

# The Judicial Review System in Japan

## - Legal Ideology of the Supreme Court Judges -

KENJI URATA

### INTRODUCTION

The Constitution of Japan, working from the doctrine of people's sovereignty, stipulates that the Diet shall be the highest organ of state power and shall be the sole lawmaking organ of the State (Article 41). On the other hand, from the position of respect for fundamental human rights, the following two provisions are included:

“This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity” (Paragraph 1, Article 98).

“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act” (Article 81).

It can be said therefore that this Constitution has to meet both the requirements of democracy and those of constitutional government. Shortly after the implementation of this Constitution, a law-professor said, “The new Constitution adopts the regime of a democratic and constitutional state”.<sup>(1)</sup>

Then what constitutional ideology or theoretical ancestry forms the basis of the judicial review system provided for in the

---

This paper was originally presented as a national report to the First World Congress of the International Association of Constitutional Law in Beograd, Yugoslavia, on August 29 to September 2, 1983.

Kenji Urata is Professor of Constitutional Law, School of Law, Waseda University.

Constitution of Japan? Some 30 years after the implementation of this Constitution, the predominant opinion is that the genealogy is to be traced to the constitutionalism that grew from the American system of judicial review. However, the intrinsic meaning, the content and the form of this constitutionalism are still controversial and have yet to be clearly defined in Japan.

Even if so, it cannot be denied that the constitutionalism that provides a basis for the judicial review system is required to meet the criteria of both democracy and constitutional government (rule of law). Then a division of opinion occurs as to which of the two should be given first priority. However, this constitutionalism could combine with a methodology of jurisprudence to give variety to the deployment of legal ideology. In fact, we are able to find a conspicuous variety in the deployment of legal ideology when we see it in the context of the postwar Japanese system of judicial review, which is comparable to that of the United States. This tendency is expressed in the attitude to judicial review of the Japanese Supreme Court Judges. In dealing with the legitimacy of judicial review, firstly the late Dr. Kohtaroh Tanaka, the ex-Chief Judge of the Supreme Court placed ideological emphasis on the "rule of law" from the viewpoint of natural law, then, working from the position of legal positivism, the late Dr. Kisa-buroh Yokota, the ex-Chief Judge of the Supreme Court, proposed that "democracy" should be more emphasized than the "rule of law". Later, considering the situation from the viewpoint of a sort of legal positivism tinged with legal realism, Mr. Jiroh Nakamura, the Judge of the Supreme Court, proposed trying to emphasize the "objectivity of justice".

Concerning the legitimacy of the judicial review system, both the case for natural law and the position of legal positivism have been articulated in Japan as arguments for passivism in judicial review. If this view of judicial review predominates, its passivity may well spread to cover the interpretation of whole Constitution.

In this paper I will review the deployment of the legal ideology which has appeared in essays written by Supreme Court Judges relating to the legitimacy of the judicial review system.<sup>(2)</sup>

## 1. The Case for the Rule of Law and the Philosophy of Natural Law

1. One argument influential in postwar Japan was that it should be the concept of the "Rule of Law" that guides the judicial power in its task.<sup>(3)</sup> This argument was powerful in and around the 1950's. Kohtaroh Tanaka's case for the rule of law can be identified with that thesis. The most typical embodiment of this thinking in his writings is *The Rule of Law and Justice* (1960). Characteristic of the rule of the law concept that Tanaka expounds is perhaps less what links it with English and American law, than something unique in it: it's being based on the idea of natural law.<sup>(4)</sup>

For some 30 years until shortly after Japan's defeat in World War II, Kohtaroh Tanaka was a member of the Law Faculty of the University of Tokyo, in the fields of commercial law and the philosophy of law. Soon after the war, he became Minister of Education. Then, with MacArthur's consent, he became Chief Justice of the Supreme Court in the years of the Yoshida Cabinet. He held this post for some ten years, through the 1950's into the 1960's. No one has ever been Chief Justice longer than he. Shortly before his retirement, Tanaka published a collection of essays entitled *The Rule of Law and Justice*.<sup>(5)</sup> All 20 essays contained in this collection had first appeared while he was Chief Justice.

