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THE SUPPLYING JUDGEMENT IN THE ADMINISTRATIVE PROCEDURE

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From the view point of our existing law can the law suit (supplying judgement) asking for commission or omission against the office of Administration be generally admitted?

(I)

The matter as to whether or not the law suit (supplying judgement) asking for commission or omission against the office of administration is admitted is different among nations and countries, and thus there are nations which acknowledge it generally, and there are nations that acknowledge it partly, and there are even nations that do not acknowledge it completely any more.

Even though we make a survey of main nations that bear attitude of judicial nation, in which the judicial courts have jurisdictional right as to the administrative matters, there is institution of 'Mandamus' in England and in America, and in West Germany 'Untätigkeitsklage' is admitted, and in Italy only the judgement commanding payment of a definite amount of to the office of administration is admitted. Well, what matter is done in Japan? In Japan hitherto, Japan has made a model of examples of European nations and the so called administrative courts, that were independent of the judicial courts, were established so as to make practice of judgement as to administrative matters and thus as a rule the judgements as to the administrative laws were executed by these judicial courts. However now the constitution of Japan is executed and thus the following matters are prescribed in Article 76 in it: 'The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be

given final judicial power. Moreover (Article 3 in the Court Laws) prescribes clearly just as following, admitting the above-mentioned statement, "besides the case of special prescription in the constitution of Japan the law-courts of judicial law-suits and can have powers prescribed especially in the laws. The prescription of the above mentioned article does not hinder the administrative organizations from judging as the previous judgements." The result was that the administrative law-courts hitherto were abolished and the jurisdiction of the judicial courts (ordinary courts) came to extend to the administrative matters that had been dealt by the administrative law-courts before.⁽¹⁾

As to the point to what degree indeed the judicial law-courts can examine the administrative and give judgements to them, however,

(1) Through the establishment and the execution of the Japanese Constitution, there are many objections as to the view point that the power of judgement for the judicial matters was entrusted to the judicial law-courts.

For example, Dr. Minobe (the late professor of Tokyo University) says as to Item 1 of Article 76 of the Constitution of Japan just like following: The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. There is no special prescription as to what the so-called judicial power means. However, it is not only used in the Old Japanese Imperial Constitution but also is admitted widely as the idea corresponded in the constitutions of other nations. Thus it is natural that we should acknowledge it to have been applied generally as the widely-used meaning to the New Japanese Constitution. (General Introduction of the Japanese Constitution, p. 449)

By this reason there is a strong objection against the ordinary theory that the so called judicial power in the Japanese Constitution means the power of judgement as to the all of the judicial law-suits including the administrative judgement, so it is emphasized that "it should be interpreted the same meaning as in the judicial power of the Old Japanese Imperial Constitution (Article 57), i. e. meaning only the judgement of the civil affairs and of the criminal affairs." (The Basic Principle of the New Japanese Constitution, p. 166) And from such a view point of situation, it is concluded that it is not based upon the need of necessity of the constitution for the judicial power to make judgements of the administrative matters, but the judicial power is nothing but acknowledged by the prescriptions (Article 3, law of the judicial law-court) as the special one of the laws. (See p. 123, Num. 8, The Study of the Public Law related with the Judicial Power and the Administrative Power, Prof. YANASE).

However, on one hand, as to the security of the fundamental personal right of the Japanese, the Japanese Constitution makes the unusually specified and elaborated prescriptions in comparison to those of the Old Japanese Imperial Constitution (Article 94 and from Article 11 — Article 40), on the other it does not make such prescriptions as Article 61 of the Old Japanese Constitution, in which it was prescribed that as to the law-suits of having been injured rights by the disposition of the transaction of the administrative office, what if belonged to the judgements of the administrative law-courts prescribed by the special laws does not have limitations of the judicial law-courts. Conversely, from the stand-point of the following prescriptions of Article 76, i. e. The whole judicial power

article 1 in the Special Case Law of the procedure for the administrative matters, which is a special law as to the administrative matters, prescribes only like this: "as for as for the law-suits related to alteration or cancellation of the illegal disposals of the office of administration and as for the law-suits related to the claim affairs of the other public laws, they are to be dependent upon what the civil procedure laws prescribe, besides their dependence upon this law." Thus there is not my concrete and clear prescription of this matter only except the above mentioned statement. Therefore, naturally through interpretation of these prescriptions it was needed for the accademic theory or the judicial precedents to establish dimension of power of judgement as to the administrative cases by the judicial law-courts and concretely there came to be proposed and raised up a problem whether or not the supplying judgement can be admitted against the administrative law-suite from the view point of the existing law, too.

