In case the administrate organs are allowed to act with discretion, an unreasonable administrative disposition caused by a wrong exercise of discretion, will not be illegal; it could be deemed only as an improper disposi-

tion from a political or technical viewpoint. Where discretion is permitted, the administration is free from law. Therefore, in performing a specific administrative act, it is required, first, that no law is as yet enacted to govern it; second, that the administrative action can be effected without specific law. Whereas Article 31 of the Constitution provides that "No person shall be deprived of...liberty..., except according to procedure established by law." It follows, as a matter of course, that the administrative action which has the effect of infringing upon the rights of the people or subjecting them to obligations must always be based on law and be subject to Ermessen der Rechtmassigkeit or a legal discretion. An administrative disposition which simply gives rights or benefits to the people and inter-organ action may be considered to come under the discretion of each administrative office. But, in this case as well, there are relevant provisions of law to govern the rights to be granted. In addition, there is a certain law pertaining to the administrative organization. Thus, it is hardly possible to admit administrative discretion in fields not covered by law.

The peculiarity of discretionary disposition is marked by the fact that any act of the administrative office, even if misguided by discretion, is not subject to judicial review. Even where administrative action is governed by law, discretion is recognized within that area of independence of the executive power which is beyond the control of the judicial power. We have a striking instance of this in the case of besonderes Gewaltverhältnis, for performance of duty, disciplinary punishment, etc. of Government employees presuppose the contract of obedience under public law, and the administrative office may, in so far as it exercises special comprehensive power on the basis of the voluntary consent of the opponent, direct and compel the latter, while the opponent can be considered as having waived, to that extent, its right to bring action. Unquestionably, it would be a mistake to regard that the guarantee of civil rights may be removed freely by the voluntary assent of the opponent of the administrative office. However, discretion of the administrative office may be allowed to the extent that it does not interfere with public welfare, and so long as it does not deprive the rights and benefits, contrary to besonderes Gewaltverhältnis under which may exist deprivation of such rights and benefits.

As regards disciplinary punishment, discretion is permitted except where the extraordinary power relationship, the very ground on which the punishment can be imposed, is established compulsorily by law, where the reason for the punishment is clearly against laws pertaining to the extraordinary power relationship, and where the effects of the punishment attended with the infringement upon a right or liberty under the general relationship of government, exceed the extent of deprivation of rights and benefits, a deprivation which is natural within the extraordinary power relationship.

With reference to the case of suspension of execution of resolution for

the expulsion of members of the Aomori Prefectural Assembly, the Supreme Court dismissed by a ruling the extraordinary complaint (January 16, 1953). This ruling supports the original one, which regarded the objection as null and void, on the grounds that under Article 10 of the Special Regulations concerning the Procedure for Administrative Litigations, an objection of the Prime Minister must be made prior to the suspension of execution of an administrative disposition. Expressing the minority opinion in the above ruling, Chief Justice Tanaka stated that an expulsion of members is a question of discipline within the Assembly, an organ which lies outside of the scope of intervention by judicial power, and, thus should properly be left to the decision of the Assembly. According to this opinion, the court can not interfere with the propriety of a discretionary disposition of the administrative office. Nor can the court interfere with the discretionary disposition even where the issue is subject to the provisions of laws, if the fulfilment or non-fulfilment of the requirements of laws is entirely left to the independent decision of the community concerned. The expulsion of Assembly members is asserted to come under the latter case. However, this distinction is not always sufficiently clear, and in the opinion of the same judge it is held that disciplinary punishment improperly imposed is reduced, after all, to the question of fact-finding or discretion and that accordingly the question of propriety of the disposition is only matter of politics, and not that of illegality. Further, in the opinion of Mr. Kuriyama, Judge of the same Court, it is held that a local assembly has, like the two Houses of the Diet, proper power to determine the rules of procedure and to impose disciplinary punishment upon its members; that the assembly adheres to the independence of its operation of proceedings, against interference from outside; and that its decision on expulsion should be final and conclusive. These minority opinions admit the independency of a local assembly and also a certain area, including disciplinary punishment, which is beyond the scope of judicial review. Against these views, Mr. Mano, Judge of the same Court, says that disciplinary punishment, in so far as it remains within the scope of discretion, may not raise the question of illegality, but that its non-compliance with the standards of law will, because of its illegality, make it a question of law even where it is actually a question of politics. Thus he upholds the manner of thinking hitherto assumed in judicial precedents, that there may exist illegal discretionary dispositions.