2. One of the essays, "The Constitution and Problems of the Existing Judicature"<sup>(6)</sup> gives one a good understanding of Tanaka's thinking on the judicial power at that time. This essay is based on statements he made in testimony (September 3, 1958) to the Cabinet Constitution Research Council when it was conducting an inquiry into the "operation in practice of the Constitution of Japan."

In the essay, Tanaka makes the following observations on the "rule of law" and "judicial review":

First, the Constitution of Japan, having given the judiciary an enhanced status and full independence, does not contradict the principles of democracy, it enhances the possibility of its attainment. One of the ideals of a democratic state is the furthering of the well-being of its people. Full attainment of the well-being of

the people can be brought closer if order is maintained in the society by law. In this sense, the rule of law can be regarded as one of the most important characteristics of a democratic society.

Second, it can safely be said that the Supreme Court has never found a law or a regulation enacted under the new Constitution to be unconstitutional. (In what is known as the Cabinet Order 325 case, the Court's majority opinion was that its application had (with ending of the Allied Occupation) become unconstitutional.) Incidentally, it should be noted that Supreme Court decisions on the constitutionality of legislation are no less significant than decisions on its unconstitutionality. In this respect, the Supreme Court has done valuable work in the past ten years. (Judgement has been passed on constitutionality regarding a total of 601 controversial points in connection with matters related to a total of 47 Articles of the Constitution.) A constitutionality ruling coming after a judicial review of legislation enhances the authority of that legislation and reinforces its social acceptance. It is not a matter for regret, but a matter for gratification, that few decisions of "Unconstitutional" have been arrived at in Japan. By its use of the "safety valve" of judicial review, the Supreme Court performs the function of making the "rule of law", which is the foundation of democratic society, a reality. Using this line of argument, Tanaka suggests that the "rule of law" which pins democratic society can be made a reality if the Supreme Court passes constitutionality rulings on acts of the government. What exactly does this mean?

3. Tanaka's concept of the "rule of law" means the rule of natural law. This is the most characteristic feature of his case for the "rule of law."

"The New Constitution and its World View" (*Jurisuto*, January 1, 1955) is an essay<sup>(7)</sup> in which he presents his basic thinking regarding the present Constitution.

In this essay, he emphasizes that "the new Constitution gives bold and frank expression to the ideas of natural law which constitute the foundation of its democracy and pacifism" (Page 13). The idea of natural law runs counter to legal positivism, which

recognizes as sources of law only legislation enacted by the State and other entities or common law. The ideas of natural law as construed by Tanaka are not restricted to the natural law theory or the natural human rights theory of the 17th and 18th centuries, but have existed in the West from Greece and Rome, through the Middle Ages to the present day. In the Orient, the thought of Confucianism, as opposed to that of jurists, shows the same tendency. The concept of natural law was revived after World War II. The Fundamental Law of West Germany, in particular, has provisions originating in the natural law ideas of Christianity.

After giving this "pan-naturalist" exposition, Tanaka gives an explanation of democracy and pacifism as political expressions of natural law (Page 17). Democracy is an expression of the natural law as an internal ideal of political life, and pacifism as its external ideal.

The concept of democracy as an expression of the natural law is a notion hostile to totalitarianism (Page 18). For, in a totalitarian state, the State's power is supreme, and such a state is the most extreme expression of legal positivism. Totalitarian legal positivism is nothing but a front for brutal violence fostered by racial or class-based antagonism.

After these observations, he sets this natural law-based democracy against Marx and Lenin's communism (Page 22). The political philosophy of natural law and the philosophy of law contained in the new Constitution, Tanake says, reject militarism and radical nationalism on ethical and universal grounds, and are also opposed to the political theory of communism based on materialism and the theory of class struggle.

Tanaka then argues that pacifism as an external ideal stands in an essential relationship to democracy (Page 22). If peace is to be brought about in the international community, he says, there must be democracy as among countries, among nations and among individuals. Democracy, in essence, should not be restricted to the country, but should also have an international dimension. The two combine to maintain world peace, he says.