Thus, even in Japan this problem came to be seriously argued gradually in this way through the theory and the judicial precedents. However, to my regret, the time has not so long passed since this problem was undertaken to study, and moreover it can be said that there are many controversialists who recognize this problem negatively at least as to the administrative law-suits of complaint, even though

is vested in a Supreme Court and in such inferior courts as are established by law nor extraordinary tribunal shall be established nor shall any organ or agency of the Executive be given final judicial power, Article 81, i. e. The Supreme Court is the court of last resort with power to determine of any law, order, regulation or official act of Article 98, i. e. This constitution shall be the supreme law of the nation and no law, ordinance imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity, the so-called judicial power of the Constitution of Japan as it is claimed as the ordinary view-point of the theory, is different from what the Old Japanese Imperial Constitution included it only in the judgements of the civil or criminal affairs, but it means widely what the nation proclaims the laws as to the concrete facts, maintaining them. Thus it should be interpreted that the judgements of the civil or administrative affairs also are included in it. (On this point, if needed the detailed argument, see p. 156, Legal Theory of the Administrative Procedure both by Prof. TANAKA and by Prof. MINOBE)

except that of the person concerned,⁽²⁾ and that there not so few who have objections against this problem. Thus the actual situation is that we have not reached any unified conclusion yet. By this reason, I here introduce how this problem in our country is dealt with in this treatise, and I should like to say my conclusion as to this point altogether.

(II)

While, as I have already mentioned, in our country there are many who interpret this problem negatively, and thus such a kind of view-point is today becoming prevalent gradually, I should like to make a survey of it from this negative view-point.

The grounds of the argument of the disputants who hold that, so long as there is no special prescription of laws as to the defending administrative law-suits in our present laws, the supplying judgement can't be acknowledged principally, are considerably various and thus they are not always uniform, however I should like to think that it is possible for us to integrate them to the following points if summed up very broadly:

- (1) It is transgression to the principle of the independence of powers established by the Constitution of Japan to acknowledge the supplying judgements as to the defending administrative law-suits.
- (2) Our laws in force generally do not acknowledge the so-called supplying claim asking for the definite commission or omission to the admi-

(2) The administrative law-suits today, generally, divided in the big two parts, i. e. the defending administrative law-suits seeking for alteration or cancellation of the unlawful dispositions of the administrative office, and the person-concerned administrative law-suits as those related to the claim relations in the public laws except the abovementioned ones. However the latter i. e. the person-concerned administrative law-suits has character like the first judging law-suit and has never character of the law-suits of retrial, and thus it is widely acknowledged that the so-called supplying judgements are applied to this kind of the law-suits. (See p. 222, The Legal Theory of the Administrative Procedure, by Prof. TANAKA)

Therefore, if the matter of the supplying judgement as to the administrative law-suits is said to become problem whether or not it is acknowledged, it is thoroughly limited within the defending administrative law-suits. Thus I would like only to name it "the administrative law-suits" without my saying "the defending administrative law-suits" especially in the following chapter.

nistrative office.

(3) Since generally there is no institution of the law similar to the "Mandamus" prevailing in America and England and other European countries, it is reasonable to interpret that, so long as there is no special prescription of law, the law-suits asking for the commission or the omission to the administrative office can't be admitted.

These points being taken up, I intend to make consideration of each of these relatively.

[I] First, what many disputants standing on the side of the negative view-points make grounds of is related to (1) above-mentioned, i.e. it is transgression to the principle of the independence of powers established by the Japanese Constitution to acknowledge the supplying judgements as to the defending administrative law-suits. I here intend to survey of what the disputants standing upon this kind of situation insist upon especially through some of the main judicial precedents and of the main academic theories.

Prof. JIRO TANAKA states like the following: "The Japanese Constitution maintains the principle of independence of the three powers, limiting the example of the modern constitutional nations. Namely it is established that the power of legislation lies in the diet and the power of administration in the cabinet and the power of jurisdiction in the law-court, and thus it should be the fundamental basis that these three powers respect one another. Therefore the judicial law-court is opposite to the power of administration and it must respect the unique judgement of the administrative power as to the administrations, playing functions of securing laws, i.e. it secures the application of the laws, as a rule, negatively in case that the administrations are performed in a form of transgression to the laws.

From this view-point, on the one hand, the function of securing the application of the laws to the concrete facts, to speak substantially, claims this to belong to the power of the law-courts, and, on the other hand, the function that transgresses the limitation it's securing the laws does not belong to the powers of the law-courts except in such a case as is especially prescribed clearly as the powers of the law-courts.'