With reference to the case concerning the application for annulment of expulsion of several public high school students, the Okayama District Court rejected the refutation of the defendant. The defendant had asserted that disciplinary punishment was a disposition leaving very much toward the technical phase of education, that it was not, essentially, an act very closely associated with judgment, and that it might give rise only to the question of propriety. The Court based its argument on the grounds that

the illegality of the disposition may have been a subject of dispute, if it is possible to contend that the disposition did not clarify the reasons for expulsion as prescribed in the school regulations; that it was a disposition remarkably unfair and severe, quite in excess of the power of discretion vested in the administrative office which made the disposition; that it was made together with domiciliary confinement (Judgment, May 30, 1951). However, this judgment was reversed by that of the Okayama Branch of the Hiroshima Higher Court. The gist of the latter judgment is that, since disciplinary punishment is imposed upon students for the attainment of the desired end of education, its propriety should come under review, first of all, out of consideration of the technical share of education; and that disciplinary punishment should not properly be subjected to the judgment of the Court so far as its respect to propriety is concerned; but that it cannot be annulled unless the disposition was so extreme and so unjustifiable that it could not be tolerated under the social structure (Judgment, July 18, 1952). This apparently coincides with the contention of the defendant at the first trial. However, referring to the minority opinion of Chief Justice Tanaka, see above, wherein he drew a parallel between local assemblies and schools, it was held that, if the disposition of expulsion from school, made with respect to university students, was deemed, like penalties such as reprimand and suspension from school, to be governed by the internal rules of a school, there would be no reasonable grounds on which to distinguish between dismissal from Assembly membership and other kinds of penalties; and that accordingly disciplinary punishment in the case of universities and that in the case of Assembly might be considered to have something in common. Whereas, in the judgment rendered by the Hiroshima Higher Court, it is pointed out that disciplinary punishment in the case of students is distinct from that in the case of component members of an organization, because the former is designed for educational purposes and the latter merely for maintenance of order within the organization.

According to pertinent judicial precedent, it is held that, where excessive exercise of discretion is in dispute, it should be subjected to lawful judicial review and in the event the disposition at issue is deemed not illegal, the application for suit should be dismissed (Judgment of Tokyo District Court, January 14, 1950). Under the former Constitution where only a very few matters could have access to administrative litigations, there were only small number of dispositions which could be made the subject of lawsuit, even though they were found illegal in terms of substantive law. This seems also the case with respect to disposition whereof one failed to observe the term of bringing an action, for such disposition may not necessarily be legal. Further, although distinction was made conceptually between dispositions coming under subjects of litigations and those made by discretion, little practical use resulted therefrom. Consequently, it was without doubt

that an action brought in respect of a discretionary disposition was usually to be dismissed. Under the new Constitution, however, subjects of litigation are not restricted to either administrative cases or to civil cases. Therefore, with respect to illegal dispositions, it has become generally possible to apply for annulment. Further, it can be considered that the recognition that a disposition is the result of discretion has the same meaning as a declaration of its legality, and that accordingly in such cases the judgment rendered has resulted in the judicial precedent of the dismissal of application. However, the recognition of the fact that the scope of discretion belonging properly to administrative office, only means directly that judicial review is excluded but that from the viewpoint of Substantive Law, a discretionary disposition is not always lawful. Therefore, in case it is clear that the disposition in respect of the issue in dispute comes under the subject of discretion a ruling for dismissal should properly be passed, and it will be incorrect to reject the application.

4.

