

# **DISMANTLING THE “DEVELOPMENTAL STATE”?**

## **ADMINISTRATIVE PROCEDURE REFORM IN JAPAN AND KOREA**

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### **INTRODUCTION**

At least until the “Asian Crisis” of 1997, the post-World War II bureaucracies in Northeast Asia were generally considered to be among the most powerful and effective states in history. The conventional story held that so-called “developmental states” presided over miraculous economic growth that transformed Japan, Korea and Taiwan from the ruins of war into industrial powerhouses.<sup>1</sup> According to this view, these states directed economic growth using a variety of activist mechanisms, rather than simply providing an enabling environment for capitalism as required by liberal ideology.<sup>2</sup> By fostering close links among elite administrators, big business and politicians, these states were able to pursue high-growth policies with relatively little interference from actors outside the dominant coalition.<sup>3</sup>

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<sup>1</sup> See WORLD BANK, *THE EAST ASIAN MIRACLE* (1993).

<sup>2</sup> See, e.g., CHALMERS JOHNSON, *JAPAN: WHO GOVERNS: THE RISE OF THE DEVELOPMENTAL STATE* (1995); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990); ALICE AMSDEN, *ASIA’S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989); ULRIKE SCHAEDE, *COOPERATIVE CAPITALISM* (2000).

<sup>3</sup> See PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* (1995); WORLD DEVELOPMENT REPORT: *THE STATE IN A CHANGING WORLD* (1997); Ulrike Schaeede, *The “Old Boy” Network and Government-Business Relationships in Japan*, in *JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM* (Harald Baum, ed., 1997).

Administrative discretion was at the core of the developmental state model.<sup>4</sup> The states in Japan, Korea and Taiwan recruited the best and the brightest of the society into the ranks of government, and advanced them based on merit.<sup>5</sup> These elites were then provided with the tools of bureaucratic intervention in the economy, subject to little oversight from courts. Using informal “administrative guidance” under broad delegations of authority from the legislature, the state was able to maintain flexibility and achieve its goals without extensive legal procedures. Courts took a hands-off approach, based on legal regimes that were nearly identical in important respects. The combination of formal insulation and informal social networks meant that the state was both insulated from adversarial interference yet responsive to those societal interests that shared the high-growth orientation.<sup>6</sup>

After decades of high growth, and in response to external pressure from the United States, Japan and Korea passed Administrative Procedure Laws for the first time in 1993 and 1996 respectively.<sup>7</sup> By doing so, these two paragons of the state interference in the economy seemed to be tying the hands of their vaunted bureaucracies.<sup>8</sup> Although

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<sup>4</sup> See John K. J. Ohnesorge, *States, Industrial Policies and Antidumping Enforcement in Japan, South Korea, And Taiwan*, 3 BUFF. J. INT’L L. 289, 395 (1997) (state must be free of administrative review to implement its economic policies).

<sup>5</sup> WADE, *supra* note 2, at 371; see generally T. J. Pempel and Michio Muramatsu, *The Japanese Bureaucracy and Economic Development: Structuring a Proactive Civil Service*, in THE JAPANESE CIVIL SERVICE AND ECONOMIC DEVELOPMENT 19-75 (Hyung-ki Kim, et al., eds., 1995); WORLD DEVELOPMENT REPORT, *supra* note 3, at 9; WORLD BANK, *supra* note 1. This has obvious continuities with Confucian tradition. See EZRA VOGEL, THE FOUR LITTLE DRAGONS: THE SPREAD OF INDUSTRIALIZATION IN EAST ASIA 92-101 (1991); see generally CONFUCIAN TRADITIONS AND EAST ASIAN MODERNITY (Tu Wei-ming, ed., 1997).

<sup>6</sup> EVANS, *supra* note 3.

<sup>7</sup> Law No. 88 of 1993 (Nov. 12, 1993), reprinted in 25 LAW IN JAPAN 141 (1995) (Japan); Act No. 5421 (Dec. 31, 1996) (Korea). See Masaki Abe, *Foreign Pressure and Legal Innovation in Contemporary Japan: The Case of the Administrative Procedure Act*, Paper presented at 1995 Meeting of the Research Committee on the Sociology of Law, Tokyo (attributing the most important role in passage of the law to American pressure on Japan). But see Lorenz Kodderitzsch, *Japan’s New Administrative Procedure Law: Reasons for its Enactment and Likely Implications*, 24 LAW IN JAPAN 105, 114-15 (1991) (noting that foreign pressure was not determinative of content in the Japanese law).

<sup>8</sup> Compare ASIAN DEVELOPMENT BANK, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 253 (1999) (hereafter ASIAN DEVELOPMENT BANK) (arguing that administrative guidance was necessary during a high-growth era when formal regulatory policy could not keep up with rapid social

similar in form, the two statutory regimes differ in certain crucial areas. We thus have a situation where two countries with nearly identical statutory frameworks and minimal legal control of administrative discretion reformed in quite different ways, providing an ideal environment for a comparative approach to determine why outcomes diverged.

This article argues that divergent statutory approaches in Japan and Korea reflect different political incentives with regard to the institutional problems of bureaucratic discretion. In Japan, a long-serving regime had little incentive to open up policymaking and passed a statute that does very little to constrain the bureaucracy. In contrast, the Korean political environment has changed drastically as a result of democratization and constitutional reforms. These reforms have changed the institutional environment for politicians, providing incentives to open up the policy process. The design of the new administrative procedure regime reflects these incentives.

This inquiry is particularly timely in the aftermath of the “Asian Crisis,” when attention has shifted from the supposed benefits of East Asian institutional arrangements to their costs. The East Asian state is now seen as captured, corrupt and opaque. There are increasing pressures on states throughout the region to improve transparency and reform government structures. Administrative procedure regimes can contribute to these remedies by ensuring public access to policymaking and constraining the abuse of bureaucratic power. The divergent experiences of Japan and Korea may provide guidance for other states as they undertake structural reforms.

One important caveat must be made at the outset. The role of the bureaucracy in postwar East Asian political economy is a matter of scholarly controversy, and it is not my intention here to rehash debates about the role of industrial policy in East Asian growth.<sup>9</sup> Ultimately, such debates founder on the fact that much of the evidence for

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and economic change, implying that the shift to lower growth was a force in spurring greater proceduralization).

<sup>9</sup> For an early summary, see Gregory L. Noble, *The Japanese Industrial Policy Debate*, in *PACIFIC DYNAMICS: THE INTERNATIONAL POLITICS OF INDUSTRIAL CHANGE* 53 (Stephen Haggard and Chung-in Moon, eds., 1989). On the one hand, there are scholars who argue the state was central to economic growth. See Chalmers Johnson, *Japan: Who Governs? An Essay on Official Bureaucracy*, 2 J. JAPANESE STUD. 1, (1975); CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982); STEPHEN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZED COUNTRIES* (1990); AMSDEN, *supra* note 2. In this view, the East Asian state has used a variety of incentives and policy tools -- including selective credit allocation, formation of research cartels, and protection from

bureaucratic control over the economy is also consistent with a more political interpretation that emphasizes delegation by legislators.<sup>10</sup> For present purposes, it is sufficient to note that there are certain commonalities among those who believe that the state itself was directing growth and those who argue that the appearance of bureaucratic power is merely delegation by political principals.<sup>11</sup> Both sides of this debate acknowledge that the administrative procedure regimes in Northeast Asia were relatively closed to public participation and that East Asian bureaucrats were not subjected to extensive judicial interference, at least when compared with their American and European counterparts. Both sides acknowledge that the state was in fact exercising great power vis-a-vis regulated parties, although they dispute whether this power was exercised independently of political control. Both sides acknowledge that political control over the bureaucracy increased over time — in the Japanese case, with the long reign of the Liberal Democratic Party (LDP), and in Korea after the *coup d'etat* overthrowing Park Chung Hee in 1979.<sup>12</sup> Although the title of this article refers to the

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foreign competition -- to steer, guide and cajole private firms into behaving in ways that maximized growth and development. Others disagree and assert that bureaucratic power has been over-rated. See Mathew D. McCubbins and Gregory W. Noble, *Equilibrium Behavior and the Appearance of Power: Legislators, Bureaucrats, and the Budget Process in the U.S. and Japan*, in *STRUCTURE AND POLICY IN THE U.S. AND JAPAN* (Peter Cowhey and Mathew D. McCubbins, eds., 1995); Samuel Kernell, *The Primacy of Politics in Economic Policy*, in *PARALLEL POLITICS: ECONOMIC POLICYMAKING IN JAPAN AND THE UNITED STATES* 325, 326 (Samuel Kernell, ed., 1991) ("The Japanese Miracle has occurred in the sectors of the economy where the government has remained relatively uninvolved."); J. MARK RAMSEYER AND FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* (1993).

<sup>10</sup> See, e.g., Kernell, *supra* note 9 at 365 ("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.")

<sup>11</sup> In between the activist and passive views of the Japanese state are a number of nuanced alternative formulations. See, e.g., DANIEL OKIMOTO, *BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY* 226 (1989) ("Network State"); JAY TATE, *DRIVING PRODUCTION INNOVATION HOME: GUARDIAN STATE CAPITALISM AND THE COMPETITIVENESS OF THE JAPANESE AUTOMOBILE INDUSTRY* 35 (1995) ("guardian state"); Brian Woodall, *The Logic of Collusive Action: The Political Roots of Japan's Dango System*, 25 *COMP. POL.* 297, 311 (1993) ("clientalist state"); and T. J. PEMPEL, *POLICYMAKING IN CONTEMPORARY JAPAN* (1987) ("gatekeeper" state).

<sup>12</sup> Chalmers Johnson, *Tanaka Kakuei, Structural Corruption, and the Advent of Machine Politics in Japan*, 12 *J. JAPANESE STUD.* 1 (1986); Michio Muramatsu and Ellis Kraus, *Bureaucrats and Politicians in Policymaking: The Case of Japan*, 78 *AM. POL. SCI. REV.* 126 (1984); JOHN HALEY, *AUTHORITY WITHOUT*

“developmental state” to capture the notion of a regime with formally flexible administrative procedure, it rejects the more extreme position that this state operated independent of political control.

The article proceeds as follows. Part One provides background on the role of the bureaucracy in Korea and Japan. Part Two describes the recent reforms in administrative procedure, including a description of the first administrative procedure laws passed in both countries.<sup>13</sup> It includes a brief discussion of the potential impact of these laws, paying special attention to the phenomenon of administrative guidance. Part Three draws on principal-agent theory to provide a political explanation for the divergence. Part Four concludes with a discussion of the implications of the argument for the comparative study of administrative law and for the prospects of governance reform in Asia.

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POWER 41 (1991); Stephen Haggard and Chung-In Moon, *Institutions and Economic Policy: Theory and a Korean Case Study*, 42 WORLD POLITICS 210 (1990).

<sup>13</sup> *Supra* note 7.

## **I. THE BASELINE: BROAD ADMINISTRATIVE DISCRETION**

### **A. Origins of Administrative Power**

#### ***1. Japan***

In Japan, the modern state has its roots in the Meiji restoration of 1868, when elites conducted a “revolution from above” to modernize and maintain independence from a threatening West.<sup>14</sup> Perceiving their country as backwards, the Meiji leaders launched a rapid program of industrialization emphasizing economic development as the key to security. In contrast with earlier developing nations like the United States and England, the Meiji oligarchs had to build a centralized state and a modern industrial economy at the same time.<sup>15</sup> The contemporaneous development of the two led to the close interdependent relationship of modern times.

Law was also a focus of modernization as Japan borrowed heavily from French and German law in adopting a modern legal system. Japanese administrative law in the Meiji period was borrowed from continental sources.<sup>16</sup> Drawing from contemporary German theory, early administrative law scholars argued for a strict distinction between private and public law.<sup>17</sup> The body of rules governing relationships between the citizen and the state was distinct from the rules governing relations among citizens. Like the continental systems from which it was borrowed, Japanese administrative law in the Meiji period centered around the existence of a special administrative court.<sup>18</sup>

The postwar American occupation had an important influence on Japanese law and politics. Besides the new Constitution, occupation authorities drafted a series of statutes to try to reorganize the Japanese economy. Postwar governance has centered around the

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<sup>14</sup> See MIKISO HANE, *MODERN JAPAN: A HISTORICAL SURVEY* (1986) (providing history of the Meiji restoration).

<sup>15</sup> See generally ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE* (1962).

<sup>16</sup> HALEY, *supra* note 12, at 70.

<sup>17</sup> *Id.*; see also HALEY, *supra* note 12, at 27 (emphasizing the lack of this distinction in the Chinese legal tradition that influenced imperial Japanese institutions).

<sup>18</sup> *Id.* at 81. Unlike the German model that features a number of specialized administrative tribunals, in Japan there was a single administrative court of first and final instance.

powerful “iron triangle” of the LDP, the bureaucracy and big business. Close links among the three groups make it difficult to determine the boundaries between them, as ex-bureaucrats played a leading role in politics and business. With one brief exception, the LDP has ruled uninterrupted since its formation in 1955 and it has consistently pursued pro-business policies that were formulated and implemented by the bureaucracy. The LDP by and large delegated detailed decision-making to the Ministries during this period, leading to the conclusion that the bureaucracy dominates Japanese political economy.

## **2. Korea**

The modern state in Korea (as well as in Taiwan) has its origins in the Japanese Occupation. Japan’s influence in Korean modernization began in the late 19<sup>th</sup> century and ultimately included 45 years of colonial rule.<sup>19</sup> Japan transplanted its government, including its court structure, to Korea and integrated the two economies. Japanese law was transplanted wholesale.<sup>20</sup> Although the occupation was undeniably brutal, many scholars believe that it had positive implications for the future growth of Korea, and a formally modern legal system was one important legacy.<sup>21</sup> Until the 1980s, Korean law was still largely composed of statutes copied from Japanese models so the two countries shared not only a developmental model, but actual statutory and regulatory language.<sup>22</sup> This provides an ideal setting for examining legal reforms that began to diverge in the 1980s, as many variables can be held constant among the two cases.

As in Japan, American influence had important institutional and political consequences in Korea.<sup>23</sup> American military authorities occupied Korea for three years and thereafter fought a war that led to the present division of the country. Preoccupied

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<sup>19</sup> DAVID I. STEINBERG, *THE REPUBLIC OF KOREA* 39-47 (1989).

<sup>20</sup> PYONG-CHOON HAHM, *KOREAN JURISPRUDENCE, POLITICS AND CULTURE* 137-51 (1986).