Order is maintained or peace is brought about, according to

Tanaka, by a method that applies essentially either to the State or to international community (Page 23). For the method applies ultimately to people who are essentially identical. While remaking man's mind is, in large measure, a religious, moral or educational task, there must be the "rule of law" in the political sphere. For the peace of society is maintained by law, he says.

It is on this premise that Tanaka expounds, as set out below, a "naturalistic understanding" of the meaning of pacifism as contained in the present Constitution:

"The current debate as to whether or not Article 9 of the Constitution accepts war in self-defence is not a subject for consideration now" (Page 24). Thus, Tanaka avoids any statement of his opinion, circumventing the need to justifying a non-literalist construction of Article 9 of the Constitution. Instead of the letter of the Constitution, he sets forth the spirit of the Constitution (Page 32). He notes "that the spirit of the Constitution will not permit the international community to be in a state of anarchy or to let the weak become the victim of the strong under the rule of violence, that the international community needs the rule of law as much as, or even more than, a national society, which provides coercive power to back up the rule of law in it. Because of Article 9 of the Constitution, Japan must employ other methods to assure its security." In reality, he says, since "the confrontation between two worlds continues to be such that there still is need for collective security," it can be argued that free countries could wage war or use force in self-defence in the form of collective security to oppose "Communist designs for world domination and the promotion for that purpose of violent revolutions in countries."

The ultimate goal of democracy based on natural law is to have countries renounce of limit their sovereign rights and get them organized in a world state (or a world federation) under a world law (Page 34).

4. Tanaka argues that only the law of nature can provide jurisprudential grounds for judicial review.<sup>(8)</sup> No such grounds can be given by legal positivism, he says (Page 271). Any State should,

according to Tanaka, accept principles that transcend it – that is, principles which the State has not laid down, but has just accepted – on the grounds that the principles exist in the constitution that the State has established. These principles will be found to be part of the law of nature.

The basis of judicial review consists in having all the three powers of the State come under the rule of the Constitution. But the violation of the Constitution does not necessarily mean the violation of the law of nature. No law, ordinance, imperial rescript or other act of government can have legal force if it contradicts the provisions of the supreme law of the nation (Paragraph 1 of Article 98 of the Constitution). This is the formal meaning of the Constitution; its substantial meaning as the supreme law lies in its provision for guaranteeing the fundamental human rights (the part of Article 97 of the Constitution). It is not the Constitution itself that makes it the supreme law of a State; it possesses substance and authority from its consonance with another source of law (Page 272). Any constitution has underlying principles, presupposing and, in effect, proclaiming a ‘super-constitution’. The actual constitution translates into positive law the principles of that ‘super-constitution’. This super-constitution is the law of nature (Page 274).

With reference to the principles of natural law that provide grounds for judicial review, Tanaka says that any constitution running counter to natural law is invalid. Such a constitution can come into being, he says, where slavery is recognized, or in a totalitarian state in which people are denied freedom of speech and association, freedom of religion and private ownership of property (Page 272). If a constitutional amendment were enacted in Japan (counter to natural law), the court would subject them to judicial review, as long as the Constitution was in force, and declare them invalid. The traditional doctrine of the natural law that any positive law violating natural law is invalid would apply (Page 274). (Page 272). If a constitutional amendment were enacted in Japan, judicial review authority and the natural law as follows:

The common law that is closely linked with Britain’s “rule of

law” concept is permeated by natural law.<sup>(9)</sup> The keynote of the American idea of law was formed by an idea of natural law that was inseparable from the common law. For example, judgment as to the reasonableness of acts of legislation and administration, as presented by precedents of the “due process of law” referred to in the Fourteenth Amendment of the United States Constitution, can only be exercised under the natural law, which is a superior law.

Only if the court has judicial review authority can the Constitution fulfil its function as the “Supreme law of the State”, thus bringing the “rule of law” closer to full attainment (Page 276).