Prof. TANAKA continues to say like the following from that standpoint:

“The administrative law-courts in the Old Japanese Imperial Constitution had a position as administrative organization having a kind of the power of superintendence to the administrative office, and used to cancel the administrative disposition of transgression, and at the same time they thought they themselves could execute their own administrative disposition in place of this or they could command the administrative office to execute the definite disposition. However it is a problem whether or not the same powers as above-mentioned especially as to the judicial law-courts under the New Japanese Constitution.

Naturally as to this point, the purport of the constitution acknowledging the power of judgement of the judgement of the judicial law-courts as to the administrative affairs becomes the gist that the powers which had ever belonged to the administrative law-courts are acknowledged to belong to the judicial law-courts, and thus the courts executes not only cancellation of the unlawful dispositions but also their own determinations in substitution of this, altering the contents of the dispositions for themselves, or they can execute the dispositions substituted for this by their commanding to the administrative office. There are some who hold this point of view... However I can't agree to this point of view. Even though the judicial law-court comes to have the powers of judgement as to the administrative affairs, it does not mean that the judicial law-court comes to have general power of superintendence to the power of administration by its negation of the principle of independence of the three powers, or it becomes the so-called administrative organization of its executing the power of administration for itself. It has already been mentioned before that the judicial law-court as medium of the power of jurisdiction has only function of the limited negative sides of its securing the concrete application of the laws. In this way it should be understood that, besides such a case as is prescribed especially in the laws, we can't propose the law-suits asking for the new administrative dispositions to the law-court, and that, as to the law-suits asking for the alteration or the cancellation of the unlawful

administrative dispositions, there being some reasons as to these law-suits, the partial alteration and the partial cancellation of the dispositions can be only possible. For example, as to the law-suits of objection to the refusal of the business licence, there being any reason as to them, the law-court can only execute cancellation of the disposition of the refusal as it's judgement. And thus it is not admitted for the law-court to execute the business licence in place of the administrative office, or to command the administrative office to execute the business licence. As to the duty of the law-court of it's securing the application of laws, even through it can make judgement whether or not the disposition of of the refusal is unlawful, the problem whether or not any concrete disposition is executed should be dependent upon the administrative office having powers to execute such disposition, considering the concrete conditions. Thus from the purport of the independence of the three powers, this can be said belong to the judgements of the power of administration; (See from p. 132 to p. 140, *The Power of the Judicial Law-court related to the Administrative affairs*, in above, *The Legal Theory of the Administrative Procedure*.)

Moreover from almost the same view-point Prof. OGAWA states like the following:

"It means that the power of administration is distributed the power of execution or non-execution of the administrative act—that the administrative act is said to belong to the administrative organization as institution. Thus it can be thought that, if we acknowledge generally the law-court can command the execution of its power, we come to acknowledge the general superintendence of the law-court by its entering the power of administration and that finally both the former and the latter end in the same result.

Namely the substantial meaning of the law lies in it that it gives the administrative organization the power of the administrative act, entrusting the administrative judgements with the matter of determination whether of not the administrative organization executes one of the administrative act. Thus it should be interpreted that, as a rule, the power of jurisdiction investigates the matter whether or not the admini-

strative judgements are lawful, and that, these judgements being unlawful, it can only deny (i.e. cancel) their effect." (See from p. 99 to p. 100, The "Administrative procedure")

Furthermore, the TAKAMATSU High Court also says about the matter in which it asked the nation for its acknowledgement of the certificates of the nationalities of the ships and of the permission of fishery—like the following:

"The law-court can only have the limited negative function of its securing the concrete application of the laws as medium of the execution of the judicial power especially in the administrative affairs, and thus it does not have such duty as realizes a kind of administrative purpose. Therefore, besides the case that there is any special prescription of the law, the law-court can't make judgements of having the same effect as the administrative office can give, behaving itself in place of the latter, and it can't command the latter to execute dispositions. If we acknowledge the law-court can have the function of its doing so, finally it ends in that the law-court executes the power of administration and that it superintends the administrative office, and thus it will become contrary to the principle of the independence of the three powers." (See p. 1, No. 1, Vol. 4, The Collection of the Judgements and the Judicial Precedents of the Administrative Affairs.)

Thus it acknowledges that, from the principle of the independence of powers, the supplying judgement can't be recognized as to the administrative law-suits. And the TOKYO High Court states clearly like the following especially as to the matter in which it asks the administrative office for the reasons why the latter does not acknowledge the claim of the test investigation regarding to the effects of the therapeutics and of the medicine, thinking nothing of it—the following is the same as the judicial precedents mentioned before—: "This claim requires the judgement that commands the administrative office to execute the administrative act. From the foundation of the independence of the three powers in the constitution, however, the law-court does not have the power of such judgement as commands the administrative office to execute the administrative act." (See p. 1063, No. 5, Vol. 3, The colle-

ction of the Judgements and the Judicial Precedents of the Administrative Affairs.)