<sup>21</sup> See STEINBERG, *supra* note 19, at 40 (1989) (discussing infrastructural and educational contributions of Japanese rule); Chung-in Moon, *Changing Patterns of Business-Government Relations in South Korea*, in *BUSINESS AND GOVERNMENT IN INDUSTRIALISING ASIA* 142, 143 (Andrew MacIntyre, ed., 1994) (identifying strong state as part of Japanese legacy).

<sup>22</sup> STEINBERG, *supra* note 19, at 46.

<sup>23</sup> JOHN KIE-CHIANG OH, *KOREAN POLITICS* 27-28 (1999).

with the communist threat, the Americans were willing to turn a blind eye to Korean authoritarianism and corruption under the First Republic led by Syngman Rhee. Corruption ultimately led to the overthrow of Rhee, and soon thereafter the replacement Second Republic fell to a *coup d'état* by General Park Chung Hee in 1961. Park initiated a period of centralized bureaucratic control over the economy and the financial system, accompanied by political crackdown on dissent. He formed an Economic Planning Board to coordinate economic policy, with a mandate to promote exports and later heavy industrialization.<sup>24</sup> Park also launched an anti-corruption drive, purged tens of thousands of bureaucrats, and promoted meritocratic policies. These measures were successful and the economy took off, led by the preferred *chaebol* conglomerates whose continued dominance of the economy is a major issue today.<sup>25</sup>

Park grew increasingly authoritarian after launching the Fourth Republic in 1972. After his assassination in 1979, a *coup d'état* led by Chun Doo Hwan established the Fifth Republic. Following massive protests in 1987, Chun's designated successor Roh Tae Woo launched a democratization program that led to significant constitutional reforms, including direct presidential elections and the creation of a Constitutional Court.<sup>26</sup> A major administrative overhaul was begun under President Kim Young Sam in 1993, and reform has accelerated after the election of former dissident Kim Dae-jung in 1997.

This discussion illustrates some major points of divergence between the Japanese and Korean versions of “developmental state” capitalism. The six postwar Korean Republics were all semi-presidential in structure, in contrast with the Japanese parliamentary system. While the precise division of powers between the Korean President and Prime Minister varied over the course of the six Republics, for the bulk of the postwar period the President has been at the very center of the political system. This concentration of power in a single individual has led to a winner-take-all approach to

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<sup>24</sup> WADE, *supra* note 2, at 322-24.

<sup>25</sup> STEINBERG, *supra* note 19, at 128-37.

<sup>26</sup> See generally ROBERT E. BEDESKI, THE TRANSFORMATION OF SOUTH KOREA: REFORM AND RECONSTITUTION IN THE SIXTH REPUBLIC UNDER ROH TAE WOO, 1987-1992 (1994).



politics. After Korean democratization began in 1987, no political force has been able to assume a dominant position, and politics remains a battle among shifting forces roughly equal in size. Parties are weak and personality-based. In Japan, in contrast, the key political force has been a political party in which individuals' personal ambitions are subordinated to the electoral interests of the party and its factions.

Another distinction is that of regime type. From the ascension of Park Chung Hee in 1961 through the 1987 reforms, Korea was under authoritarian rule. Civil liberties were seriously infringed, the press was controlled, electoral processes were manipulated, and judicial independence was subordinated to short-term policy goals. Labor was suppressed and professional organizations were state-controlled in a kind of authoritarian corporatism. The military played a major role in politics. Japan, in contrast, has remained consistently democratic through the postwar period.

The two bureaucracies thus existed in very different political environments. Korean presidentialism was personality-based, often authoritarian, and subject to frequent constitutional changes. Japanese parliamentarism was politically and constitutionally stable. These distinctions turn out to be crucial for understanding why administrative law has diverged in recent years, and they will return to the fore in Part Three below.

## **B. The Legal Construction of Administrative Discretion**

### ***1. Broadly Drafted Statutes and Channeled Participation***

The postwar American occupations of both Korea and Japan were dominated by New Dealers whose orientation was primarily technocratic. It is no surprise, then, that Japanese and Korean law have both been characterized by broadly worded statutes that delegate considerable authority to bureaucrats.<sup>27</sup> The major postwar regulatory reforms — in antitrust, securities regulation, and foreign investment — devolved significant decision-making to bureaucratic bodies. The bureaucrats have modified these statutes reluctantly if at all, maintaining discretion and flexibility.

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<sup>27</sup> HALEY, *supra* note 12, at 148; James M. West, *Administrative Procedure in Korea*, AM-CHAM KOREA J., December 1992, at 9 (“In Korea the level of precision in decrees and regulations is sometimes comparable to that of statutes in other systems.”)

These flexible arrangements are not surprising, given that the bureaucracies in both Japan and Korea have enjoyed a near-monopoly on the drafting of legislation.<sup>28</sup> This is in part because legislators have historically lacked the staff and expertise to play a role in drafting.<sup>29</sup> While the initiative for a new piece of legislation might come from a variety of sources, for example the legislature, the media, or interest groups, the process of drafting is controlled by the bureaucracy.<sup>30</sup> Beyond their role as the primary source of policy ideas, bureaucrats have traditionally had some involvement in the legislative process itself.<sup>31</sup>

This is not to imply that the bureaucracy makes policy in a vacuum. In Japan, any significant legislative proposal involves the convening of a “deliberative council” (*shingikai*) by the relevant Ministry to facilitate the participation of outside expert opinion.<sup>32</sup> In some cases, existing law requires that new legislation-drafting efforts involve such groups.<sup>33</sup> Access to the *shingikai* is controlled by the bureaucracy, but their membership always includes representatives of various industries and interest groups affected by the proposal in question. They also frequently include academics and journalists, precluding negative publicity by co-opting independent monitors.

Some have asserted that the bureaucracy easily manipulates the *shingikai* reports because participants have so many other obligations.<sup>34</sup> Others have argued that shingikai

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<sup>28</sup> HALEY, *supra* note 12, at 40; RAMSEYER AND ROSENBLUTH, *supra* note 9, at 136. For a recent account, see Minoru Nakano, *The Changing Legislative Process in the Transitional Period*, in JAPANESE POLITICS TODAY 45-74 (Purnendra Jain and Takashi Inoguchi, eds., 1997) (focusing on the brief period in the early 1990s when the LDP was out of power).

<sup>29</sup> Kodderitzsch, *supra* note 7.

<sup>30</sup> Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 LAW IN JAPAN 172 (1986).

<sup>31</sup> Johnson, *Japan: Who Governs?*, *supra* note 9, at 12 (“There seems no doubt from many accounts that the power of the bureaucracy with regard to legislation goes well beyond the initiation of legislative proposals and includes a degree of managing the bills within the Diet itself.”)

<sup>32</sup> See generally FRANK SCHWARTZ, *ADVICE AND CONSENT* (1998).

<sup>33</sup> Seki, *supra* note 30, at 176.

<sup>34</sup> David Boling, *Access to Government-Held Information in Japan: Citizens' “Right To Know” Bows to the Bureaucracy*, 34 STAN. J. INT’L L. 1, 20-21 (1998).

are effective means for private sector associations to influence policy.<sup>35</sup> A 1995 Cabinet Order nominally required the opening up of *shingikai* deliberations to the public, but has had little impact because of its weak language and lack of sanctions.<sup>36</sup> Whether the *shingikai* involve capture of government by interest groups or co-optation of interest groups by government, their important role ensures that the bureaucracy rather than the legislature is the important locus of policy formation. Although *shingikai* are less extensive in Korea, the same closed-door approach to policymaking among the interested groups has always been predominant.

We thus see a great deal of bureaucratic control over the process of drafting legislation, but ministries are not completely unconstrained. 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 Japanese Administrative Procedure Law itself followed such a route. The very statute nominally constraining the bureaucracy was in fact drafted by the bureaucracy itself, with results that are hardly surprising.<sup>37</sup>

## **2. *The Ubiquity of Administrative Guidance***

The bureaucratic role in governance extends not only to the drafting of legislation, but also, and more importantly, to policy implementation. Bureaucrats have a variety of legal but primarily extralegal tools to ensure their control over the shaping of public policy.<sup>38</sup> The latter are known euphemistically as administrative guidance and at one time comprised, by one estimate, 80% of Japanese bureaucratic activity.<sup>39</sup> Similarly, Korean agencies have frequently relied on administrative guidance.<sup>40</sup>

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<sup>35</sup> SCHAEDE, *supra* note 2, at 57-60.

<sup>36</sup> Boling, *supra* note 34, at 23-23.

<sup>37</sup> See Part II.B. *infra*.

<sup>38</sup> HALEY, *supra* note 12, at 160-164.

<sup>39</sup> Michael K. Young, *Judicial Review of Administrative Guidance*, 84 COLUMBIA L.R. 935 (1984).

<sup>40</sup> SANG-HYN SONG, KOREAN LAW IN THE GLOBAL ECONOMY 1249-51 (1996).

Administrative guidance is a form of pressure on regulated parties to modify their behavior and is characterized by its lack of formal legal effect.<sup>41</sup> Frequently implicit, however, is the threat of collateral sanction unofficially imposed on companies that do not follow the guidance.<sup>42</sup> 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 frequently obtained. Individuals and firms can resist administrative guidance and did so with increasing success at the local level in the 1980s.<sup>43</sup> Yet administrative guidance remains the object of great criticism from legal scholars, foreigners, businessmen, and others.<sup>44</sup>

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.<sup>45</sup> Whatever the underlying factors, the incentives for Ministries to use informal mechanisms are obvious. Ministries will naturally prefer to use informal processes over which they have full control rather than formal ones that are subject to likelier threat of review.<sup>46</sup> More importantly, agencies will seek to accomplish their most sensitive and controversial tasks through such informal processes, for these are precisely the areas in which courts are most likely to interfere with their own perception of the appropriate action.

### **3. *Minimal Judicial Oversight: The Administrative Law Frameworks***

#### **a. Japanese Administrative Law**

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<sup>41</sup> Hiroshi Shiono, *Administrative Guidance*, in PUBLIC ADMINISTRATION IN JAPAN 204 (Kiyooki Tsuji, ed., 1984).

<sup>42</sup> See FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 176-84 (1987) (recounting Sumitomo Metals incident where company left a cartel and was punished by a decrease in its import quota for coal); Young, *supra* note 39, at 938. But see SCHAEDE, *supra* note 2, at 11-12, 53 (formation of administrative guidance involved negotiation with trade associations).

<sup>43</sup> J. MARK RAMSEYER AND MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 209-12 (1999).

<sup>44</sup> Boling, *supra* note 34, at 8.

<sup>45</sup> See HALEY, *supra* note 12, at 160-164.

<sup>46</sup> HALEY, *supra* note 12, at 164.

Drawing from German and French administrative law theory, the Meiji reforms introduced the notion of an administrative act.<sup>47</sup> For a citizen's claim of administrative abuse to be justiciable, the administrative action in question had to constitute an official, formal act of the government carried out under legal authority. The courts often found such a threshold lacking. In this manner, potential legal constraint existed only on a narrow band of actions in the Meiji period. The band was broadened a bit, however, by courts' occasional willingness to consider criminal and tort actions against the state.<sup>48</sup> But the state's general immunity was a strong limiting force, and prewar administrative law was dominated by concern for state over individual interests.

The Allied Occupation imposed a new constitutional order on Japan, abolishing the state's immunity and doing away with the prewar system of special administrative courts in favor of a unified court system.<sup>49</sup> This left citizens without the benefit of designated courts to review administrative misconduct. The regular courts, imbued with public law doctrine oriented toward the state, were quite reluctant to interfere with agencies. The public-private distinction served to insulate the state. In the words of one scholar:

While those administrative activities which restrict individuals' rights or freedoms should be based on the provisions of statutes, those activities which contribute only toward the public interest or which are not directly related to the rights and obligations of the individual need not necessarily be based on law.<sup>50</sup>

Such notions expand latitude for the bureaucracy, and directly underpin the general rule that administrative guidance need not be authorized by statute.<sup>51</sup>

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<sup>47</sup> John Haley, *Japanese Administrative Law*, 19 LAW IN JAPAN 1, 2 (1986).

<sup>48</sup> *Id.* at 1.

<sup>49</sup> *Id.* at 4-5.

<sup>50</sup> Ichiro Ogawa, *The Legal Framework of Public Administration*, in PUBLIC ADMINISTRATION IN JAPAN 14 (Kiyoaki Tsuji, ed., 1984).

<sup>51</sup> See, e.g. *K.K. Daiyou Kensetsu v. Nerima Ward*, 18 Hanrei Jiho 952 (Tokyo Dist. Ct., Oct. 8, 1979), quoted in Shiono, *supra* note 41, at 209 ("If we consider the obligations of the administration toward people, it is not proper to conclude that administrative guidance . . . should be banned only because it is not based on statutory authority.")

One of the Occupation reforms was the Administrative Litigation Special Measures Law of 1948. This law established the use of ordinary civil procedure in administrative cases, but had two further features that limited effective judicial review.<sup>52</sup> First, courts could dismiss suits if the relief sought would conflict with the “public interest.” Predictably, ordinary courts that were not used to challenging the government took a wide view of the public interest. Second, the statute lacked provisions for remedies. Without the benefit of a conceptual overhaul, such as took place in Germany following World War II, Japanese courts had little involvement either in enforcing administrative measures or in remedying administrative violations.<sup>53</sup>

In 1962, this law was replaced with the Administrative Complaints Investigation Law<sup>54</sup> and the Administrative Case Litigation Law.<sup>55</sup> According to one scholar, “[d]rafted within the government, the Administrative Case Litigation Law codified prevailing concepts and doctrines without . . . expanding the notion of judicial power or the reviewability of less formal administrative measures.”<sup>56</sup> As in the prewar system, these laws continue to impose serious limitations on justiciability and standing to limit effective reviewability.<sup>57</sup> Under the current framework, review is curtailed unless the action is a formal disposition that affects the legal rights and duties of the affected party,<sup>58</sup> and the complaint must be brought by the party itself.<sup>59</sup> The standards of review are high: the complainant must show that the agency acted illegally or exceeded the

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<sup>52</sup> Haley, *supra* note 47, at 6-7.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> Law 160 of 1962.

<sup>55</sup> Law 139 of 1962.

<sup>56</sup> Haley, *supra* note 47, at 7.

<sup>57</sup> Administrative Case Litigation Law §9 (legal interest required to sue).