5. Now let us examine the ideology underlying Tanaka’s case for the “rule of law”.

The structure of Tanaka’s case for the “rule of law”, which he connects with the judicial review system, can be summed up as follows: Although the “rule of law,” viewed in the above natural law perspective, points to the “constitution as the supreme law,” it means the rule not of merely a positive constitution, but of a “constitution as natural law.” The principles of natural law embrace the private ownership of property and the freedom of religion, speech and association. Natural law also finds expression in a substantive reasonable procedure in the exercise of the judicial review authority (the exercise of judgment in determining the presence of reasonableness). But, on the other hand, he emphasizes that the spirit of a constitution based on natural law requires the rule of law to be backed up with enforcing power.

The “rule of law,” in the sense used so far, he says, only comes about after governmental acts of legislation and administration have actually been put under court review and found to be constitutional.

Now it can be argued that, in his case for the “rule of law,” he asserts on personal version of natural law and actually does little more than “constitutionalize” Japan’s existing positive law and that it is in this sense that this case links up with his case for de-



mocracy.

6. The Chief Justice of the Supreme Court in office during the 1950's, thus, tried to base its judicial review authority on ideological grounds that conformed to the jurisprudence of his own version of natural law. In a way, this was to meet what he saw as the needs of the times.

First, it was to meet needs of the anti-communist camp at a particular stage in world history. "A remarkable revival of the natural law ideology occurs when there is a concrete historical situation that is complex and transitional," the scholar of philosophy of law says. After World War II, "the social and political situation assumed complex proportions as the world split up into the capitalist and the socialist systems, with the latter succeeding in both expanding geographically and increasing its influence. The issue was not only an ideological reflection of internal contradiction in the complex capitalist society, but also related to the search for a new ideological weapon for its struggle with the socialist world."<sup>(10)</sup> This was where the "rule of law" was found to have a political role as symbolic of the West.<sup>(11)</sup>

Second, during the Occupation period and shortly after the conclusion of the San Francisco Peace Treaty, because of a sense of the potential instability of Japan's political structure, rule by a government, of whatever colour, it was felt, to be backed up with a compelling legal philosophy.

The decade of the 1950's was a transitional period as it was marked by the East-West cold war that began with the Korean War, and then by the "thaw" that followed the Soviet peaceful co-existence line. In the context of U.S. occupation policy, in this decade the United States, departing from the Allied Potsdam Declaration, took steps to turn Japan into an anti-communist military force. On one hand, measures running counter to political democracy were adopted, such as measures for the suppression of democratic movements and the purge of Communist Party leaders from public life, and measures were taken on the other, for the rearming of Japan as seen in the "creation of a Police Reserve

Force.” These measures were given a legal basis by an Occupation control ordinance, which the Japanese government followed, making domestic laws to facilitate implementation of the measures. After the conclusion of the Peace Treaty, this Occupation control law continued in force under another form. As politics took a course in ways that ran counter to the Constitution of peace and democracy, even some members of the Japanese government and the ruling party had doubts as to the legitimacy of law and regulations.

In these circumstances, the role of the dominant legal ideology was to adapt the function of democracy and pacifism of the New Constitution for anti-communism. An abstract principle, the “dignity of man”, was given the central role in doing so in order to struggle against totalitarianism. The case for “renewed natural law” was part of this attempt. It was argued that in the circumstances prevailing, the system of government then existing in Japan was the guardian of democracy and pacifism. The Occupation policy and the Japan-U.S. security system were upheld on the same grounds. The concept of the “rule of law” and that of judicial review were made to play an ideological role.<sup>(12)</sup>

## 2. The Case for Democracy and Legal Positivism

1. The “rule of law” concept was emphasized as a basis for judicial review. On the other hand, the concept of democracy was set forth vigorously to put a rigid limit on the exercise of the judicial review authority. This case for democracy was used by Kisaburoh Yokota in his *Judicial Review* (1968)<sup>(13)</sup> to urge caution in the conduct of judicial review.