The Law for Special Regulations concerning the Procedure for Administrative Litigations specifies the term for bringing an action (Art. 5). It also provides that the bringing of an action will not suspend the execution of the administrative disposition in dispute (Art. 10). It has similar provisions with respect to the procedure regarding application for judgment of an administrative office, such as *Sogan* appeal and filing of objection. In case the agency which made the disposition finds the disposition illegal, it should annul such dispositions ex-officio even after the lapse of the term for institution of action. Further, a public official will be answerable for his civil as well as criminal liability resulting from abuse of official power. However, insofar as the agency which made the disposition insists on the legality of its disposition, that disposition is executable even when its opponent insists on its illegality, and the disposition becomes indisputable because of the failure to observe the term for bringing action. The basis for this outcome is that it has become possible to presume from a legalistic viewpoint the legality of the dispoition. In this connection, Kelsen asserts that such a presumption of legality is impossible from the 'law-logical' viewpoint, for it implies the political principle of giving prominence to the executive power. However, even in the theory of Otto Mayer which admits the presumption of legality, it is held that a disposition which is clearly and seriously illegal is necessarily inoperative even before it is annulled. The theory admits only that, where the legality of the disposition is in dispute, the assertion of the administrative office is regarded as reasonable, unless otherwise warranted by adequate counter-evidence. Accordingly, Kelsen's theory is not acceptable except in cases wherein the illegality of the disposition is not in dispute between the parties concerned or wherein the judgment of the office

which made the disposition is held to be of equal value to the contention of a private individual who is its opponent.

In civil cases, and as the effects of Court action, both the formal and the substantial binding forces are produced simultaneously; whereas, in the case of administrative disposition an action applying for annulment thereof will be dismissed through failure to observe the term for bringing action. It may be considered that here the formal binding force is produced by the administrative disposition, just as judgment in the first instance becomes incontestable through failure to observe the term of appeal after that judgment is rendered. But in this case no court action has been taken; consequently, no substantial binding force will be produced, and the administrative office may therefore rescind the disposition. Further, an administrative disposition resembles a final and conclusive judgment in the sense that in the former the execution of the disposition in dispute may not be suspended by means of the institution of an action applying for its annulment, as distinct from that of the judgment in the first instance which may be suspended by the filing of an appeal. Non-suspension of the execution of an administrative disposition implies that the disposition will not be prevented from taking effect and also that all subsequent procedures and the execution based thereon will not be suspended. Accordingly, a police disposition, if it is not *ipso facto* null and void, but may be illegal, may bind any person who does not comply with it. Resistance thereto will constitute an offense of the use of violence against a public official in the performance of his duties. The plaintiff in a suit for the annulment of an illegal disposition can apply for a suspension of execution of the disposition in dispute (Art. 10, Special Regulations concerning the Procedure for Administrative Litigations). This case, however, is an extraordinary instance of a provisional disposition wherein administrative function is performed by the judicial power, and consequently various restrictions are here imposed with regard to such dispositions. When the Prime Minister in particular raises an objection as regarding the suspension of an execution, the Court cannot render a ruling of suspension thereof. Nor can the court render ruling when the damage may be compensated good by payment of money, as in the case of damage due to the execution of disposition against tax default (Judgment, Tokushima District, May 30, 1950).

It would appear that a plaintiff applying for annulment of an illegal disposition is in an offensive position, but actually he is in a defensive position. Therefore, according to the principle of distribution of burden of proof in the Code of Civil Procedure under which the burden of proof is on the person affirming the existence of a certain legal effect, the burden of proof as regards legality of the disposition in dispute must be on the administrative office which made the disposition. However, this will only put a disposition which has become irrevocable through failure to observe

the term for bringing an action, extremely out of proportion to the disposition to be disputed by action. Furthermore, the institution of action concerning the determination of its will will transfer discretion which is proper to the administrative office to the judicial power, which in turn will undertake to make an administrative disposition. Consequently, it may be proper to hold that under the Special Regulations concerning the Procedure for Administrative Litigations the legality of administrative dispositions is by law presumed, and therefore, with respect to the illegality of the disposition in dispute, the burden of proof will be upon the plaintiff. The National Tax Collection Law (Art. 31-(4)) provides that, if the Court finds the contention of the administrative office, as defendant, reasonable, the plaintiff should be directed to produce counter-evidence. This may be regarded as a compromise of the opinion of the Finance Ministry which places the burden of proof upon the plaintiff and that of the Court which placed it upon the defendant. However this compromise is not a final solution of the problem.