Next, the opinion of Prof. KANEKO has some nuance from these disputants, and says that in the chapter of the law ... alteration or cancellation of the dispositions...(I mean by it the so-called "alteration or cancellation of the dispositions" in the Special Case Law of the procedure of the Administrative matters mentioned before). However here is a question about what it means. The administrative law-court hitherto was in the position of superintendence to the administrative office, and thus it could cancel the administrative dispositions by reason of its being based upon the power of superintendence.

Thus the cancellation shows that of the manifestation of its original intention based upon the power of administration and also means the disposition of objection, and the act dependent upon the power of the administrative office having the power of cancellation. Then can it be possible that such cancellation showing the manifestation of its intention will be executed in the law-court based upon the power of jurisdiction?

From the view point of the foundation of the independence of the three powers, the law-court can't execute the power of administration for itself. Therefore the cancellation of the law-court does not show the manifestation of its intention, but rather shows only that, as the result of the establishment of transgression by the judgement, its own act of execution can be cancelled and also the possibility of the application of laws to the administrative dispositions can be turned over. Thus it is possible to think that this is a special effect caused by the manifestation of the judgement of the law-court as well as the power of formation and of the execution of its judgement. What the law-court can act lies only in the manifestation of the judgement based upon the complete application of the laws. However, if the content of the judgement is that needing the power of execution, or the power of execution is the content of the judgement needing the power of formation, it is likewise thinkable that the power of formation can be given to it as judgement of formation. In this way of recognition it can be possible that the power of jurisdiction is accused of its execution of the power

of administration. Thus it seems that the judgement of the cancellation of the administrative disposition can't say the proclamation of the temporary execution.

As for the law-court, it can only execute the cancellation in that sense, but can't execute the disposition in place of the administrative office. For example, as to the unsatisfied law-suits to the dispositions in which the claim of acknowledgement is rejected, if there is any lawful reason to them, the law-court should execute the cancellation of the disposition of refusal, and thus it is a kind of excessive act for the judge to acknowledge it by himself or to command the office of defendants to acknowledge it. The law-court execute only the cancellation and it entrusts the other matters only to the administrative office.

As to the case of its cancelling the petitioned judgement, the law-court only draws back to the conditions in which there has never been the judgement of the law-court, and thus it can't give its own judgement ... Thus, even if there is "the alteration or cancellation of the administrative dispositions" in the chapter of the law, the so-called alteration is not the new disposition, but it seems to mean the partial cancellation of them. The power of jurisdiction can't substitute for another disposition by its having cancelled some parts of them as transgression" (See p. 18, No. 7, Vol. 2, *The Law Times the Quality of the Administrative Cases*) Thus it is considered that the supplying judgement in the administrative procedure escapes from the limitation of the power of jurisdiction. Further the KANAZAWA District Court states like the following—as to the law-suits asking for the fulfilment of the duty of calling the cityassembly—from the same view-point:

"The matter as to whether or not the power of administration can be generally executed, or how it can be really executed is the item entrusted only to the administrative organization. The law-court only executes the judgement of the concrete application of laws from the view-point of the foundation of the function securing the judicial laws, and only establish the claim relation in the public law or the matter as to whether the administrative disposition is lawful or not. Namely it must be said that it is not admitted as transgression of the limitation

of the power of jurisdiction for the law-court to command the omission of the administrative office to execute the dispositions positively, and to cancel the performed administrative dispositions, and to command the administrative office to execute the administrative dispositions, behaving itself in place of the administrative office." (See p. 37, No. 1, Vol. 1, The Collection of the Judicial Precedents of the Administrative Affairs) And thus, saying in that way, it refused this.

Furthermore, even though the view-points of Prof. TAGAMI is very different from the above mentioned theories, having considerably some peculiarity, it can be said to take even the sides of thus kind. Namely he insists upon the following:

"It is of course certain for the law-court not to be able to execute the power of administration, but it can't be said that so long as there is need to protect the claim of the plaintiff in the concrete affairs, the supplying judgement by the law-court as to the administrative dispositions does not always escape the limitation of the power of jurisdiction" He continues to state:

"If the administrative office does not have any free ability as to the administrative dispositions, in another words, the execution of the dispositions being obliged to by the laws, it can propose the supplying law-suit enforcing to execute the disposition to the act of unfulfilment of duty just as in the private law relations, and thus the law-suit of acknowledging that it has duty to execute the dispositions should be permitted." He says, "Then, is there any case in which there is no room for the power of consideration the administrative office as to its disposition?." He replies like the following:

"First, even if the law establishes the one-sided prescriptions as to the matters of the administrative dispositions, there is some room for consideration as to the acknowledgement of the facts to be concerned to it, and thus, if the administrative disposition is only the simple act of the execution of laws without any consideration accompanied, it can be thinkable that the effect of the law does not need the disposition, being directly based upon the law. Thus we can say that all of the administrative dispositions make up for the laws and therefore they

become the concrete laws....Second, the dispositions belonging to the consideration of laws by the administrative office are different from the those of free consideration, and the errors of the considerations submit to the judicial investigation, and thus the self-independence of the administrative office is not acknowledged. However after the execution of the power of consideration by the administrative office receives possibility of the lawfulness especially in the law-court, even though the content of the disposition determined by the administrative office is taken up in the matter of law-suit, it does not always arrive the same conclusion as in the case in which the law-court determines the content of the disposition, preceding that by the administrative office.

In this way here is need that the initiative of the administrative office should be respected as to the disposition in the consideration of laws. It is contrary to the independence of the powers to propose the supplying law-suits in execution of such disposition." (See from p. 104—to p. 106, No. 8, The Study of the Public Law, The Independence of the Administrative Power to the Judicial Power.)

In this way I have mentioned the gist of the academic theories and of the judicial precedent, all of which generally insist upon inability of acknowledging the supplying judgements as to the administrative law-suits, insisting upon the transgressiveness to the principle of the independence of the powers in case that the supplying judgement is permitted. Therefore what these disputants insist upon, in a word, lies in the points, that the administrative law-court in the Old Japanese Imperial Constitution could execute the supplying judgement because it had had the power of superintendence as a kind of administrative organization to the administrative office, and that, if the judicial law-court nowadays having not such power executes the supplying judgements as to the administrative affairs, it means that the law-court as judicial organization executes the act of administration, and that therefore the power of jurisdiction originally to be equally independent of one another infringes the power of administration. Then can the contentions of these disputants be justified? Since, at least, I think there are considerably problems as to it, I should like to investigate what they insist upon again

in detail. First the disputants say that the supplying judgements were acknowledged as to the administrative law-suits especially in the Old Japanese Imperial Constitution because the administrative law-court as a kind of administrative organization had the power of superintendence to the administrative office, executing the judgement and the detailed investigation as to the administrative affairs. Certainly the administrative law-court that had executed the judgements and the detailed investigations—under the Old Japanese Constitution, just as the disputants insist upon, was kind of the administrative organization. However can it be concluded that in that way the administrative law-court had been given the power of superintendence to the administrative office? On this point the disputants only explain that the administrative law-court as a kind of administrative organization had the power of superintendence, but they do not explain any more as to what law they rely upon, and moreover what kind of content was given to the power of superintendence.

Thus we can't but inferring this from what they insist upon, but since generally there are only two kinds of the powers of superintendence i. e. the general power of superintendence and the special power of it, at least, it must mean either the former or the latter. On the one hand, the general power of superintendence (we mean generally the superintendence as power of the administrative office by this kind of superintendence) means that it belongs to the same administrative system and thus it is executed between the higher administrative office and the lower one, both of which have the same common administrative business. On the other hand, even if the administrative law-court is said to be the administrative organization, it is clear that the judgements of the administrative affairs executed only at the administrative law-court did not belong to the judicial idea limited to the judgements of the civil or criminal affairs at those days, namely it was formally the administrative organization, and thus what it executed was thoroughly limited to the judgements of the administrative affairs, and so it was not the administration in the true original meaning, i. e. the action that the nation will realize the conditions of reality so as to accomplish its pur-

pose. Therefore it was completely the special power of administrative organization that executes only the judgements and the investigations of the administrative affairs, and thus it does not belong to the same administrative system as all of the other administrative organs (i. e. the organizations that execute the original true administrations except the administrative law-courts) do, and it also does not have the same common administrative business, and thus it can't be possible that the general power of superintendence was given to the administrative law-court. However, since the relation of the general superintendence can be maintained only among the same administrative class, such kind of relation can be established between the administrative law-court and the other administrative office. Then is it possible to think that the power of superintendence which the disputants think to have been given to the administrative law-court means the special power of superintendence? Surely the special superintendence means that some definite administrative offices except the administrative class execute to all of the other administrative offices especially from some special points.

For example, they are the superintendence of accountancy by the section of accountancy investigation, and the superintendence of personal administration by the bureau of personal administration, etc.