<sup>58</sup> See Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunse as a Barrier to Administrative Litigation*, 18 CORNELL INT’L L.J. 37, 52-56 (1985); RAMSEYER AND NAKAZATO, *supra* note 43, at 196-97; Ohnesorge, *supra* note 4, at 396-97; UPHAM, *supra* note 42, at 170.

<sup>59</sup> UPHAM, *supra* note 42, at 171-72.

scope of its discretion.<sup>60</sup> Given the broad language of many Japanese statutes, this can be a difficult showing to make.

This statutory scheme gives administrators the best of both worlds. They have the doctrinal benefit of limited standing and justiciability, and the institutional benefit of reviewability by a regular court system imbued with a deferential public law doctrine. Standing rules prevent non-governmental organizations and citizen groups from intervening, foreclosing a channel of advocacy for social change. The net result is limited public ability to participate in administrative processes, leaving the agencies “considerable flexibility.”<sup>61</sup>

This is not to say that judicial review of administrative guidance never occurs. In a narrow class of cases, courts will not only review but overturn administrative actions based on noncompliance with administrative guidance.<sup>62</sup> The courts’ general approach is to encourage negotiation between regulators and the regulated. When a private party clearly states its refusal to comply with the guidance, courts have held that ministries and local governments must refrain from withholding the benefits sought by the party. Nevertheless, the superior position of the state gives it leverage against regulated parties. Judicial oversight of administrative activity has been minimal.

Empirical studies of administrative litigation support this characterization. The Asian Development Bank, for example, found that reversals of agency action in administrative litigation are uncommon.<sup>63</sup> Although reversal rates rose in the era of environmental activism around 1970, they dropped dramatically to 1.8% in 1975 after the appointment of a new Chief Justice, and remained at a low 4.4% in 1990. This low rate no doubt provides a disincentive to bring cases, and Japan has one of the lowest rates of

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<sup>60</sup> UPHAM, *supra* note 42, at 173.

<sup>61</sup> RAMSEYER AND NAKAZATO, *supra* note 43, at 201.

<sup>62</sup> *Id.*

<sup>63</sup> ASIAN DEVELOPMENT BANK, *supra* note 8, at 254.

administrative litigation in Asia.<sup>64</sup> Municipal governments received greater scrutiny than national.<sup>65</sup>

*b. Korean Administrative Law*

Korean administrative law originated in the era of Japanese colonialism and essentially copied the Japanese adaptation of the West European model, with the distinction that there were no separate administrative courts. From the closing years of the 19<sup>th</sup> century, Japanese influence on Korean law was paramount, culminating in the annexation of Korea in 1916. Eventually all court proceedings were conducted in Japanese, usually before Japanese judges.<sup>66</sup> This is often claimed to have contributed to an aversion to judicial procedures among Koreans, although in fact Korea's own series of authoritarian governments provided little incentive to sue. Although an Administrative Litigation Law was passed as early as 1951, there was little recourse in fact, and bureaucrats enjoyed great power.<sup>67</sup> The relevant statutory framework was based on the Japanese Administrative Case Litigation Law of 1962, with the same restrictive approach to standing and justiciability.<sup>68</sup> To be reviewable, administrative acts had to constitute an exercise of public authority that restricted the plaintiff's legal rights, and in addition had to constitute the final and conclusive stage of the administrative process with immediate legal effect.<sup>69</sup> Even if one was successful in overcoming these hurdles, remedial provisions were minimal so there was little incentive to sue.

Things began to change after the creation of the Fifth Republic in 1981. Knowing that his regime had little internal legitimacy, President Chun Doo Hwan turned

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<sup>64</sup> Compare *id.* at 252, 254-55, 257.

<sup>65</sup> RAMSEYER AND NAKAZATO, *supra* note 43, at 219 (finding 11.09% of suits against local governments succeeded during 1986-95, as compared with only 8.63% of suits against the national government). Although there are some discrepancies between the rates reported by the Asian Development Bank and those found by Ramseyer and Nakazato, both are quite low.

<sup>66</sup> HAHM, *supra* note 20, at 140.

<sup>67</sup> HILTON ROOT, SMALL COUNTRIES, BIG LESSONS: GOVERNANCE AND THE RISE OF EAST ASIA (1996).

<sup>68</sup> Ohnesorge, *supra* note 4, at 398-99. See *supra* text at notes 55-60 for a discussion of the Japanese statute.

<sup>69</sup> Ohnesorge, *supra* note 4, at 399.



increasingly to rule-of-law discourse. One reflection of this was the revised Administrative Appeals Act of 1984, which provided an expanded framework for citizen recourse.<sup>70</sup> This Act essentially provided for appeals to a superior administrative agency and gave superior agencies the power to revise or cancel illegal measures adopted by junior administrative authorities. All public authorities were required to set up administrative appeals commissions, composed of 15 members and chaired by the head of the public authority, to hear particular appeals against that body.<sup>71</sup> This meant that each Ministry would be responsible for hearing complaints against itself. The Administrative Appeals Act provided a means for superior bureaucrats to control inferior ones, but did not provide a truly independent constraint by the courts. As in Japan, Korean administrative law sought to minimize judicial oversight. However, administrative litigation began to rise after 1980, reflecting the evolving procedural framework.<sup>72</sup>

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<sup>70</sup> Administrative Appeals Act, Act No. 3755, Dec. 15, 1984.

<sup>71</sup> *Id.* Art. 6.

<sup>72</sup> ASIAN DEVELOPMENT BANK, *supra* note 8, at 254.

## II. REFORMS: THE NEW ADMINISTRATIVE PROCEDURE LAWS

### A. Introduction

In the late 1980s, Japan's governance system began to experience severe difficulties. A series of scandals forced several top LDP leaders to resign.<sup>73</sup> The economy slowed. The financial boom and bust known as the "bubble economy" called into question the competence of the bureaucratic management.<sup>74</sup> The Ministry of Finance, once seen as the central and most powerful ministry, was extensively criticized for mishandling and exacerbating the banking crisis that has now plagued the Japanese economy for over a decade. This, and other incidents of bureaucratic failure, led to gradually increasing pressures for reform, and for a brief period, the electoral loss of the LDP.<sup>75</sup>

Slower growth itself can create pressures on any administrative state, but to the extent that the Japanese state saw itself as having a developmental, rather than regulatory mission, these pressures were particularly severe. During the high-growth era lasting into the 1970s, Japan's system was essentially governed by a coalition of business-government-LDP interests. When challenged by new interest groups, the political system could absorb them by simply buying them off with a share of the ever-expanding pie.<sup>76</sup> Once the pie ceased to expand, however, the shares become relatively more scarce and contested. Slower growth requires a shift from distributive toward redistributive politics as groups fight over scarcer government resources. Distributive politics involves material compensation of the core constituencies of the LDP, interests that we have seen

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<sup>73</sup> See Gregory Noble, *Humpty-Dumpty Had a Great Fall*, 34 ASIAN SURVEY 19, 25 (1994) (attributing the fall of the LDP to the years of scandal, internal fissions in the party and economic and demographic change).

<sup>74</sup> JEI Report, No. 5C June 1994.

<sup>75</sup> See, e.g., Takashi Inoguchi, *Japanese Bureaucracy: Coping with New Challenges*, in JAPANESE POLITICS TODAY 92 (Purnendra Jain and Takashi Inoguchi, eds., 1997) (providing several examples of scandals); E. B. Keehn, *Virtual Reality in Japan's Regulatory Agencies*, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 321, 321 (Harald Baum, ed., 1997).

<sup>76</sup> See KENT CALDER, CRISIS AND COMPENSATION 156-230 (1988) (describing dynamic of compensating challengers to LDP authority).

are enmeshed in close social networks and used to informalism.<sup>77</sup> Redistributive politics in a slow-growth era may be less likely to function through a series of back-room deals because interest groups want to ensure that their bargains with politicians are enforceable. They may therefore wish to formalize their input into policy through regularized procedures. In this way, slower growth can contribute indirectly toward formalization of law.

Some version of this dynamic appears to have been at work in Japan, as the *Keidanren* association of big business joined the lobbying for the Administrative Procedure Law. Domestic business may also have been focused on the consequences in overseas markets, as continued trade imbalances with the United States and foreign perceptions of administrative opaqueness created external political pressures to enact the Administrative Procedure Law (APL) and other mechanisms of greater transparency.<sup>78</sup> These pressures, and a brief period when the LDP fell out of power, finally led to the passage of the APL in 1993 – some forty years after it was initially proposed.<sup>79</sup>

Once Japan had a law, Korea followed shortly. This may have reflected the longstanding influence of Japan on Korean law, but it also resulted from Korea's democratization process that led to increasing pressures on the bureaucracy to become more responsive to a wider range of interest groups. President Kim Young Sam, who in 1992 became the first civilian to be elected President since 1960, took several steps to control corruption, including institution of a "public official wealth registration system" to identify discrepancies in individual wealth before and after public service careers.<sup>80</sup> He also established the Presidential Commission on Administrative Reform in April

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<sup>77</sup> *Id.* at 171-72, 188.

<sup>78</sup> Pressure has also come from multilateral sources. *Cf.* Lorraine C. Cardenas and Arpaporn Buranakanits, *The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia*, 5 ANN. SURV. INT'L & COMP. L. 49, 68 (1999) (APEC encourages transparent administrative procedures to avoid trade disputes).

<sup>79</sup> The history of the drafting process is described in detail in Kodderitzsch, *supra* note 7; *see also* Mark Levin, *Bureaucratic Sumo Wrestling* 4 ASIAN L. J. 16, 16 (1998); JOHN HALEY, *THE SPIRIT OF JAPANESE LAW* 36 (1998) (law originally been proposed in 1952); *Gyosei Tetsuzuki Ho Yokoo no Kento* (Symposium on the Draft Administrative Procedure Law), HORITSU JIHO 65-6 (1993);

<sup>80</sup> Kwang Woong Kim and Sung Deuk Hahm, *The Korean Presidency: Institutional Reforms and Democratization Under the Kim Young Sam Administration* 4 (unpublished paper on file with author).

1993.<sup>81</sup> This Commission recommended the passage of an Administrative Procedure Act as well as a number of deregulatory steps and government reorganization.<sup>82</sup> Further support in Korea, as in Japan, came from the academic community, which had long pressed for an administrative procedure regime as an essential element of legal modernization.

### **B. The New Japanese Administrative Procedure Law: A Summary**

The Japanese Administrative Procedure Law consists of Six Chapters, with a total of 38 Articles.<sup>83</sup> 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.”<sup>84</sup> The statute applies uniformly to national administrative agencies, except specially listed bodies such as the tax and audit authorities.<sup>85</sup> Legislative and judicial actions are excluded.

Chapter 2, “Dispositions Relating to Applications” requires administrative agencies to enact substantive standards<sup>86</sup> and clear time-periods<sup>87</sup> for evaluating and responding to applications. These standards must be displayed publicly “except in cases of extraordinary administrative inconvenience.”<sup>88</sup> The agency must “endeavor to” provide information on the status of review processes upon request.<sup>89</sup> When applications are

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<sup>81</sup> *Id.* at 5.

<sup>82</sup> See PRESIDENTIAL COMMISSION ON ADMINISTRATIVE REFORM, ADMINISTRATIVE REFORM IN KOREA: IN SEARCH OF A NEW PARADIGM (1995). For criticism, see Kim and Hahm, *supra* note 80, 12-13. See also Tong-wook Chi, *South Korean Shakeup Keeps Bureaucrats on Toes*, NIKKEI WEEKLY, Mar. 6, 1995, at 7.

<sup>83</sup> For commentary, see Katsuya Uga, *Gyosei Tetsuzuki Ho Ni Tsuite* (Concerning the Administrative Procedure Law) KIKAN GYOSEIKANRI KENKYU, Mar. 1994 at 1, and KATSUYA UGA, GYOSEI TETSUZUKI HO NO RIRON (1995).

<sup>84</sup> Art. 1(1)

<sup>85</sup> Art. 3.

<sup>86</sup> Art. 5(1).

<sup>87</sup> Art. 6.

<sup>88</sup> Art. 5(3).

<sup>89</sup> Art. 9(1).

denied, the agency must provide reasons for their denial.<sup>90</sup> This section responds to complaints from foreign business interests regarding opaque standards.<sup>91</sup>

Chapter 3, “Adverse Dispositions” is the longest section of the statute. It requires hearings when a privilege is being revoked.<sup>92</sup> As in the section on applications, the agency must give reasons for adverse dispositions,<sup>93</sup> but unlike that section, the agency must further provide both notice and an opportunity for a formal hearing process with access to agency records on which the decision was based.<sup>94</sup> The Chapter contains extensive provisions on the conduct of hearings, circumstances of continuance, and submissions of written arguments. These concentrate decision-making in the agencies themselves. For example, procedural dispositions in hearings are not reviewable under the Administrative Complaints Investigation Law of 1962, though the ultimate disposition of the hearing may still be challenged.<sup>95</sup> Article 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.<sup>96</sup> Japanese NGOs continue to be marginal players on the political scene.<sup>97</sup>

Perhaps the most unusual section of the statute is Chapter 4, “Administrative Guidance.” This section restates existing law by stipulating that the objects of

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<sup>90</sup> Art. 8.

<sup>91</sup> Levin, *supra* note 79, at 17.

<sup>92</sup> Art. 13(1).

<sup>93</sup> Art. 14.

<sup>94</sup> Arts. 15 and 18.

<sup>95</sup> Article 27; *see* text at note 54 *supra*.

<sup>96</sup> *See* UPHAM, *supra* note 42.

<sup>97</sup> *See, e.g.,* Robert Mason, *Whither Japan’s Environmental Movement? An Assessment of Problems and Prospects at the National Level* 72 PAC. AFF. 187 (1999) (Japan’s environmental movement politically marginalized compared to counterparts in other industrialized countries).

administrative guidance must be realized solely on voluntary cooperation of the party.<sup>98</sup> Furthermore, non-compliance cannot result in negative treatment by the agency, removing the collateral threats that had strengthened the bureaucracy's hand.<sup>99</sup> The agency must provide guidance in writing if so requested, except in cases of "extraordinary administrative inconvenience."