Yokota served on the law faculty of the University of Tokyo as professor of International Law. He was a member of the International Law Commission of the United Nations before succeeding Kohtaroh Tanaka as the Chief Justice of the Supreme Court in October, 1960. He was in that post for nearly six years.<sup>(14)</sup> The above-mentioned book contains the results of his research and thinking in those years. It was written with the aim of learning from American judicial precedents “guiding principles on which to make

judicial reviews prudently.” That is why the author offered no grounds for judicial review, nor did he give any theoretical explanation of its task. In this respect, the focus is on a subject totally different from what Tanaka dealt with in his book. This indicates how Yokota tried, in his capacity as the Chief Justice of the Supreme Court, to meet the needs of the particular decade of the 1960’s.

In this book, *Judicial Review*, Yokota acknowledges that the Japanese authority for judicial review was established following the example of the United States. Pointing out that the exercise of this authority is the exercise of an important authority vis-a-vis the Diet and the Government, he then urges caution because, he says, it might have grave consequences. The first major reason he gives for that is the principle of separation of the three powers, and the second, democracy. He makes this case after the pattern of American theory. But there is little persuasiveness in his observations on the above-mentioned principle of separation of the three powers, as it actually is out of line with United States practice.<sup>(15)</sup>

The case for separation of the three powers disappears in the essays, “Democratic Society and Justice” (*Jurisuto*, January 1, 1971), which he wrote five years after publication of the aforecited book, giving way to the case for democracy as a reason for the argument that judicial review should be made with the utmost prudence.

2. The case for democracy used by Yokota can be summarized as follows:

In the first place, Yokota notes that what is most important, in practice, for democracy in the field of government and law is “government by the people” and “law by the people.”

“Government and law by the people” means, in fact, that the people elect their representatives, who act for them in the conduct of state affairs and in the making of laws. The laws they make are expressions of the will of the people, and so can be identified with the will of the people. When the laws enforced, the will of the people becomes a reality and democracy is attained. The justice

ensures system that the laws are upheld in practice. In this sense, the justice system makes possible the full attainment of democracy.

Therefore, according to Yokota, justice must be served by interpreting and applying the law as it is. It must not be allowed to depart from the provisions of the law and start from external concepts or subjective thinking. Judges must be "speaking laws." This is something particularly important for democracy.

Yokota then argues against those who oppose literal application of the law. In other words, he takes up the question of majority rule.

In the case of objective values, truth can and must be proved. (A case in point is the truths of natural science.) But virtue and beauty cannot be proved. Being right is one form of virtue. Moreover, whether something is right or not cannot be decided by a majority vote.

Some values are objective and others subjective. Anything that people consider to be valuable can become a value (for example, liquor and tobacco). People having something subjectively valuable can be satisfied with it and feel happy. Now, if what the subjective value is to be is decided by majority, the majority of people can attain what they think is right and proper. So far as subjective value is concerned, majority rule is reasonable.

The same can be said for the law. Under majority rule, when considered as subjective values, better laws can be made. Any law decided by the majority of people should be duly respected, with justice administered in such a way as to apply the law as it is.

In the second place, Yokota, after stating his case for democracy, makes observations on judicial review and the way it ought to be carried out. Of course, there could be a majority decision that is obviously wrong. The same is true of laws. But there are two points meriting attention with regard to finding ways to avoid error. The first is that there must be a law that is unmistakably not right. For laws are identical with the will of the people that must be duly respected. The second is that it is to be desired that there should be some objective criteria on which to determine that a law is not right. One such criterion could be the Constitution. The

Constitution is a law established by the will of the people and as a supreme law.

But what Yokota really means to suggest is quite simply this: judicial review must be made with utmost care. Judicial review is, in itself, a matter of grave consequence, as its purpose is to determine whether a law, etc., is against the law and Constitution and, if it is, to declare it null and void. This is also true when seen in the light of the relation between judges and people. Judges are not elected by the people and are not directly responsible to the people. These are the reasons mentioned.