Since the administrative law-court was given the power of cancelling or altering the dispositions executed by the other administrative offices and of commanding them to execute some definite actions, it seemed from the outside that the administrative law-court would be given the special power of superintendence to the other administrative offices. (according to my inference, it is possible that what the disputants — though they said that the administrative law-court was kind of power of superintendence — means this kind of superintendence).

However the so-called-relation of superintendence among the administrative offices can't be real until it is based upon the law.

Namely, since the administrative office can represent the nation only within the limitation acknowledged by the laws, executing its power, it is impossible that some administrative offices can naturally execute the power of superintendence to the other ones, and thus even if they do

so, there will be surely any clear or suggestive prescription regarding it. However, as to the matter whether or not there was such prescription in the administrative law-court, the prescription of the law prescribes only that the administrative law-court can execute the judgements and the investigations as to the administrative affairs. Therefore, so long as we do not look on the power of administrative judgement as the so-called power of administrative superintendence, the administrative law-court is not given the power of superintendence to the other administrative offices, so think I. But if it is true so, it can be said that it was finally based upon the power of administrative judgement i. e. the power of administrative superintendence that the administrative law-court under the Old Japanese Constitution could execute the supplying judgements, and thus there will be no room for birth of doubt especially as to this point, even though the judicial law-courts nowadays having the power of administrative judgement execute the supplying judgements. At the same time, suppose that we insist thoroughly upon the contentions of the disputants who think the administrative law-court was given the power of superintendence to the other administrative offices, the administrative law-court as the natural action of the so-called power of superintendence, can willingly execute the judgements and the investigation of the administrative dispositions without its waiting for the claim from the disposed people, and thus it is possible that it can execute the judgements not only of the unlawful dispositions but also of the improper ones. Therefore here is a great contradiction between this and the really given power of the administrative law-court. Second, if nowadays the disputants acknowledge the supplying judgements in the administrative law-suits, it is said that the judicial court comes to execute the administrative action and thus the administrative power comes to be inbrought by the judicial power to be equally independent of each other.

But in that case, there no agreement among the disputants especially as to the matters of the reason why the supplying judgement become the administrative actions or of how the judicial power inbrings the administrative power, and thus their contentions are very various, so we can't affirm this completely from one-side. It seems there are con-

siderably problems even as to all of them.

In the most representative and standard theory as to it, the action of judgement as the essence of jurisdiction is regarded as the representation (law-abiding commission) of the idea, and the supplying judgement is finally the representation (lawful commission) of the will commanding some definite commission or omission to the administrative office, and thus it is said not to be permitted owing to the reason that it escapes from the region of the jurisdictional power.

Indeed, the action of jurisdiction, as the disputant asserts, is the representation of judgement. But it is rather a hasty judgement to deny the supplying judgement as to the administrative law-suits only directly from it. Namely, suppose that the law-courts can't do anything but represent the judgements, the judgement of cancellation should be remained in acknowledging the unlawfulness of the administrative dispositions giving rise to it. However, why is such formal power as extinguishes the administrative dispositions as to the judgement of cancellation produced? The disputant explains as to this point that it is a special effect given especially by the laws. But, as to the representation of the idea as the law-abiding commission, the laws generally let the judicial effects adhere to the men of commission, even though they do not want them. Thus it can surely be thought that, as to the acknowledgement of the claim power of supplement asserted by the plaintiff, the effects of the supplying command by the plaintiff are added to.

Indeed, the fact that the supplying judgement can be admitted in the civil law-suits may be interpreted into saying that such effects are given by the laws. Moreover, even though we suppose that the law-courts can't do anything but represent the idea about it, it can't be said that the action of jurisdiction escapes from its region by this so long as the supplying judgements are regarded as the acknowledgement of the claim power of the supplement asserted by the plaintiff.

Next from the view-point of the traditional situation which distinguishes administration from jurisdiction as to the purpose of the actions performed, it is asserted that the supplying judgements are the actions commanding some definite commissions or omission to the administra-

tive office and thus they are the actions intending the realization of some results and thus they are neither the so-called judicial actions depending on the administrative action, nor, the actions of maintaining the laws.

Indeed, the purpose of the judicial actions is different from that of the administrative action, thus from this point the both two are distinguished from each other. Namely, the purpose of the judicial laws lies in the maintenance of the order of laws and also are the actions in which they proclaim as to the concrete facts, but the administration is the action represented so as to realize the real circumstances in accomplishing the national aims. However, which side does it belong to, i. e. the action that the law-court fills the supplying judgements?