These provisions, which have analogues in the Korean statute, are an attempt to legalize the non-legal and formalize the informal. 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 formal legal action on the part of the government."<sup>100</sup> 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, we can assume agencies try to avoid complicated procedures by using informal methods where available.<sup>101</sup> Indeed, one of the effects of the onerous procedural requirements for formal rulemaking in the United States Administrative Procedure Act was to encourage agencies to use the informal, "notice and comment" alternative.<sup>102</sup> So if the intent of formalizing is to ensure that the agency always complies with more stringent procedures, it is likely to fail. Simply put, this codification of administrative guidance may actually encourage opaqueness in administration, as new euphemisms for informalism come into play to avoid the old one.

Nevertheless, the formalization of administrative guidance, and the statute generally, theoretically should lead to marginal improvement of the relative bargaining

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<sup>98</sup> Art. 32(1).

<sup>99</sup> Art. 32(2); Art. 33.

<sup>100</sup> Haley, *supra* note 12, at 160-161.

<sup>101</sup> Peter Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

<sup>102</sup> See Martin Shapiro, *A Golden Anniversary? The Administrative Procedure Act of 1946*, REGULATION, Nov. 1996, at 41, 46.

positions of industry and other regulated parties vis-a-vis the government. Firms can now impose additional costs on regulators through demands for hearings, written administrative guidance, and reasons for dispositions. To the degree that these things become burdens on the agencies, the bargaining position of private parties is slightly improved. By merely giving legal expression to the concept of administrative guidance without changing the formal rules that apply to it, the APL may have affected the power relationships in informal negotiations between regulators and private actors.

There is also some potential for development of more effective oversight by courts. In particular, the requirement that agencies give reasons for adverse dispositions imposes administrative costs on the government and provides the basis for expanded review. Other countries have learned that the requirement of reasons provides a record that activist courts can use to conduct substantive review of the agency action.<sup>103</sup> These seeds will await the development of a more aggressive stance among Japanese courts.

The new statute clearly represents a compromise.<sup>104</sup> It meets public demand for some sort of formalization of administrative procedure, and repeatedly refers to the important goals of transparency and fairness. But in several crucial respects, it reflects the persistence of bureaucratic discretion over rule-based regulations. It recodifies existing law, rather than representing an institutional innovation.

To American eyes, it appears strange that there are no provisions for rulemaking because rules about rulemaking occupy such a central place in United States administrative law.<sup>105</sup> Given Japan's extensive use of bureaucratically-controlled *shingikai* to formulate and legitimate laws, it is not surprising that bureaucrats would see little need in a set of judicially-enforced rules governing the policy-making process. To do so would upset a system that seems to work just fine to its participants. The

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<sup>103</sup> Martin Shapiro, *The Giving Reasons Requirement*, UNIV. CHICAGO LEG. FORUM 179 (1992); see also William Bishop, *Comparative Administrative Law*, in THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 327, 330 (Peter Newman, ed., 1997).

<sup>104</sup> Kodderitzsch, *supra* note 7, at 139.

<sup>105</sup> See 5 U.S.C. Sec. 553. Americans would do well to remember that the Administrative Procedure Act's section on rulemaking is really quite brief. Most of the law about rulemaking is in fact judge-made law created by courts in the 1960s and 1970s. See Martin Shapiro, *Administrative Discretion: The Next Stage* 92 YALE L.J. 1487 (1983).

longstanding tradition of closed-door policymaking thorough expert advice to a paternalistic bureaucracy remains quite intact.<sup>106</sup>

Furthermore, the flow of information is distinctly one-way. The law expressly does not apply to “dispositions ordering submission of reports or articles and any other Dispositions, or Administrative Guidance, rendered with the express purpose of collecting information necessary for the performance of administrative duties.”<sup>107</sup> This means much of the product of government is out of the reach of the public. The flow of inputs into the government is also controlled.

Administrative insulation from the public and from judicial scrutiny does not appear to have been dramatically reduced by the recent passage of the Freedom of Information Act (FOIA), though it may be too early to say.<sup>108</sup> Only after twenty years of lobbying by the United States Government and Japanese business interests was the LDP willing to pass a national freedom of information act. After domestic pressure increased as a result of growing disillusionment with the country’s bureaucracy and its inability to resolve lingering economic difficulties, politicians set up an Administrative Reform Committee in mid-1995. This Committee in turn set up a subcommittee to study how other countries enhance transparency, paying special attention to the American freedom of information act. This led to the passage of the FOIA in 1998.

Critics have noted that the law contains loopholes that allow the government to withhold information.<sup>109</sup> For example any material deemed damaging to national security or foreign relations can be withheld, along with materials from government audits and inspections. Courts will have no role in reviewing material before its

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<sup>106</sup> Note that in 1999 a Public Comment procedure was finally introduced for regulatory lawmaking. See <http://www.somucho.go.jp/gyoukan/kanri/990422.htm>. It is not yet clear how much the procedure has been utilized yet.

<sup>107</sup> Art. 3(14).

<sup>108</sup> Narufumi Kadomatsu, *The New Administrative Information Disclosure Law in Japan*, 8 ZEITSCHRIFT FÜR JAPANISCHES RECHT 34 (1999); Tsuneharu Yonemaru, *Joho Kokai Ho 2-ju: Taisho Kikan to Bunsho no Teigi*, 1156 JURISTO 34 (1996). Sonni Efron, *Japan’s Right to Know*, INTERNATIONAL HERALD TRIBUNE, May 18, 1999, at 2. See also Boling, *supra* note 34 (on draft statute).

<sup>109</sup> Efron, *supra* note 108. (describing experts’ perception that implementation will be expensive, difficult and slow).



release.<sup>110</sup> Some also note that the Act allows requesters to be charged twice, with no limit on what fees can be charged to process requests.<sup>111</sup> Even though the new FOIA has led to numerous new requests and no doubt more information flowing from government to citizen,<sup>112</sup> bureaucratic claims of public interest are likely to receive judicial deference at the national level.

This is not to say that the FOIA could not have profound positive impact. The language of the statute is not self-enforcing and much will depend on the attitude of courts in implementing the statute. Similar statutes at the local level have had some positive impact in rendering government more accountable,<sup>113</sup> though there is some debate over their impact.<sup>114</sup> It is not out of the question that the FOIA could serve as a tool for opening up the bureaucracy significantly. Furthermore, other recent efforts to reorganize and streamline the Japanese government have impinged on the once-vaunted tight control of information in the Japanese governments. A bill adopted by the Cabinet in March obligated Government organizations to conduct regular evaluations after programs are implemented.<sup>115</sup> This is no doubt an important step to increase accountability, but the bill is limited to internal evaluation with no provisions for external monitoring of performance.

To summarize, the Japanese APL statute, in conjunction with the new FOIA, recodifies existing law in a way that preserves administrative flexibility. The statute is

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<sup>110</sup> *Id.* The Law does establish a nine-member panel to hear complaints of noncompliance.

<sup>111</sup> Jon Choy, *Diet Considers Freedom of Information Act*, JEI Reprt No. 16 (1998).

<sup>112</sup> Government figures showed 4000 filings for disclosure in the first week after Japan's Freedom of Information Act came into force.

<sup>113</sup> Lawrence Repeta, *Local Government Disclosure Systems in Japan*, NBR Executive Insight No. 16 (Oct. 1999) at 19 (noting that courts have been unusually active in upholding disclosure requests).

<sup>114</sup> Boling, *supra* note 34 (reviewing caselaw on disclosure of governors' expense accounts); Repeta, *supra* note at (Noting that "(a)lthough information disclosure ordinances have existed in Japan for fifteen years, one can point to relatively few concrete political changes that can be traced to greater access to government files" but also reporting on the success of citizen's ombudsmen movement in auditing local government expenditures.)

<sup>115</sup> Mainichi Shimbun, Mar. 22, 2001, available at <http://www.mainichi.co.jp/english/news/archive/200103/22/news06.html> (noting that the bill fails to force ministries to incorporate evaluation results into future budgets, and fails to include outside evaluation).

full of vague terms, stipulating that the government will endeavor to perform certain actions, where possible, except in case of administrative difficulty.<sup>116</sup> These vague terms provide easy escape clauses for bureaucrats to avoid the new requirements. Without more extensive judicial review, such good-faith provisions may have little impact. The statute re-equilibrates the status quo.

How has the APL worked in its first few years of operation? Because the law provides few opportunities for judicial review, it has not led to much new litigation. Five years, later, the government noted that many ministries have been slow to take the required steps to implement the law.<sup>117</sup> The most visible result of the law was a “hotline” set up by *Keidanren*, the business association that had lobbied intensively for the law.<sup>118</sup> 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.<sup>119</sup>

Two examples are a drugstore chain that applied for permission to sell drugs at a new shopping center location.<sup>120</sup> The Ministry of Health and Welfare demanded that the company 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.<sup>121</sup> Pointing out that there was no legal reason it should not be able to expand, the company complained to *Keidanren*. The ensuing publicity forced the Ministry to back off. In this instance, enforcement of the rule shifted to the political realm, with a quasi-independent business organization

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<sup>116</sup> See Jon Choy, *Uncertain Impact of Administrative Reform Law*, JEI Report No. 40B, Oct. 21, 1994, 5.

<sup>117</sup> 23 *Government Agencies Urged to Work Harder for Transparency*, Kyodo News Service, June 17, 1999; MANAGEMENT AND COORDINATION AGENCY, ADMINISTRATIVE PROCEDURES LAW DATABOOK 1999.

<sup>118</sup> See Benjamin Fulford, *Japan: Law to Limit Bureaucratic Rule Fizzles* Nikkei Weekly, April 8, 1996.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

taking the leading role in mediating between the regulators and the private sector. One can expect that the *Keidanren* also serves to screen potential complainants, so that any group seen to threaten the interests of the business interests will find this a less effective channel. Essentially, the hotline provides a pro-growth filter on complaints against the administration.

Another window on how the APL's hearing requirements might work in operation is provided by the Yukijirushi (Snow-Brand) milk scandal. In July 2000, after an outbreak of food poisoning led to the discovery that the milk company had been lax in sanitizing its plants,<sup>122</sup> the Health Ministry held a hearing before revoking certain licenses of the firm. Media reported that the company executives used the hearing as an occasion to admit their errors. The incident is suggestive even though legal issues as to whether agency fact-finding could be contested, or the extent of procedural rights held by private parties were apparently not considered. If a hearing merely becomes an occasion for apology, it will not serve as a means to protect the interests of regulated parties vis-à-vis the government. Indeed, the hearing process could become a threatened sanction, which government agencies would use to embarrass the regulated party, and thus might actually strengthen the hand of agencies seeking to use administrative guidance.

In sum, the impact of the APL appears to have been marginal, as predicted by many.<sup>123</sup> No major cases have been litigated and it is unclear whether private parties are availing themselves of the procedural rights at least nominally provided by the statute. The government has been slow to revise procedures and take other steps required to

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<sup>122</sup> *Snow Brand Starts Recalling All Products from Osaka Plant*, Yomiuri Shimbun, July 5, 2000; Toshimitsu Kishi, *Recalling the Summer of Eating Dangerously*, Mainichi Shimbun, Aug. 27, 2000; Philip Brator, *Coverup Just Makes Scandal Worse*, Japan Times, July 20, 2000.

<sup>123</sup> See Kodderitzsch, *supra* note 7, at 139 (compromise that ensured passage of the law may have muted its impact on regulation); David Boling, *Administrative Procedures Law Makes Inroads on Bureaucracy but Leaves Web Largely Intact*, 16 E. ASIAN EXEC. REP. 7 (July 15, 1994) (APL is "modestly progressive despite shortcomings"); *but see* Ken Duck, *Now that the Fog has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 FORDHAM INT'L L. J. 1686 (1996) (predicting that APL impact would be marginal); Frank Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L. J. 396, 504 (pessimism may be premature although dramatic change unlikely).

implement the law. The United States Government, source of outside pressure for the law, has taken note.<sup>124</sup>

### C. Korean Administrative Procedure Reform

As in Japan, academics in Korea had been discussing the need for an administrative procedure law for many years before its eventual enactment in 1996. A statute was close to passage in 1987, but the process was derailed by the mass protests that eventually led to the resignation of President Chun Doo Hwan.<sup>125</sup> The administrative reorganization launched by President Kim Young Sam in 1993 gave new impetus to the project.

The Administrative Procedure Act was part of a package of reforms launched during the Kim administration that radically changed Korean administrative law. 1994 amendments to the Administrative Litigation Law established a designated administrative court of first instance.<sup>126</sup> The amendments also eliminated the requirement that a plaintiff exhaust administrative remedies, significantly expanding justiciability.<sup>127</sup> In 1995, the Administrative Appeals Act of 1984 underwent a drastic revision.<sup>128</sup> Instead of vertically segmented administrative adjudication in individual ministries, a new Administrative Appeals Commission under the Prime Minister was set up to handle virtually all appeals against the central government. The members are senior public officials themselves,<sup>129</sup> and the chair is the Minister of Legislation.<sup>130</sup> This Commission

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<sup>124</sup> OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, NAT'L TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 180-86 (1996) (criticizing the APL for lack of rulemaking provisions).

<sup>125</sup> Ryutaku In, *Kankoku No Gyosei Testuzuki Ho*, 1114 JURISTO 95 (1997); West, *supra* note 27, at 9.

<sup>126</sup> Sang-kyu Rhi, *Furtherance of the Korean Administrative Law*, INT'L LEG. PRACTITIONER 139 (1997). Appeal is to the ordinary court of appeals and the Supreme Court. *Id.* This Court came into existence in March 1998.

<sup>127</sup> Art. 18.

<sup>128</sup> Act No. 5000, Dec. 6, 1995.

<sup>129</sup> Art. 6-2 (4). The Presidential Enforcement Decree of the Act specifies that public officials will be drawn from the Ministries of Finance and Economy, Justice, and Government Administration and the Administrative Coordination under the Prime Minister's Office. Enforcement Decree of the Administrative Appeals Act, Presidential Decree No. 14957, Art. 4.

<sup>130</sup> Administrative Appeals Act, Art. 6-2 (3).

is empowered to revoke or alter administrative dispositions as necessary.<sup>131</sup> Its rulings are binding, and if the agency concerned fails to abide by them by issuing an appropriate disposition, the ruling authority may directly issue the disposition.<sup>132</sup> At the same time that Korea was expanding access to courts for administrative litigation, it was centralizing administrative appeals in a powerful new body.