3. The essence of Yokota's case for democracy is majority rule.<sup>(16)</sup> This principle of majority rule is in line with a view of law based on the idea that judges must respect the laws that express the will of the people. He also points out that the judges are not directly responsible to the people. As this view of government insists, in connection with the structure and function of a constitutional government, on responsible government based on representative democracy, it would appear to be linked with a kind of legal positivism. Since legal positivism maintains, from viewing laws as matters of subjective value, that democracy comes about when laws made by the majority of people are respected, it follows that constitutional rule, having man's personal dignity for its ultimate aim, becomes relativized. Emphasizing the rule of law, instead of the rule of positive law under a Constitution, is characteristic of Yokota's version of legal positivism.

The practical functions of majoritarian democracy and legal positivism can take a diversity of forms, depending on its relationship to the political structure of the society in which the courts perform their function. In a political structure in which the majority of society are not only promoters of social progress and human values but also holders of a majority in Parliament, and in which rule is maintained by laws, the judges, who are the "mouths by which to speak the law" will be supporters of the interests and values of the social majority. But that is not the case if the social

majority and the parliamentary majority are not in agreement. In a political structure in which laws expressing the will of the parliamentary majority do not fit in with values determined by the interests of the social majority and by the Constitution, the role of the judge differs from what was mentioned above. Judges serving the rule of law will not protect the interests of the social majority and will oppose constitutional values.

Are we justified in assuming that the postwar Japan had completed the needed postwar reform restructuring in the economic, social, political and cultural sectors of life by the end of the 1950's? If so, this provided the conditions for the high-rate economic growth policy that the Ikeda Cabinet set for Japan to pursue rapidly in the 1960's. As it became clear that the political rule of the parliamentary majority was there to stay, the "political regime of 1955" appeared to be in good shape. Under these political circumstances, as the case for democracy under majority rule and for legal positivism served the interests of capital accumulation and supported the political majority, it was in conformity with the needs of the times as seen by those who ruled.

This case finds vivid expression in a lecture Yokota delivered in the United States. He gave the lecture at Columbia University on August 14, 1963. In this lecture, he pointed out the profound importance he attached to the tendency of the Japanese Supreme Court to refuse to intervene in politics. In this connection, he also noted that, with regard to the Sunagawa Case, involving violation of the Special Criminal Law, the Supreme Court ruled that it was not subject to judicial review because the presence of the United States Forces in Japan could not be regarded as "being obviously in violation of the Constitution." This ruling on the Sunagawa case came shortly before Kohtaroh Tanaka stepped down as Chief Justice. As Yokota gives a positive interpretation of this ruling, one can find in his case for judicial review something almost identical with Tanaka's case, as regards the political and legal functions of judicial review.

### 3. Case for the Legitimacy of Justice

1. Jiroh Nakamura, now a justice of the Supreme Court, published a monograph entitled *On a Objectivity in Justice* in 1970. This is, its introduction states, an analysis and study of the essence of justice, or judicial procedure, based on a series of essays he had written some ten years before — reflections on American and other arguments on the legitimacy of judicial review under a democratic regime.

A clear indication of the author's thinking can be found in the appendix, which contains his lecture entitled "The Judge as an Onlooker."<sup>(17)</sup> In this lecture, he studies the thought and achievements of Holmes as a justice of the Supreme Court of the United States in order to sum up the points at issue before making observations on the relationship between democratic government and judicial review.

What Nakamura suggests in this regard may be summarized as follows:

In the American system of judicial review, there is a confrontation between 'passivists', who do not pass, or as far as possible avoid passing, judgment on the constitutionality of laws and regulation, on one hand, and 'activists', who are very ready to rule against laws and regulations they find to be unconstitutional. To put it briefly, there is a sort of division of political and philosophical opinion regarding how we should see the relationship between democratic government and judicial review. Of course, there are no definite criteria on which to decide objectively which philosophy is right and which application is proper. Moreover, the answer will vary, depending on time and place. For example, there are Holmes, who proposed judicial restraint, and John Marshall, who evolved a creative constitutional interpretation. If a judge is to be a great judge, he needs to have a practice based on a deep insight into the needs of the times. But it is very difficult to gain such an insight and have such a practice. Each judge, who wishes to be a great judge has no choice but to continue striving for himself, seeking to go in the right direction.