5.

The administrative action which imposes a new duty on the people or violates any of the rights of the people, is required, under Article 31 of the Constitution, to be based upon law. Therefore, even wherein the law, from which authority is derived, admits the discretion of the administrative office, the exercise of the right of discretion will, as a question of law, be subject to full-scale criticism and also to judicial review. A mistake in such discretion will make the administrative disposition illegal and subject it to the review of the Court, such error being ground for annulment. However, a disposition will be fixed primarily by the free discretion of the administrative office and the legality of the disposition presumed unless counter-evidence is produced in subsequent action. Therefore, the opponent may have no other recourse than to sue for annulment or for declaration of nullity thereof after disposition has been made. Leistungsurteil or 'performance' judgment, which directs, prior to the making of disposition, the effectuation or non-effectuation of the disposition, and Gestaltungsurteil or 'formative' judgment, which causes, on behalf of the disposing agency, the same effect as may be produced when the disposition has been made, will both become binding upon the discretion of the administrative office, by virtue of the binding force of the judgment, thus running counter to the principle of separation of powers. As compared with formative judgment, performance judgment to a limited extent infringes upon the freedom of choice of the administrative office. However, if the executability of performance judgment were admitted, the Court would exercise supervision similar to that of a superior agency over the administrative office, an authority which runs counter to the principle of separation of powers.

The declaratory judgment as to whether the administrative office is

obliged or not authorized to make a specific disposition is not incompatible with the principle of separation of powers, but it is doubtful to assume that the plaintiff may derive the benefit of protection of rights through application for a non-executory judgment.

An "action applying for annulment or alteration of illegal disposition" under Article 1 of the Special Regulations concerning the Procedure for Administrative Litigations should, therefore, properly be construed to mean an action applying for annulment, in whole or in part, of the disposition in dispute. Actions for different disposition than that of the original disposition are not properly included in actions applying for alteration of the disposition.

Further, the judgment of annulment of an illegal disposition produces the effects of annulment by virtue of the provisions (Art. 12 of the Special Regulations concerning the Procedure for Administrative Litigations) under which the establishment of illegality of the disposition by the judicial power becomes binding upon the administrative office concerned. On the other hand, the annulment effected ex-officio by the administrative office is not necessarily limited, as distinct from the former judgment, to cases of illegality of dispositions, but forms, as often as not, a second disposition, the substance of which is the reverse of the original one. For the judicial administration is the operation of reasoning which, with referance to concrete cases where civil rights are in dispute, interprets law as the major premise, finds facts as the minor premise and lastly draws a final and conclusive judgment. In this sense, actions applying for annulment may be regarded as those applying for declaration of illegality as ground for annulment.

A NOTE ON "LONG TERM CHANGES IN THE NATIONAL PRODUCT OF JAPAN"

By KAZUSHI OHKAWA

ERRATA

(I) Table X, Total (A)

Incorrect	Correct
3.7	4.2
5.0	4.9
5.4	5.4
2.6	3.0
2.0	3.0
3.0	3.5
3.3	4.1
3.1	5.1
3.5	5.5
3.2	4.7
5.7	3.8

(II) Table XI, National Income

Incorrect		Correct	
(I)	(II)	(I)	(II)
2.3	2.5	2.8	3.0
3.8	3.9	3.7	3.8
4.5	4.4	4.5	4.4
1.9	1.4	2.3	1.8
1.5	0.7	2.5	1.7
2.6	1.6	3.1	2.1
2.9	2.0	3.7	2.8
2.4	1.9	4.4	3.9
2.7	2.1	4.7	4.1
2.4	1.7	3.9	3.2
4.7	4.7	2.8	2.8

(III)

Page	Line	Incorrect	Correct
176	8	between 2.0 and 5.7	between 3.0 and 5.4
,,	9~10	varies slightly at over 3.0	lies between 3.5 and 5.5
,,	10~13	except the...period	eliminate phrases