This radical reorientation was followed in 1996 by the passage of the Administrative Procedure Act, heavily influenced by its Japanese precursor.<sup>133</sup> Like the Japanese law, the Korean law requires agencies to establish processing periods and publicly announced standards for issuing dispositions.<sup>134</sup> The Korean law requires formal hearings,<sup>135</sup> but only when required by statute or deemed necessary by the agencies involved.<sup>136</sup> The statute also contemplates a public hearing when needed “to compile a wide range of opinions considering the potentially extensive influence of the dispositions concerned.”<sup>137</sup> This provides a mechanism for group participation in the administrative process. The Act also requires agencies to give reasons for adverse dispositions unless considered insignificant,<sup>138</sup> and, upon request, to give reasons for successful dispositions.<sup>139</sup>

The Korean law follows the Japanese statute in explicitly devoting a chapter to administrative guidance.<sup>140</sup> This section begins by setting the principle that

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<sup>131</sup> Art. 32(3).

<sup>132</sup> Art. 37(2).

<sup>133</sup> Act No. 5421 (Dec. 31, 1996); for a description and translation of the law in Japanese, see In, *supra* note 125.

<sup>134</sup> Art. 19 (1) (processing periods); Art. 20(1) (standards must be stated “as concretely as possible.”).

<sup>135</sup> Arts. 27-37.

<sup>136</sup> Art. 22(1).

<sup>137</sup> Art. 22 (2), Para. 2. Procedures described in Arts. 38-39.

<sup>138</sup> Art. 23(1)

<sup>139</sup> Art. 23(2).

<sup>140</sup> Arts. 48-51.

administrative guidance should be as minimal as is necessary to achieve its purpose and should not be exercised against the will of the affected party.<sup>141</sup> This establishes a presumption against “excessive” guidance, although it is unlikely to have much impact as it is the bureaucrats who define the “purpose” of any particular exercise of guidance. Consistent with the Japanese approach, non-compliance with administrative guidance cannot result in negative treatment by the agency.<sup>142</sup> The Korean statute follows the Japanese statutory language in requiring the agency to provide guidance in writing if so requested, except in cases of “extraordinary administrative inconvenience.”

There are some important points of divergence between the Japanese and Korean approaches. Unlike the Japanese statute, the Korean Law requires administrative agencies to announce in advance proposed legislation that affects the rights and duties of citizens or affecting the daily lives of citizens,<sup>143</sup> and to allow public comment.<sup>144</sup> The procedures for this are to be prescribed by Presidential Decree.<sup>145</sup> There is a similar chapter requiring pre-announcement of administrative action for four categories of policies, namely those that are “of great influence to the livelihood of citizens,” that involve conflicts of interests among many citizens, that impose burdens on many citizens, and other matters that require wide accumulation of opinions from citizens.<sup>146</sup> Together, these provisions are even more open than American notice-and-comment requirements for rulemaking, for they extend notice requirements to statutory legislation. This reflects the Korean practice that most statutes are in fact drafted by the bureaucracy. By providing an additional forum for comments on legislative proposals, the Korean law

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<sup>141</sup> Art. 48(1)

<sup>142</sup> Art. 48(2).

<sup>143</sup> Art. 41(1). Art. 41(2) provides for exceptions where the legislation is urgent, “deemed difficult considering the nature of the contents of the legislation” or where pre-announcement may “severely damage the public interest.” These provisions reflected longstanding Korean law.

<sup>144</sup> Art. 44. Interestingly, although the agencies are required to notify the person of “the processed results” of their submission, there is not an explicit “giving reasons” requirement.

<sup>145</sup> Art. 41(4).

<sup>146</sup> Art. 46. See also Art. 47 applying by reference the provisions on pre-announcement of legislation.

opens up the policy process to those parties that lose in the legislature and ensures that the bureaucracy will continue to be a locus of political contestation.

In addition to the above changes to the administrative law framework, in 1997 Korea passed the Civil Petitions Treatment Act.<sup>147</sup> This Act supplements the administrative law regime by allowing petitions to be brought by any individual who alleges that an administrative act infringed on his or her rights, or provided “inconvenience and burden” to citizens.<sup>148</sup> It extends not only to unlawful acts but “unreasonable” acts.<sup>149</sup> This Act establishes a National Grievance Settlement Committee under the Prime Minister to receive, investigate and settle civil petitions.<sup>150</sup> To ensure consistency, the jurisdiction of this Committee extends only to acts for which another appeal has not been made. This was part of the effort to “reinvent” Korean government by ensuring responsiveness in public administration.<sup>151</sup> Another reform, undertaken in 1994, was to establish an Ombudsman’s office with the power to hear citizens’ complaints about administrative dispositions and recommend corrective action.<sup>152</sup> The effect of all these reforms is to provide citizens with multiple alternative fora — both legal and administrative — to pursue complaints about administrative action.

Another element of reinventing Korean government was the Basic Law on Administrative Regulation.<sup>153</sup> This law established the general principle of cost-benefit analysis and accordance with statutory purposes for all regulations,<sup>154</sup> required agencies

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<sup>147</sup> Act No. 5368, Aug 22, 1997.

<sup>148</sup> Art. 2, Para. 2.

<sup>149</sup> Art. 2, Para. 3.

<sup>150</sup> Chap. III.

<sup>151</sup> See generally John D. Montgomery, *Bureaucrat, Heal Thyself! Lessons from Three Administrative Reforms*, 24 WORLD DEV’T 953, 959 (1996); see also *4,973 Regulations Scrapped by Joint Panel over Past Year*, KOREA HERALD, Apr. 26, 1999 (44.7% of regulations abolished by committee co-chaired by Prime Minister).

<sup>152</sup> See <http://www.ombudsman.go.kr> for details on the operation of this office.

<sup>153</sup> 22 Aug 1997.

<sup>154</sup> Sec 5. Compare U.S. Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1993), reprinted in 5 U.S.C. §601 (1994) (Clinton administration Order requiring agencies to conduct cost-benefit analysis).

to conduct regulatory impact analysis,<sup>155</sup> and established a Regulatory Reform Commission co-chaired by the Prime Minister to review existing and proposed regulations in accordance with the requirements of the statutes. This Commission has abolished numerous regulations that had not been based on adequate statutory authority and has facilitated the National Assembly's amendment of hundreds of statutes. Some 58 percent of Korea's regulations were abolished or amended through 2000.<sup>156</sup>

A further statutory change was the passage of a Law on the Disclosure of Information held by Public Authorities.<sup>157</sup> This established the principle of freedom of information and provides for a right to apply for information, with narrow exceptions to protect privacy.<sup>158</sup> Should the agency requested dismiss the application, the law provides for judicial review under the Administrative Litigation Law.<sup>159</sup> These laws interact with other administrative reforms to significantly open up policymaking.

To summarize this statutory framework, Korean citizens have an array of choices in challenging administrative action. They no longer need to exhaust administrative remedies before going to court. Alternatively, they can pursue administrative appeals before a designated commission under the Minister of Legislation, or can submit a petition to the National Grievance Settlement Committee under the Prime Minister. The 1996 Administrative Procedure Act expanded the formal records required for agencies to make rules and to issue dispositions, established a presumption against administrative guidance, and set up extensive notice-and-comment type rulemaking procedures. The Law on Disclosure of Information gives citizens more information on which to base their complaints. These rules reinforce each other to open up policymaking and expand control of administration.

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<sup>155</sup> Sec. 7.

<sup>156</sup> MINISTRY OF LEGISLATION, LEGISLATIVE REFORM IN KOREA 9 (2000).

<sup>157</sup> Promulgated 31 December 1996.

<sup>158</sup> Rhi, *supra* note 126, at 141. Interestingly, one of the critics of Japan's proposed Freedom of Information Act noted that it was "inferior to even South Korea's freedom of information law." Jon Choy, *Diet Considers Freedom of Information Act*, JEI Reprt No. 16 (1998).

<sup>159</sup> Section 18.



While there is little systematic information available on the performance of the revised legal framework, anecdotal evidence suggests that private parties are beginning to utilize these new tools. Administrative litigation rates are up, and there is increased newspaper coverage of legal suits against the government.<sup>160</sup> Use of the civil complaint system has been overwhelming, with 164 million complaints being filed in the first 8 months of 2000, prompting the government to develop new mechanisms for responding.<sup>161</sup>

As frequently occurs in administrative reforms, there is some evidence of unanticipated effects. For example, five top *chaebol* recently challenged a penalty issued by the Fair Trade Commission.<sup>162</sup> This illustrates how procedural rights can in fact hamper the government in its efforts to secure structural reforms. Like Dr. Frankenstein, the Korean state has so far been unable to control the *chaebol* that it created, and administrative legal reform may actually hamper these efforts.<sup>163</sup> The use of law may reduce agency costs but can produce offsetting policy losses.

#### **D. Summary**

Japan and Korea have recently adopted administrative procedure regimes that appear similar in some respects. Both regimes formalize the process of issuing administrative dispositions and take on the puzzling task of legalizing administrative guidance. But the systems diverge in a number of important areas. In Japan, the law re-codified a system where administrative action is subject to review by ordinary courts, without expanding the basis for or scope of review. Korea, in contrast, established a designated court.<sup>164</sup> More importantly, revisions to the Korean Administrative Appeals

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<sup>160</sup> There are, of course, problems with drawing conclusions from increased litigation rates. *See generally* George Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984). Nevertheless, the increased rates are consistent with citizens responding to an expanded supply of administrative remedies.

<sup>161</sup> *South Korean Government to Form Civil Complaints Committee*, Yonhap News Agency, 20 Dec. 2000.

<sup>162</sup> *See Top 5 Chaebol File Suit Against FTC's Penalty for Illegal Internal Trade*, KOREA HERALD, Apr. 3, 1999.

<sup>163</sup> *Compare Antitrust Watchdog to Expand Scope*, KOREA HERALD, Aug. 17, 1999 (draft statute calling for increased penalties).

<sup>164</sup> See text at note 126 *supra*.

Act and the new Civil Petitions Act provide for enhanced review to external authorities. The Korean statute, unlike that of Japan, includes provisions opening up the policymaking process through public comment and hearing on draft legislation. Thus while the Japanese statute re-equilibrates a closed policymaking process based on broad delegations and seldom-exercised judicial oversight, the new Korean system provides for external control of bureaucrats for the first time, along with public participation in policymaking. It combines open policymaking with greater control of policy implementation, while the Japanese system keeps policymaking closed but continues to have decentralized control of bureaucratic discretion by courts at the margin. The next section offers a positive theory explaining these differences.

### **III. EXPLAINING DIVERGENT CHOICES: THE POLITICAL LOGIC OF PROCEDURAL REFORM**

#### **A. Introduction**

Both Japan and Korea had insulated bureaucracies that exercised discretion and both passed administrative procedure laws in the mid-1990s. The Japanese law preserves a system of insulated policymaking with occasional and limited judicial control of administrative action. In contrast, the Korean law opens up policymaking and provides for extensive oversight by courts and newly designated committees under political control. What explains these divergent outcomes? This section argues that the difference lies in political structure.

## B. Theory

My approach will draw on the recent literature that sees the structure of administrative procedure as dictated by politics.<sup>165</sup> We assume that at the center of any given political system there is a single actor that can be characterized as a sovereign at a particular point in time. The precise identity of the principal for a given polity will depend on the nature of the political system. For simplicity, we can distinguish between parliamentary regimes such as Japan, wherein the governing party or coalition of parties is the principal, and presidential systems such as Korea where the president has the authority to hire and fire bureaucrats, wherein the president is the political principal. In reality, agents in either type of system may be subject to demands for multiple principals, such as the backbenchers and ministers within a single parliamentary party, or legislators and executive actors in a presidential system who may have competing policy goals. Furthermore, in systems with a split executive, as in Fifth Republic France, bureaucrats may be subject to differing commands from the president and the prime minister. For simplicity we set these problems aside. For our purposes it is sufficient to characterize the President as the principal in Korea and the long-ruling Liberal Democratic Party (LDP) as the principal in Japan.<sup>166</sup>

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<sup>165</sup> See John Ferejohn and Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J. L. ECON AND ORG. 1 (1990); Mathew McCubbins, et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Mathew McCubbins, et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); see also Jonathan Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEG. STUD. 413, 415-18 (1999) (summarizing the literature).

<sup>166</sup> The historical weakness of both the legislature and political parties in Korea justify this approach, which has been adopted by Korean scholars as well. See SUNG-DEUK HAHM AND L. CHRISTOPHER PLEIN: AFTER DEVELOPMENT: THE TRANSFORMATION OF THE KOREAN PRESIDENCY AND BUREAUCRACY (1997). See also Chan Wook Park, *Partisan Conflict and Immobilism in the Korean National Assembly: Conditions, Processes, and Outcomes*, in DEMOCRACY IN KOREA: ITS IDEALS AND REALITIES (Sang-Yong Choi, ed., 1997). Japanese law scholars have also characterized the LDP-bureaucracy relationship as one

Because of the sheer scale and complexity of modern government, political principals must delegate certain tasks to administrative agents.<sup>167</sup> The agents, however, may have their own preferences, and, where possible, will try to implement their own favored policies rather than those chosen by politicians. We assume that their expertise gives agents an information advantage over principals in the details of policy implementation. Politicians thus need a mechanism to monitor the agents' performance and to discipline those agents that do not obey the instructions of the principal. Politicians can rely on a variety of mechanisms to try to accomplish these tasks.<sup>168</sup> This sets up a problem of institutional choice for politicians to choose the most effective mechanism or combination of mechanisms to resolve the particular problems they face. Broadly speaking, there are three categories of mechanisms that politicians can choose from to reduce agency costs.

#### **A. Internalization and Ideology**

Perhaps the most desirable method of reducing agency costs from the perspective of the principal is to convince the agent to internalize the preferences of the principal. Perfect internalization of the preferences of the principal eliminates the need for monitoring and enforcement. Internalization can occur through professional indoctrination and training or through promulgation of a substantive political ideology that commands the loyalty of the agent. Internalization can also involve procedural rather than substantive values, so that the agent internalizes a way of acting that will serve the interests of the principal. For example, by requiring that all senior civil servants be

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of principal and agent. J. MARK RAMSEYER AND MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999).

<sup>167</sup> MURRAY HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION* 192 (1995)

<sup>168</sup> McNollgast, *Political Control of the Bureaucracy*, in 3 *THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS* 50-55 (P. Newman, ed., 1998); cf. William Bishop, *A Theory of Administrative Law*, 19 J. LEG. STUD. 489, 492 (1990) (within ideology of "democratic legalism" there is no alternative to courts as monitors).

trained as lawyers (as is *de facto* the case in Japan and was formerly a legal requirement in Germany), politicians might discourage their agents from departing from the text of statutes. Legal education that emphasizes fidelity to text serves the interest of the coalitions that enact statutes.