Not to mention, the supplying judgement in the administral law-suits is the action asking for some definite commissions or omissions against the administrative office. Thus, this kind of actions commanding to the lower administrative offices, depending on the superintendence, can be identified with the form of their actions, therefore at a glance it seems as if the administrative actions. But the both two are different each other in the purposes of their actions, — from this point, as mentioned before, the distinction of the jurisdiction and the administration can be practised — and thus it can be thought that the command of some definite commissions or omissions to the administrative office as to the supplying judgement by the law-courts can be executed as proclamation to be applied in the case from the view point of the maintenance of our laws. And here in the other theory, even in the case in which the business of the administrative dispositions is uniquely determined by the laws, there is acknowledged some room of consideration in the acknowledgement of the facts in it. Thus it can be said that it is not permitted for the law-court to execute the supplying judgement, going before the administrative dispositions, owing to the reason that it is equal for this to deprive of the initiative given to the administrative office. However, it really shows that such dispositions are the ones of supremacy that the laws prescribe the business of the administrative dispositions in the unique manner. Thus it would be suggested that there is no more room for

consideration in the administrative office.

Furthermore, even in the case that the laws prescribe the business of the administrative dispositions in the unique manner, there being still some room for consideration by the administrative office, such dispositions become the ones of free consideration. Finally it would result that both the supplying judgement and the judgement of cancellation can't be permitted. In spite of this, what is the reason why the supplying judgement can't be permitted, even though only the judgement of cancellation is permitted? There are considerably some problems on this point.

(II) The other points except these becoming the foundation of argument, however, there are not few theories and judicial precedents denying the supplying judgements in the administrative law-suits. First, as a general principle of our existing law, there being not given to the nation the claim power of supplement against the administrative office, it is asserted that the law-court can't execute the judgements commanding some definite commissions or omissions against the administrative office. For example, the judge ASAGA states that, 'only in such a case that it is understood that it is advantageous directly for some definite nation to execute the administrative dispositions in accordance with the judicial prescription, the nation can propose the appeal of the supplement against the administrative office,' and that "as a rule, there being not given to the side of the nation such a claim power in accordance with the written laws, the supplying judgement as to the general administrative law-suits finally can't be permitted' (Some Problems of The Administrative Procedure ASAGA, p. 37-p. 38).

Indeed, in the public law affairs, just as the disputant asserts, the advantage to be received by the nation becoming not yet the so-called public power, thus there are many bases in which it is nothing but reflection of the laws. On the other hand, however, there are many cases in which the nation is given the power againsts the administrative office. For example, it is stated clearly in the Article 10, 11 and 12 and in the Article 69 etc. in the Life Protection Law — that it is the right that the very nation receives their advantages. Therefore, in such a case, there

will be no reason to regard the advantages to be received as reflection of laws. So long as it is the right, it should be interpreted that it is possible to claim the advantages to be received by the nation against the administrative office to be concerned with. As to this point, it seems true that the disputants think that, the claim power of supplement of the nation being abstract, not concrete, the law-suits claiming some definite supplement against the administrative office are not permitted.

Even if it is regarded in such a way, in the case that the appeal about the infringement of the powers by the unlawful administrative dispositions is proposed, it seems that this appeal becomes the law-suits as to the concrete rights and duties.

(III) Furthermore, there are another disputants who assert that, there being generally not the institution of the duty execution command especially in Japan, the law-courts can't execute such supplying judgement as commanding some definite commissions or omissions against the administrative office. For example, as to the law-suit of calling the assembly, the Kanazawa local law-court states clearly that, the so-called duty execution command as general institution being not admitted in Japan, so long as there is no special prescription about that, it must be said that the law-court does not have power commanding the action of calling the assembly to the head of the city as administrative organ". (See p. 101, No. 1, succession, The collection of the Judicial Precedents of the Administrative Affairs.) However, the appeal asking for the duty execution command being a special law-suit regarded as formal administrative law-suit, it can be said that it is a complete reverse order to make judgements of analogical inference as to the principal law-suits — from these exceptional kind of law-suits.