The way Nakamura builds up his arguments indicates that he accepts the American system of judicial review as a given. That

is why he does not follow the example of Tanaka, who begins by finding philosophical grounds for the judicial review system. With regard to how judicial review ought to be carried out, however, Nakamura attempted a philosophical consideration of the confrontation between judicial passivism and judicial activism. Nakamura's contention is an extension of the logic that Yokota evolved earlier from the standpoint of judicial passivism. Nakamura tries to adduce new grounds for the approach known as judicial passivism. This also brought him to the question of the "authority of justice." If we are not mistaken in giving this interpretation to the basis of Nakamura's argument, we can say that he examined matters relating to the "legality of justice" and the "justification of justice" as conditions necessary for "justice to be authoritative."

2. The purpose of the present part of this paper is to take up and examine Nakamura's case for the "legitimacy of justice" in the belief that it will shed light on the postwar thinking on the judicature. Before that, however, I think I should give a summary of Nakamura's studies and thinking on "the legality of justice and value judgment." This is, in fact, the subject of the book *On Objectivity in Justice*.

Nakamura is fully aware of the idea of democracy being something putting limits to judicial review. However, he does not choose to examine this question of democracy as a political theory or philosophy. He chooses, instead, to consider the question of how the objective rightness of judicial reviews can be ascertained, whether there are any criteria by which to test any trial for objective rightness and guarantee that it is so.

This question is discussed in "The Establishment, Development and Limitations of Legality" (Part III of the book), in which the author considers what is required if justice is to have rationality — elimination of arbitrariness. As a result, from a viewpoint of independent of conceptual jurisprudence, pragmatic jurisprudence and the case for natural law, he calls for attainment of the rationality of justice. This point of view is based on the assumption that the choice of a conclusion from justice is its essential creative and



legislative action. The idea is that "it is not entirely impossible to effect a compromise and secure harmony between the case for recognizing some objective criterion or law of value (the position of the axiological absolutists, especially that of the advocates of natural law) and the case for denying the existence of any such system of value (the position of the axiological relativists and legal realism jurists) (Pages 43-76).

From the question of "legality," his focus moves shifts to "Justification of Value Judgment in Justice" (Part IV). The "Judgment of value" is the idea that leads the author here to give consideration to the "rationality of the judge's action of choice included in the interpretation and application of laws in the administration of justice."

Pointing out that rational decisions, in this sense, are limited, he goes on to "The Ultimate Choice and the Role of the Courts" (Part V). Acknowledging that there are "cases in which no objective criterion exist on which the judge can fall back for judgment" (p. 115), he poses the question "whether what should be fallen back on for the ultimate choice and decision in this case should be sought in the person who makes the decision or in the letter of the law." Explanations are offered for each of the cases that may arise in this regard which can be classified into (1) cases in which the interpretation and application of laws are in question and (2) cases in which the interpretation and application of the Constitution are in question. (Ibid.) In conclusion, in cases of (1), when expressed schematically, the judges are called on vigorously to develop a creative activity of making law in such a way that the courts will stand in a collaborative relationship to the legislature. For the two are not in confrontation with each other in a real sense because any creation of law by the courts could be nullified by legislative measures at any time if the legislature did not like them (Page 156). On the other hand, cases of (2) should be considered with an awareness that there is here an essential difference in the function of the courts in the interpretation and application of laws (Page 151).

Nakamura then proceeds to "grapple squarely with the es-

sential political function and problems of what is known as the judicial review system.” He maintains that “there is a limit to what the courts can do and to the responsibility that they can accept” (Page 160).

However, from the standpoint he established earlier — the premise of harmony between axiological absolutism and axiological relativism — Nakamura raises the question whether objective criteria for the exercise of the authority for judicial review should be sought in or outside the judges, in the letter of the law or elsewhere the third parties. But he has no concrete conclusion to offer in reply to this question.<sup>(18)</sup>

The point of his argument then shifts from “the objectivity of justice” to “the question of its legitimacy and authority.”