We assume that agents compete to be selected by the principal. Educational requirements help the principal select among potential agents. By requiring potential agents to undergo costly training *before* selection, the principal allows the agents to signal to the principal that they have internalized the values of the principal. Those potential agents who do not share the values of the principal may be encouraged to pursue other careers rather than undertake the training. Furthermore, pre-selection training reduces the need for post-selection indoctrination, the cost of which must be borne directly by the principal.

All legal systems utilize indoctrination through legal education and selection criteria to reduce the agency costs of administration. The most durable administrative system in history, that of imperial China, relied on a civil service examination requiring mastery of arcane legal and philosophical texts to impose a common body of knowledge on the magistracy. The Chinese dynasties were able to integrate elites from the vast empire into a coherent administrative organ. Other rules of the magistracy, such as the practice of sending magistrates to serve far from their home region, also are easily interpreted as devices to reduce agency costs. More recently, Leninism is an example of an extreme form of indoctrination, although the Chinese variant of that ideology has not seemed to prevent extensive corruption and severe agency problems.<sup>169</sup>

### **B. Hierarchy and Second-party Supervision**

Politicians may also be able to influence bureaucratic agents through direct manipulation of incentive structures. As mentioned above, agents compete against other potential agents to be hired; once hired they compete to advance. By advancing loyal agents and punishing disloyal agents in career advancement and retirement decisions,

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<sup>169</sup> Hilton Root, *Corruption in China: Has it Become Systemic?* 38 ASIAN SURVEY 741 (1996); TING GONG, *THE POLITICS OF CORRUPTION IN CHINA* (1994).

politicians provide bureaucrats with an incentive to perform. Hierarchical structures help reduce monitoring costs, as more senior agents help monitor and discipline junior ones. Politicians can also manipulate the incentive structure of the bureaucracy as a whole. They can, for example, reduce the budget of the agency; impose process costs such as performance reviews, which utilize scarce staff time; and force the agency to promulgate internal rules that constrain discretion. They can create multiple agencies with overlapping jurisdictions to compete for budget and authority.<sup>170</sup> Finally, politicians can intervene directly with the bureaucracy on behalf of constituents. This allows the politicians to sell bureaucratic intervention services to the public in exchange for support. But this is a relatively costly form of monitoring, involving scarce staff time. Furthermore, the informational advantages that bureaucrats have over politicians make this a costly mechanism.<sup>171</sup>

All of these mechanisms of intervention will be easier to undertake for a ruling party with a longer time horizon than for a party with a short time horizon. If bureaucrats' time horizons are longer than the expected period of rule by the political principal, bureaucrats may not find politicians' threats of career punishment to be credible. If the punished bureaucrat anticipates a new party coming to power with preferences that align more closely with his own, he may actually reap long-term gains for being disloyal to the present regime. Bureaucrats can also exploit their informational advantages to create delay, waiting until a new political principal comes into office.

### **C. Administrative law and Third-party Supervision**

Judicially-supervised administrative procedures, such as a right to a hearing, notice requirements and a right to a statement of reasons for a decision, are a third mechanism for controlling agency costs. By creating a judicially-enforceable procedural

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<sup>170</sup> McNollgast, *supra* note 168, at 51; SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* (1995).

<sup>171</sup> ARTHUR LUPIA AND MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA: KNOWLEDGE, DECEPTION AND THE FOUNDATIONS OF CHOICE* (1997).

right, politicians decentralize the monitoring function to their constituents, who can bring suits to inform politicians of bureaucratic failure to follow instructions.<sup>172</sup> Politicians also create a mechanism to discipline the agents and can use the courts as a quality-control system in judging whether the monitors' claims have merit. Although administrative procedures are sold to the public as a means of ensuring accountability, they are in fact instruments of political control of agents.<sup>173</sup>

Whereas agents who have internalized the principal's preferences are self-monitoring and hierarchical supervision involves second-party monitoring and discipline by the principal, administrative law requires third parties to monitor and discipline administrative agents. It is therefore the most institutionally complex of the three mechanisms (as well as the last to develop historically). Most systems of administration utilize a combination of the three mechanisms.

#### **D. Why Administrative Law? Comparative Institutional Choice**

Under what conditions will political principals rely on third-party, legal mechanisms of judicial supervision of agent action? To begin with it is worth noting that as a mechanism of controlling agency costs, administrative law has costs as well as benefits. Extensive administrative procedures entail costs in the form of slower, less flexible administration. By their nature, procedural rights may extend to politicians' opponents as well as their supporters, and so may lead to policy losses. Politicians can try to tailor the procedures so as to limit access by opponents, but nevertheless will likely be faced with some losses caused by opposition lawsuits.

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<sup>172</sup> Mathew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). This technique benefits constituents with considerable resources for litigation or procedural intervention. McNollgast, *supra* note 168, at 52.

<sup>173</sup> Bishop, *supra* note **Error! Bookmark not defined..**

There are also agency problems associated with the third-party monitor.<sup>174</sup> The extent of these agency problems will depend on the mechanisms available to politicians for controlling judges, which also include hierarchy and internalization. For example, professional norms of fidelity to law reduce the agency costs of judicial monitoring (“judicial agency costs”). Specialization, such as a designated administrative court, can also improve quality of monitoring, though it might increase agency costs as judges are themselves “captured” by the technical discourse of the bureaucrats. In many systems the factors that give rise to judicial agency costs are likely to be the same as those that produce bureaucratic agency costs. Civil law judges, including those in Japan and Korea, are typically appointed at a young age and serve in hierarchical structures much like the bureaucrats themselves.<sup>175</sup> (The relatively late age that lawyers pass the difficult bar exam in Korea and Japan makes this less true than in Germany or France. Judges in Japan and Korea are therefore more steeped in legal ideology than are ordinary bureaucrats, but also may have internalized norms of judicial independence that reduce their reliability for politicians.)

Whether or not politicians want to adopt a strong administrative law regime depends in part on the other mechanisms available for controlling bureaucrats, and in part on their perceptions of judicial agency costs. If politicians believe they can control bureaucrats with other mechanisms such as indoctrination or control over careers, a system of judicially enforceable administrative law is undesirable.

We can conceptualize this decision in simple economic terms. Politicians will evaluate the benefits of administrative proceduralization and will choose a level of procedural constraint where marginal costs are equal to marginal benefits in agency cost

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<sup>174</sup> Cf. Bishop, *supra* note **Error! Bookmark not defined.** Bishop does not view the use of courts as creating its own agency cost problems, although he does suggest that administrative law rules are generally oriented to the needs of courts as monitors rather than those of the rights-holders themselves.

<sup>175</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d. ed., 1985).



reduction. To do so, they need to consider not only “pure” bureaucratic agency costs, but also process costs that come in the form of slower bureaucracy. The former decline with proceduralization, while the latter rise. Furthermore, the political principals must also consider agency costs associated with a third-party monitor, reflected in the proverbial problem of “who guards the guardians.”<sup>176</sup> Choosing the level of proceduralization that minimizes the sum of these costs will set the “price” of the legal solution. Political principals will then evaluate this price against hierarchical and ideological alternatives to choose an agency-cost reduction strategy.

Note the level of proceduralization that results may or may not be socially optimal. This is because politicians themselves are agents of citizens and may not have incentives to internalize all social costs of procedural solutions. Ideally, politicians should evaluate the marginal benefit of an additional unit of procedure in reducing social cost. But they are unlikely to do so. To the extent that the costs of suing the government and preparing a case are borne by private litigants (rather than subsidized through active judicial fact-finding as in France), politicians may be liberal in granting procedural rights.

The relative cost of administrative law as opposed to hierarchy and internalization depends in part on the structure of politics itself. For example, strong political parties help political leaders because they provide a group of committed persons who can assist in the monitoring and discipline of bureaucrats. They also can provide qualified and motivated personnel to staff the bureaucracy. Political parties utilize internalization and hierarchy to help reduce administrative agency costs.

Principals that govern for an extended period have less need to rely on independent courts as monitors. A disciplined political party that is electorally secure, for example, can easily utilize first- and second-party solutions to the problem of agency cost.<sup>177</sup> Where parties are weak, however, they may want to use courts to protect their policy

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<sup>176</sup> MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1986).

<sup>177</sup> Robert Cooter and Tom Ginsburg, *Comparative Judicial Discretion - An Empirical Test Of Economic Models*, 16 INT’L REV. L. ECON. 295, 298 (1996).

bargain from repeal by later coalitions because they anticipate electoral loss. Furthermore, weaker and more diffuse parties will be less able to motivate agents ideologically and discipline them through hierarchical mechanisms.

One of the implications of the above analysis is that politicians who are in the best position to enact procedural controls are those who need them the least. Strong parties are able to impose collateral costs on agencies through other mechanisms. Weak parties are not. Similarly, strong parties will normally have more mechanisms for influencing judges than weak ones, so the decision to adopt administrative law will be determined primarily by the costs of increased procedural constraints that slow the bureaucracy.

To summarize, I am making two claims. First, principal-agent theory predicts that, other things being equal, *parties likely to be in power a long time want minimal procedural rights, parties likely to lose want extensive procedural rights.*<sup>178</sup> Second, because there are substitutes for an administrative procedures regime, *shifts in cost structures among the three main forms of agency control will generate changes in the administrative procedures regime.* If hierarchy or internalization becomes less effective, we should see legal proceduralization. Conversely, if hierarchy or internalization becomes cheaper, we should see less proceduralization. The level of administrative proceduralization will thus reflect: the severity of the agency cost problem; the process costs such as slower administration; the costs associated with third party monitors; and the availability of lower-cost mechanisms to reduce agency costs, such as internalization and hierarchy.

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<sup>178</sup> See also J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts*, 3 J. LEG. STUD. 655 (1994).

Politicians can rely on a variety of mechanisms to try to accomplish these tasks.<sup>179</sup> Some of these mechanisms involve direct manipulation of bureaucratic personnel processes. For example, politicians can influence selection, career advancement, and retirement of bureaucrats. Hierarchical structures help reduce monitoring costs, as more senior agents help monitor and discipline junior ones. By advancing loyal agents and punishing disloyal agents, politicians provide bureaucrats with an incentive to perform.

Politicians can also intervene directly with the bureaucracy by assigning staffers to deal with administrative agencies on behalf of constituents.<sup>180</sup> Politicians sell bureaucratic intervention services to the public in exchange for support. But this is a relatively costly form of monitoring, involving scarce staff time. No single politician is likely to have the resources to provide enough such services to reduce agency costs significantly.

Professional indoctrination is another mechanism that can play a role in reducing agency costs. For example, by requiring that all senior civil servants be trained as lawyers (as is *de facto* the case in Japan and was formerly a legal requirement in Germany), politicians might discourage their agents from departing from the text of statutes.<sup>181</sup> Legal education that emphasizes fidelity to text serves the interest of the coalitions that enact statutes.

Politicians might also look for help from other actors. Regulated parties are the logical choice to help monitor the bureaucracy. By creating a judicially-enforceable procedural right, politicians decentralize the monitoring function because the public – the constituents of politicians – can bring suits to inform politicians of bureaucratic failure to

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<sup>179</sup> RAMSEYER AND NAKAZATO, *supra* note 43, at 214; cf. William Bishop, *A Theory of Administrative Law*, 19 J. LEG. STUD. 489, 492 (1990) (within ideology of “democratic legalism” there is no alternative to courts as monitors).

<sup>180</sup> RAMSEYER AND NAKAZATO, *supra* note 43, at 216.

<sup>181</sup> Bishop, *supra* note 103, at 333-34 (1997).

follow instructions.<sup>182</sup> The courts can serve as a mechanism to discipline the agents and as a quality-control system in judging whether the monitors' claims have merit. Although administrative procedures are sold to the public as a means of ensuring accountability, they are in fact instruments of political control of agents.

As a mechanism of controlling the bureaucracy, administrative law has costs as well as benefits. By their nature, procedural rights may extend to politicians' opponents as well as their supporters. Politicians can try to limit such access by tailoring the procedures but nevertheless will likely be faced with some losses caused by opposition lawsuits. Judges may not always enforce the politicians' preferences. Extensive administrative procedures also entail costs in the form of slower, less flexible administration.

Administrative procedure is only one option among several alternative modes of controlling administrative discretion and may not even be a particularly central one.<sup>183</sup> Whether or not politicians want to adopt a strong administrative law regime depends in part on the other mechanisms available for controlling bureaucrats, and in part on their perceptions of judicial agency costs. If politicians believe they can control bureaucrats with other mechanisms such as indoctrination or control over careers, an open system of administrative law is undesirable. Similarly, if judges are quite independent, there is little reason to entrust the task of monitoring bureaucrats to them.<sup>184</sup> The decision to adopt administrative law depends on the relative agency costs associated with bureaucratic policymaking and judicial monitoring.<sup>185</sup> Only where the agency costs of courts are perceived to be less severe than those of bureaucracies should we expect a strong system of administrative law.

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<sup>182</sup> Mathew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

<sup>183</sup> JAMES Q. WILSON, BUREAUCRACY 295-312 (1989) (control of bureaucratic discretion primarily achieved by executive branch and political parties rather than parliaments and courts).

<sup>184</sup> See RAMSEYER AND NAKAZATO, *supra* note 43, 214.

<sup>185</sup> Cf. Bishop, *supra* note 179. Bishop does not view the use of courts as creating its own agency cost problems, although he does suggest that administrative law rules are generally oriented to the needs of courts as monitors rather than those of the rights-holders themselves.

Professional norms of fidelity to law do tend to reduce the agency costs of courts generally. However, in many systems the factors that give rise to agency costs are likely to be the same for courts as for bureaucrats. Civil law judges, including those in Japan and Korea, are typically appointed at a young age and serve in hierarchical structures much like the bureaucrats themselves.<sup>186</sup> (The relatively late age that lawyers pass the difficult bar exam in Korea and Japan makes this less true than in Germany or France. Judges in Japan and Korea are therefore more steeped in legal ideology than are ordinary bureaucrats, but also may have internalized norms of judicial independence that reduce their reliability for politicians.) Much will depend on the particular mechanisms available for controlling judges and bureaucrats.