(3)

Next, I should like to make a survey of the assertions of the theories and the judicial precedents, admitting the supplying judgements as to the administrative law-suits. Even among the disputants who stand on this kind of position, it is fact that there is considerable difference of nuance in their assertions. The most typical and representative theory

among them is that of Professor YAMADA's. Professor YAMADA asserts like the following: "From the view point of the contents of the administrative affairs, the examination of them is indeed administration, but it becomes jurisdiction from the view point of their formal affairs. The problem, therefore, whether it is entrusted to the administrative organ or to the judicial organ, is different among the nations, and thus there is not always uniformity about it. In Japan, however, the power of judgement as to the administrative affairs being given to the general law-courts as judicial organ, even if the law-court commands some definite commissions or omissions against the administrative office, it does not transgress the principle of the independence of power any more, so long as it is regarded as judicial judgement. Moreover, the omission of the transgression of duties being possible to be regarded as a kind of action, it should be understood that, even in such a case, the proposition can be admitted. Therefore, in the case that the nation suffers infringement of the powers in a unlawful manner, without any relation to the matter of the administrative dispositions, it can ask the law-court for the supplying judgement." (See from p. 1 ff, vol. 29, No 2/3, 4/5 the Meiji Law Review, as to the adoption in Japan of the west-german suits for agency action).⁽¹⁾

Indeed it is understood that it transgress the principle of the independence of powers acknowledging the initiative of the administrative dispositions against the administrative office—to permit the supplying judgement as to the administrative law-suits. As to this point, the disputant means that the omission of the transgression of duties can be regarded as a kind of action, but it seems that there is considerably problems owing to the reason that, in Japan, the American-English way of thinking of laws has not been matured yet.

(4)

Finally I mean to state my own conclusion as to this problem.

First, when one looks at the Japanese Constitution, it prescribes

(1) The following can be taken up as of the same viewpoint as the above-mentioned theories: Decision at the sapporo high court: November 8. 24 of showa. (p. 63 ff. vol. 17, collection of the judicial precedent of the administrative affairs.)

fundamental principles of the national system in the item of the parliament of the chapter 4, and in the item of the Cabinet of the chapter 5, and in the Article 3 of the Jurisdiction of the chapter 6. And in each top of the chapter the following prescriptions are prescribed: "The Diet shall be the highest organ of state power, and shall be the sole lawmaking organ of the state" (Article 41), and Executive power shall be vested in the Cabinet" (Article 65), and "The whole judicial power is vested in a Supreme Court and in such inferior Courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power." (Item 1 and 2 in Article 76). Thus, naturally from these prescriptions, it can easily be understood that, the principle of the independence of powers being adopted in the Constitution of Japan its contents are divided into the three actions, i.e. legislation and administration and jurisdiction, and these actions belong one another to the Legislative Organ (i.e. parliament) and to the Administrative Organ (i.e. Cabinet) and to the Jurisdictional Organ (i.e. Law-Court). If the national action executing the supplying judgements as to the administrative law-suits is executed as jurisdictional action, naturally the law-court can execute it owing to the reason that such an action should be executed as a rule by the judicial organ. However, can it be thought that such an action is a jurisdictional action? It has been said that it is very difficult to distinguish the jurisdictional action from the administrative action especially from the quality of their actions, because the both two have been the actions of the execution or application of laws. However, just as many disputants recently point out, from the view point of the purpose of the both two to be executed, even if they are said equally to be the actions of application of laws, the former is the action executed for giving rise to the circumstances of really so as to accomplish the national purpose and the latter is the action proclaiming the laws to be applied in conformity to the concrete facts, and thus the difference between the both two lies in this point. Therefore we can easily understand that the distinction between the both two can be performed. On the other hand, as to the action executing the supplying judgements in the administrative law-suits, this kind of action being

based only upon the judicial value judgement, it applies the prescriptions to the concrete disputes, and thus it only proclaims what the prescriptions command, acknowledging that the plaintiff has the judicial claim power of the supplement. Namely, it is surely executed as the proclamation of laws to be applied to the actions so as to maintain the laws, and it is never executed towards the direction giving rise to the circumstances of reality to accomplish the national purpose. Therefore, it can be concluded clearly that the action of executing the supplying judgements as to the administrative affairs is surely the jurisdictional action, not the administrative one.

Next, while we look at the Special Precedents Law as to the law-suits of the administrative affairs as the Special Law as to the administrative law-suits, it uses such a sentence as 'the cancellation or alteration of the administrative law-suits' in the Article 1 and 2 in the above-mentioned law. In this case, if we realize the word 'alteration' literally, I think that it is the purport of the law that the law-court is permitted to execute both cancellation of the administrative dispositions and alterations of their contents. Furthermore it can be possibly concluded that, if it is in that way, the law-court can execute some dispositions to be substituted for cancelling the administrative dispositions executed already, and that the law-court can be admitted to command the execution about this to the administrative office.

From these reasons mentioned above, I wish to mean that the man who is entrusted the right to the unlawfulness by the administrative disposition can ask the law-court for the supplying judgement.⁽¹⁾

(1) See the following work as of the same view as mine. T. Isozaki, p. 1 ff. vol. 11, No. 2, The Public Law Review, The Judgement of the Court affecting an Unlawful act.