The attractiveness of administrative law also depends on the structure of politics itself. For example, strong political parties help political leaders because they provide a group of committed persons who can assist in the monitoring and discipline of bureaucrats. They also can provide qualified and motivated personnel to staff the bureaucracy. Parties that govern for an extended period have less need to rely on independent courts as monitors.<sup>187</sup> Where parties are weak, however, they may want to use courts to protect their policy bargain from repeal by later coalitions because they anticipate electoral loss. Principal-agent theory generates the following prediction: parties likely to be in power a long time want minimal procedural rights, parties likely to lose want extensive procedural rights.<sup>188</sup>

### **C. Application**

How does this theory elucidate the evidence from Japan and Korea? Mark Ramseyer and Eric Rasmusen have argued persuasively that Japanese administrative law reflects the interests of the dominant political party, the LDP, which has ruled more or less continuously since 1955. A party such as the LDP, they argue, is likely to develop

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<sup>186</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d. ed., 1985).

<sup>187</sup> Robert Cooter and Tom Ginsburg, *Comparative Judicial Discretion - An Empirical Test Of Economic Models*, 16 INT'L REV. L. ECON. 295, 298 (1996).

<sup>188</sup> See also J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts*, 3 J. LEG. STUD. 655 (1994).

strong collateral controls over bureaucrats and the courts.<sup>189</sup> 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 and allow opposition to interfere with policy. The LDP is likely to have few difficulties monitoring bureaucratic performance, but it will have some and has therefore adopted a modest administrative law regime that interferes with the bureaucracy only at the margins.<sup>190</sup>

Consider the restrictive approach to standing in Japanese administrative law.<sup>191</sup> The administrative law regime allows courts to monitor bureaucratic behavior of individual rights claims and indeed the courts do overturn government action on occasion. However, when it comes to group claims involving many plaintiffs — claims that are by definition more politically salient because they involve more voters — the LDP prefers that the administrative law regime *not* consider them, forcing these groups to come to the politicians to seek intervention with the bureaucracy. When groups must work through the LDP to obtain desired policy outcomes, they cannot mount a broader electoral challenge to LDP rule. In this manner, politicians retain control over the cases that are most salient to them, while delegating the less salient to the courts to resolve.

Ramseyer might have added that a strong party with means of controlling the bureaucracy has no incentive to promote a transparent policymaking process through open rulemaking provisions. It is an axiom of American scholarship on regulation that extensive public access to rulemaking simply opens up another arena of policy struggle at the agency level. Where access to rulemaking is judicially supervised, a third arena opens up, namely the courts. American administrative law has been subject to extensive criticism by scholars on the grounds that the bureaucrats and judges in these alternative arenas impose their own policy preferences. All of these alternative arenas divert rents from politicians. By failing to include rulemaking provisions, the Japanese

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<sup>189</sup> See, e.g., J. Mark Ramseyer and Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: the Evidence from Japan*, 13 J. L. ECON. & ORG. 259 (1997).

<sup>190</sup> Courts in Japan are characterized by Ramseyer as reliable, but of course agency costs are likely to be greater than zero.

Administrative Procedure Law maintained a system that was serving the political interests of the LDP.

The decision to allow review by generalized monitors in the form of ordinary courts also reflects the interests of politicians. Generalized judges by definition are not encouraged to develop special expertise.<sup>192</sup> However, they have the offsetting virtue that they can impose consistent rules on all parties whether private or public. By doing so, they advance a notion of the rule of law influential in the common law world.<sup>193</sup> In Japan, legal theory provides ordinary judges with no such ideology. Nor can ordinary judges develop expertise in constraining agencies as might, for example, United States Federal Judges on the D.C. Circuit, because Japanese judges are rotated among various posts in a system that allows political influence.<sup>194</sup> Faced with information imbalances vis-a-vis the agencies, and imbued with continental public-law ideology, Japanese courts of general jurisdiction produce less review.

Contrast this story with the recent reforms in Korea. For many years, the Korean political system concentrated a great deal of power in the single individual who occupied the Presidency.<sup>195</sup> Under authoritarian governments, Presidents would not hesitate to discipline bureaucrats or judges that were not loyal to them. Following the creation of the Second and Third Republics in 1960 and 1961, for example, Presidents fired large numbers of bureaucrats.<sup>196</sup> The creation of the Fourth Republic in 1973 was prompted by an adverse decision from the Supreme Court, and the new Constitution allowed the President to replace judges who had voted against his policies with other, more compliant

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<sup>191</sup> The following relies on RAMSEYER AND NAKAZATO, *supra* note 43, at 216-17.

<sup>192</sup> Harold Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991).

<sup>193</sup> ALFRED DICEY, *THE LAW OF THE CONSTITUTION* (5th ed., 1897).

<sup>194</sup> Ramseyer and Rasmussen, *supra* note 189.

<sup>195</sup> ROOT, *supra* note 67, at 18-31 (1996); AMSDEN, *supra* note 2.

<sup>196</sup> Chi, *supra* note 82.

judges.<sup>197</sup> The creation of the Fifth Republic in 1980 was followed by a purge of some 18,000 bureaucrats.<sup>198</sup>

With increasing democratization after 1987, however, the power of the President has weakened.<sup>199</sup> Constitutional amendments limited the President to a single term, shortening the time horizon for any occupant of the office and encouraging bureaucrats to delay implementation of any policies they do not favor. Increased pressure for civil rights meant that certain tools of the Presidents for controlling dissent were no longer available. Although Presidents may have wanted to purge the bureaucracy wholesale, the bureaucrats now enjoyed rights like everyone else. Courts became the locus of contesting whether bureaucrats could be fired.<sup>200</sup> Unable to launch broad purges and knowing that they had only five years in office, Korean Presidents faced increasing difficulties monitoring the agents that they had not selected, and agency costs grew.

Furthermore, demands on the system increased with political liberalization. During the “high-growth” period, the business-bureaucracy coalition monopolized economic policy. As liberalization proceeded, other groups — labor, NGOs, academics and environmental groups — sought to be included in the policy process. More complicated policy management raised pressure for political monitoring of agencies.

Korean politicians faced a more difficult set of structural problems than the LDP in Japan. Not only was executive power weakening with democracy, making traditional mechanisms of bureaucratic control difficult to exercise, but the option of relying on political party personnel as monitors was unavailable. Korean political parties have been notoriously weak, functioning as personalistic groupings around the central figures rather

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<sup>197</sup> DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* 185-86 (1990).

<sup>198</sup> Chi, *supra* note 82; *but see* STEINBERG, *supra* note 19, at 62 (5000 fired).

<sup>199</sup> SUNG-DEUK HAHM AND L. CHRISTOPHER PLEIN: *AFTER DEVELOPMENT: THE TRANSFORMATION OF THE KOREAN PRESIDENCY AND BUREAUCRACY* (1997).

<sup>200</sup> See Shim Jae Hoon, *Pointing Fingers*, FAR EASTERN ECON. REV., Sept. 10, 1998, at 21 (court cases against Kim Young Sam era economic bureaucrats for failing to warn that economic crisis was imminent).



than as integrated ideologically-driven organizations.<sup>201</sup> Since 1987, politics have been dominated by three major figures: Roh Tae Woo, the chosen successor of the military regime; and two former dissidents, Kim Young Sam and Kim Dae-jung. The parties and coalitions surrounding these figures have changed several times and are still weak as institutions.<sup>202</sup> Under such circumstances, players could not rely on political parties to serve as effective monitors.

A complicating factor is that each of the three major political figures enjoyed roughly equivalent support from the public at the outset of reform in 1987. In such a circumstance, no player could predict with accuracy that he was sure to win the all-important office of the Presidency. Many of the institutions of the 1987 Constitution, from the powerful Constitutional Court to the single-term limitation on the Presidency, can be explained as rational choices of players who anticipated losing power at some point in the future. For example, effective constitutional limitations on majority action ensured that electoral losers would have some substantive protections and an alternative forum in which to challenge legislative policy. Imposing a short time horizon on the Presidency maximized the chances of each of the three major figures holding the office eventually. In fact, each of the three has now held the office, with Kim Young Sam and Kim Dae-jung inheriting the bureaucracies of their predecessors, increasing their problems of controlling administration.

In response to these structural problems, Korean politicians reformed the administrative procedure scheme in such a way as to maximize political control over agents. The monitoring function was decentralized, so that cases could be brought by any individual. However, the Korean regime — unlike the long-governing LDP — could not trust increasingly independent judges to serve as faithful agents in disciplining bureaucrats. Therefore, the Korean regime set up new commissions under the cabinet as alternative channels for procedural complaints. These allow the President to exercise

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<sup>201</sup> Chan Wook Park, *Partisan Conflict and Immobilism in the Korean National Assembly: Conditions, Processes, and Outcomes*, in *DEMOCRACY IN KOREA: ITS IDEALS AND REALITIES* (Sang-Yong Choi, ed., 1997).

<sup>202</sup> See, e.g., Shi-yong Chon, *President Kim, Prime Minister Plan to Create Large Ruling Party*, *KOREA HERALD*, July 21, 1999. A fourth major figure is current Prime Minister Kim Jong Pil.

greater control over disparate bureaucratic bodies through his agents, the Minister of Legislation and the Prime Minister. A designated body responsible to the Prime Minister would hardly be attractive to a parliamentary regime such as that of Japan: it would allow the Prime Minister too much power in a party-based system. Indeed, Japanese Prime Ministers are selected as often for perceived weakness as for perceived strength.

As in Japan, the Korean courts have continued to use limited standing rules to preclude group actions.<sup>203</sup> But the government has taken the lead on drafting a bill to allow citizen suits, which, when passed, will force the courts to broaden standing requirements.<sup>204</sup> Why would this occur? Politicians who anticipate staying in power, such as those in Japan, will prefer to force groups of plaintiffs to come to the legislature for help. But those who anticipate losing elections, such as Korean parties, want no such thing, for that might strengthen their opponents. Such politicians face greater agency costs from bureaucrats and may look to private groups to help politicians by subsidizing the costs of monitoring.<sup>205</sup>

The Korean rulemaking story also reflects the interests of politicians with short time horizons. Politicians who believe they are likely to be out of power soon want to ensure as many possible points of entry into the policy process. By forcing the executive branch to listen to outsiders, the politicians insure themselves a point of access when they are out of power. Public access to rulemaking through notice-and-comment-type procedures helps inform interest groups when the administration is trying to overturn previous statutory bargains through subordinate lawmaking, allowing them to mobilize against change. The Korean legal regime takes this one step further by extending notice requirements to proposed legislation itself. The likely outcome of this addition of a veto gate is to make legislation more difficult to pass and to further weaken the legislature.

Information law reflects the same political logic as administrative procedure. For example, Japan has long had laws requiring information disclosure at the local

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<sup>203</sup> Hong Sik Cho, *An Overview of Korean Environmental Law*, 29 ENV'T L. 501, 510-11 (1999).

<sup>204</sup> *Id.* at 511.

<sup>205</sup> Rui J. P. De Figueiredo, Pablo Spiller, and Santiago Urbiztondo, *An Informational Perspective on Administrative Procedures*, 15 J. L. ECON. AND ORG. 283, 286 (1999).

government level.<sup>206</sup> Because the LDP did not control many local governments, local information disclosure laws made sense to help citizens monitor governmental performance. At the national level, the LDP and bureaucracy resisted the Freedom of Information Act and arguably watered it down to reduce its impact, preserving the information monopoly of insiders.<sup>207</sup> In Korea, in contrast, shifting coalitions provided incentives to encourage the release of government information. More open information law allows interest groups, the public, and opposition politicians to ensure that the bureaucracy is not renegeing on its statutory commands.

In sum, Japanese politics creates incentives for a continuation of a closed system of administrative law, while Korean politics provides the opposite incentives. Empirical evidence on case filings and success rates indicates that this interpretation has some plausibility. Although recent data are unavailable, it appears that there is much more administrative adjudication in Korea than in Japan. In 1995, for example, there were 7.6 administrative cases per million persons decided by Japanese courts.<sup>208</sup> Korean courts decided 214.9 cases per million persons that same year.<sup>209</sup> This difference cannot be explained in terms of the different role of the state in the economy and society because the two systems were so similar historically. Another possible explanation for this divergent data is that the Japanese state violates citizen rights much less frequently than the Korean. This seems implausible. Nor can it be said that either the Japanese or Koreans are more culturally litigious: both societies have conventionally been seen as valuing consensus and avoiding courts.<sup>210</sup> Rather there must be institutional incentives at work.<sup>211</sup> One such incentive is provided by the greater willingness of Korean courts to

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<sup>206</sup> Efron, *supra* note 108.

<sup>207</sup> *Id.*

<sup>208</sup> ASIAN DEVELOPMENT BANK, *supra* note 8, at 254.

<sup>209</sup> ASIAN DEVELOPMENT BANK, *supra* note 8, at 255.

<sup>210</sup> Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41-72 (Arthur T. Von Mehren, ed. 1963); STEINBERG, *supra* note 19, at 101-02; HAHM, *supra* note 20, at 250.

<sup>211</sup> Compare John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

discipline administrative agents. In 1994 and 1995, for example, the Korean state lost in 36.7% and 33.9% of all adjudicated administrative cases, respectively.<sup>212</sup> In Japan, the corresponding rate in 1995 was a mere 7.8%.<sup>213</sup> Other things being equal, the low success rate of administrative litigants might discourage future filings in Japan.<sup>214</sup>

It would be tempting, but wrong, to conclude from this data that Japanese courts have been more politically reliable to the governing regime. Frequent political change at the top in Korea makes it difficult to determine precisely what the preferences of the sitting President are on many administrative matters, but it is likely that any President would seek to strike many of the decisions issued by his inherited bureaucracy. This is particularly true under President Kim Dae-jung, who has made liberalization a central theme of his regime. In a political transition, courts may actually be serving politicians' interests by striking administrative action with greater frequency.

In this regard, it is uncertain at this time whether the selection of LDP "reformer" Junichiro Koizumi as Prime Minister in mid-2000 will lead to substantial changes in the relationship between the LDP and bureaucracy in Japan. It is worth noting that talk of the urgent need for reform has been a constant theme of discussions of Japanese political economy for the last decade, without dramatic change.<sup>215</sup> Many core features of the political-economic system remain in place.<sup>216</sup> There is no reason to expect a dramatic revolution in the relationship unless and until the political system undergoes fundamental change.

#### IV. IMPLICATIONS

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<sup>212</sup> ASIAN DEVELOPMENT BANK, *supra* note 8, at 256.

<sup>213</sup> ASIAN DEVELOPMENT BANK, *supra* note 8, at 254.

<sup>214</sup> The lower success rate and the smaller number of filings may also reflect greater accuracy on the part of Japanese courts. If Japanese courts are predictable, there is little reason to bring costly suits. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1

(1984).

<sup>215</sup> Aurelia George Mulgan, *Japan: A Setting Sun?* FOREIGN AFFAIRS 40 (2000).

<sup>216</sup> John Haley, *Japanese Law in Transition?* Paper presented at University of Michigan Conference on Japanese Law, April 6-7, 2001.

This foregoing analysis has several implications for Japan and Korea, for the broader prospects of governance reform in Asia, and for the comparative study of administrative law. I treat each in turn.

**A. Implications for Japan and Korea.**

The above analysis suggests that the rates of administrative litigation will continue to diverge. The Japanese administrative procedure regime discourages judicial oversight whereas the Korean regime encourages it. These different approaches are likely to have important downstream effects on the interest-group environment. By limiting group actions, Japanese administrative law prevents the formation of broad-based challenges to LDP rule, and as Frank Upham observed, tends to particularize disputes.<sup>217</sup> The Korean approach will soon allow group actions and, in certain categories of cases, will encourage them. This will make public interest litigation a viable strategy for non-governmental groups.

These structures have important feedback effects. Because litigation is unavailable as an interest group strategy in Japan, the government is not publicly challenged by non-governmental organizations.<sup>218</sup> It becomes more difficult to launch a broad-based challenge to LDP rule. The perpetuation of LDP rule, combined with its influence over judicial careers,<sup>219</sup> in turn discourages the use of courts as monitors. The low-litigation equilibrium is a stable one. In Korea, in contrast, weak political parties and frequent turnover expands bureaucratic discretion and provides incentives to challenge actions before the courts. Any elected party must anticipate that it will soon be out of power and hence values the availability of access to courts to preserve the legislative bargain from repeal at the administrative level. This increases suits by those

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<sup>217</sup> UPHAM, *supra* note 42, at 200-04.

<sup>218</sup> Mason, *supra* note 97, at 196. To be sure other factors are at work. 90% of Japanese NGOs have no tax-exempt status, despite the passage of a non-profit organizations law in March 1998.

<sup>219</sup> Ramseyer and Rasmussen, *supra* note 189.

out of power, making it harder to form a dominant disciplined coalition that would limit access to courts.<sup>220</sup> The high-litigation equilibrium is self-perpetuating.

Administrative litigation is just one field on which this drama is played out in Korea. Constitutional litigation has also increased rapidly in recent years,<sup>221</sup> as have high-profile criminal prosecutions against those associated with former regimes. For example, President Kim Young Sam's son was recently acquitted on corruption charges after a lengthy and well-publicized investigation.<sup>222</sup> Similarly, former Presidents Chun Doo Hwan and Roh Tae Woo were involved in well-publicized trials brought by Kim Young Sam — in apparent violation of the implicit deal that made him President — for their role in the Kwangju massacre and *coup d'état* in 1979.<sup>223</sup> We may expect a greater trend toward the judicialization of politics in Korea.<sup>224</sup> This is not likely to occur in Japan barring major political change. We can expect increasing divergence in these two countries that have heretofore had similar legal developments.

## **B. Implications for Governance Reform in Asia**

The analysis also has implications for the prospects for increased transparency and other reforms in the aftermath of the Asian crisis. The multilateral development banks that are involved in the Asian crisis have shifted emphasis in the past few years from physical infrastructure toward institutional problems involving law and

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<sup>220</sup> Consider for example, the rise and fall of the so-called Democratic Liberal Party formed out of three political parties in 1992. Consciously modeled on the LDP as a grand conservative coalition, the Party failed to gain support in the next election and was subsequently transformed into the Grand National Party.

<sup>221</sup> CONSTITUTIONAL COURT OF KOREA, A BRIEF LOOK AT THE CONSTITUTIONAL JUSTICE IN KOREA (1996); Ahn Kyong Whan, *The Influence of American Constitutionalism on South Korea*, 27 S. ILL. U. L.J. 71 (1998).

<sup>222</sup> See, e.g., *Court finds Kim Young-sam's Son Innocent of Tax Evasion*, KOREA HERALD, Apr. 10, 1999 (describing conviction and subsequent release).

<sup>223</sup> James West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y J. 94 (1997).

<sup>224</sup> On judicialization, see THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal Tate and Thorsten Vallinder, eds., 1995). Evidence for the increasing legalization of Korean society can also be found in increasing litigation rates. See *Korean Courts Burdened by Increasing Cases; Number Grows by 50 Percent Since 1987*, KOREA HERALD, Oct. 1, 1999 (overall caseload up 50% in ten years; administrative litigation increased 90% during the same period).

“governance.”<sup>225</sup> This shift has been echoed in the discourse surrounding the Asian crisis, which has sometimes focused as much on corruption and institutions as on the macroeconomic factors at play.<sup>226</sup>

As we have seen, administrative law has a role to play in providing solutions to problems of non-transparency and corruption. It therefore make sense for proponents of transparency to advocate the reform of administrative law regimes toward broader standing rules, more flexible approaches to justiciability, and greater public involvement in rulemaking. These reforms should not, however, be characterized as merely technical in nature. The administrative law solution is ultimately a political one and cannot be expected to emerge until a political coalition is in place to support it.

This finding has implications for those development agencies involved in structural reform in Asia and elsewhere. The World Bank, for example, is prevented by its charter from interfering in the political affairs of its members and is required to limit its involvement to economic issues.<sup>227</sup> This mandate creates tensions with World Bank involvement in “governance” issues. The Bank has resolved this by characterizing governance as neutral and technical in character.<sup>228</sup> If this characterization is more than simply rhetorical, it dooms efforts to promote reform. Administrative procedures have an undeniably political component as well as important economic effects. Efforts to reform and constrain government require careful attention to the political coalitions at play. For example, simply recommending to the Japanese Government that it adopt a more open

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<sup>225</sup> ASIAN DEVELOPMENT BANK, GOVERNANCE: PROMOTING SOUND DEVELOPMENT MANAGEMENT, Proceedings from a Seminar in Fukuoka, Japan, 10 May 1997; David Trubeck, *Law and Development: Then and Now*, AM. SOC. INT’L L. PROCEEDINGS 223 (1996); Maria Dakolias, *A Strategy for Judicial Reform: the Experience of Latin America*, 36 VA. J. INT’L L. 167 (1995); LAWYERS COMMITTEE FOR HUMAN RIGHTS, HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM 22-25 (1996).

<sup>226</sup> See, e.g., PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS 158 (1999) (critiquing the approach of “blaming the victim”); Enrique R. Carrasco, *Tough Sanctions: The Asian Crisis and the New Colonialism*, CHICAGO TRIBUNE, Jan. 3, 1998; Enrique Carrasco, *Rhetoric, Race and the Asian Financial Crisis*, LOS ANGELES TIMES, Jan. 1, 1998.

<sup>227</sup> Articles of Agreement, Art. IV, Sec. 10.

<sup>228</sup> WORLD BANK, GOVERNANCE--THE WORLD BANK’S EXPERIENCE (1994); see also ROOT, supra note 67.

administrative procedures regime would be futile barring a shift in the underlying incentive structure of Japanese politics.

### **C. Implications for the Study of Comparative Administrative Law**

Just as those who promote development must pay close attention to politics, so should scholars of comparative administrative law. Other things being equal, it is arguable that principal-agent problems are likely to be more severe in the context of a presidential system than in a parliamentary system.<sup>229</sup> This is particularly true in the context of a presidential system like the United States, which balances the presidency with a strong legislature.<sup>230</sup> The United States system sets up the problem of multiple principals, whereby agencies are the site of competition for influence between the President and Congress. In a parliamentary system, by contrast, the chief executive is the head of the majority party in the legislature and there is less tension between the legislative and executive branches. This allows for tighter control over the administration and shifts the focus away from the need to constrain administrative policymaking toward trying to ensure that the rules were properly applied in particular cases.<sup>231</sup>

However, the generalization that agency costs are greater under presidentialism is subject to an important qualification. Basic issues of the party system and regime type must be taken into account. Simply because a system is parliamentary does not mean that the legislature is in the hands of a single dominant party. On the contrary, it could be led by a coalition of parties that are very weak and have their own internal differences on policy issues. This would allow administrators some freedom to exploit differences among the majority coalition and implement their own policy preferences. Similarly, a strong presidency might face fewer internal bargaining problems and be better able to exercise strict control over bureaucrats.

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<sup>229</sup> Pablo Spiller, *Institutions and Commitment*, 5 INDUS. AND CORP. CHANGE 421 (1996).

<sup>230</sup> See, e.g., LOUIS FISHER, *THE POLITICS OF SHARED POWER, CONGRESS AND THE EXECUTIVE* (1998).

<sup>231</sup> Arguably, the absence of strong political accountability in the modern American administrative state is the source of our strong system of legal control of administration.



There is no reason to limit the analysis of principal-agent problems to democratic regimes.<sup>232</sup> Even dictatorships have bureaucracies and need to ensure that they carry out their instructions. It is probable, of course, that principal-agent problems are more severe in a democracy than in a dictatorship because civil servants as well as citizens have rights. Democracies also tend to proscribe the use of violence so the relative costs of using coercion are higher. In other words, the relative price of a coercive substitute for administrative law is lower under dictatorship than democracy so administrative law is likely to become more attractive with democratization.

This is illustrated amply by the analysis presented above. Constitutional structure interacts with regime type and party system to create incentives for politicians to utilize administrative procedures to control bureaucrats. If one considers the comparative task to take into account the three different regimes discussed here, reliance on administrative law was greatest in (presidential) Korea under democratization, next greatest in (parliamentary) Japan, and finally least in (presidential) Korea under autocracy.

One final implication concerns method. Comparative law has been extensively criticized for its lack of a distinctive methodology.<sup>233</sup> Some have called for increasing use of social science methodologies in comparative law, although there is no consensus on the best methods to adopt.<sup>234</sup> The approach used here adopts a falsifiable theory drawn from microeconomics, namely principal-agent theory, to illuminate different paths of legal change among countries with common starting points. The theory has explanatory power for the two cases of administrative procedures reform discussed here; we can use it to generate predictions for other cases. Should these predictions fail, we must reconsider the theory and the implications drawn from it.

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<sup>232</sup> Compare Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567-576 (1993) (providing a unified theory of the state and development applicable over both regime types).

<sup>233</sup> See, e.g., Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEORGE WASH. L. REV. 149 (1998) (reviewing UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997), and YVES DEZALAY AND BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER*).

<sup>234</sup> *Id.*; Ugo Mattei, *An Opportunity not to be Missed: The Future of Comparative Law in the United States*, 46 AM. J. COMP. L. 709 (1998); see also Janet Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19 (1996) (calling for an "emic" approach to comparative law drawing on contemporary interpretive anthropology).

One simple extension is to apply the theory to the Republic of China on Taiwan, the third of the Northeast Asian countries believed to have a “developmental state.”<sup>235</sup> Taiwan passed an Administrative Procedures Law on February 3, 1999, effective in 2000. The scholarly committee that drafted the statute has paid special attention to the Japanese and Korean statutes, for example by including provisions for administrative guidance.<sup>236</sup> Like the Korean and Japanese statutes, the Taiwan act requires administrative agencies to adopt standards for disposing of applications<sup>237</sup> and establishes hearing procedures.<sup>238</sup> Appeals are originally to the superior authority of the agency concerned, and only after a final internal disposition can litigation be brought.<sup>239</sup> Agencies must provide reasons for adverse dispositions.<sup>240</sup> The Act provides a default regime that information will be available,<sup>241</sup> but there are some exceptions for agencies to withhold information.<sup>242</sup>

Along several dimensions, the Taiwanese Law lies somewhere between the Korean and Japanese statutes. In terms of group standing, for example, the Taiwan Law provides standing to associations.<sup>243</sup> It also requires agencies to preannounce administrative rules in a government journal, giving the name of the agency, the draft text

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<sup>235</sup> WADE, *supra* note 2.

<sup>236</sup> Arts. 165-67; *see also* Kodderitsch, *supra* note 7, at 127. The provisions on administrative guidance, like those in the Japanese statute, requires guidance in writing if so requested by the party. The agency is required to refrain from abusing the guidance process and cannot take collateral action against a party that refuses to comply with the guidance.

<sup>237</sup> Arts. 34-35.

<sup>238</sup> Arts. 54-66.

<sup>239</sup> Art. 92.

<sup>240</sup> Art. 96.

<sup>241</sup> Arts. 44-47.

<sup>242</sup> Art. 46. The exceptions include internal deliberative materials of the government, documents whose publication would threaten national defense, foreign affairs or compromise official secrets, business secrets, third party rights, or pose severe jeopardy to the public interest or public order. Taiwan also has a Freedom of Information Law, passed December 15, 1999.

<sup>243</sup> Art. 21(3). Although this is consistent with the civil procedure code and with longstanding recognition in Chinese law of clan and place associations, it also reflects an interest in allowing broader monitoring of the administration than in Japan.

and a period within which the public can express their views on the law.<sup>244</sup> This is a form of notice-and-comment regime less open than found in Korea, since it does not extend to draft legislation, but more open than under Japan's statute which contains no provisions on rulemaking.

The political regime in Taiwan is a semi-presidential system, with less power concentrated in the presidency than in Korea. Historically, however, Taiwan was governed by a dominant party, the Kuomintang (KMT), that has ruled continuously since its establishment on the mainland in 1947 until 2000 when it lost a Presidential election and parliamentary majority. As a dominant party, we would expect the KMT to be less supportive of an open administrative procedure regime than its weak Korean counterparts. However, if it anticipated the possibility of an electoral loss, it might have wanted to have more open access to administrative procedures to constrain the bureaucracy. Nevertheless, as the richest and arguably strongest party in Taiwan today, it would not want to weaken the bureaucracy to the same extent as Korean politicians with very short-term time horizons. In such circumstances, it is no surprise that the Administrative Procedure Act passed on Taiwan is somewhat more open than that of Japan, but less open than that of Korea.

## CONCLUSION

The study of comparative administrative law is in its infancy. This article has utilized a simple political-economic framework to explain recent reforms in administrative procedure law in Japan and Korea. Specifically, it has sought to illuminate why two systems that were historically very similar have diverged in recent years. It has suggested that political factors are driving the divergence, and the analysis suggests further divergence is likely in the future.

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<sup>244</sup> Art. 154.