3. What Nakamura emphasizes concerning the legitimacy of justice can be narrowed down to the following two points:

The first is the meaning of the term “the legitimacy of justice.” The legitimacy of justice does not require that decisions be demonstrably right, but that judicial decisions have qualifications or grounds for claiming recognition or acceptance as generally legitimate (Page 194).

The second is what it is that gives grounds for the legitimacy of justice. What supports the legitimacy of justice is the principle of “ruling through the application of a generally objective law” and the principle of impartiality and fairness (Page 200). Since the question of fairness is fundamentally of a formal nature, it is a matter of the appearance of fairness combined with such elements as the general confidence placed in it and the way it is accepted (Page 210).

What I should like to consider here in particular is the first point. For that is the point where the essential character of Nakamura’s case for legitimacy can be found and where there seems to be something closely related to the matter under consideration in the essay.

Nakamura says that the legitimacy of justice “means qualifications and grounds for demanding that the parties in the cases being

tried and the general public beyond them recognize and accept the court's decision." Now, who have the qualifications and grounds required? No clarification is offered on this point. But there is no doubt that they are not "the parties in the cases being tried and the general public beyond them." It can be argued that those things whose recognition and acceptance by the parties and the general public is required include the rights of sovereignty, including governing power. For the function of justice is performed by the courts, an agency of sovereign power.

It is then pointed out that the legitimacy of justice is a concept independent of the legality of justice. While a trial may be legal, it is not always possible to expect its claim to its legitimacy to be accepted by someone outside the legal system concerned. That is why legitimacy is a question outside the legal system, being something to be assessed on the moral plane in a broad sense.

This approach to legitimacy is something that gives a guiding operating principle to those who operate the judicial system and which functions as a principle on the basis of which to approve or criticize its operation.

In connection with this process of forming a conception of the legitimacy of justice and its relation to sovereign power, another factor is found to support the legitimacy of justice. It is the morality of the judges, avoiding suspicion of bias. The point is to ensure that "justice shall have the appearance of fairness."<sup>19</sup> If the former approach seeks to attain acceptance by means of normative arguments, the latter is concerned with a matter of fact and leads to questions about the "authority of justice."

4. Nakamura wrote his book shortly after Kisaburoh Yokota stepped down as Chief Justice. In the United States, precedents and theories were being established based on the judicial positivism of the Warren Court to provide fundamental conditions for democratic government, such as political liberties (voting rights, freedom of expression and personal liberty) and the human rights of the socially weak and minorities (equality in education and social security).

In Japan, by the time when the Japan-U.S. Security Treaty of

1960 was concluded after the Occupation period and the conclusion of the peace treaty, all the court decisions that were necessary for the Supreme Court to give legitimate status to the domestic laws, etc., of the legislature and acts of the government in all the social, economic, political, ideological and military fields had been made.

In the 1960's, in which Japan was in the high-rate economic growth period, capital felt able to let labor derive greater benefits from profits, relaxation was reflected in the government policies, and Japan and United States relations were established on "Reischauer lines". The remarkable thing about the attitude of the Supreme Court was that the Court reinforced its bureaucratic system of intra-Court control (with the Secretary-General fully exercising his authority), on one hand, in ways that made judicial administration follow rigidly precedents that permitted restrictions on political freedom, and boldly changed precedents, on the other hand, with regard to economic freedom and fundamental labor rights, in an attempt to present a jurisprudence of precedents adapted to the times. A case illustrating the first tendency was the decision (1963) in which the confiscation of third-party property was found to be unconstitutional, one illustrating the second was the decision on the Tokyo Central Post Office chapter of the Japan Postal Workers Union (1966) and the decision on the Tokyo Teachers Union (1969). The former was passed when Kisaburoh Yokota was in office as Chief Justice, and the latter when Masatoshi Yokota was in office.

5. The present-day controversy regarding the concept of legitimacy<sup>(20)</sup> reflects today's critical situation. Now let us see Nakamura's case for legitimacy, comparing it with that of American Professor D. Adamany<sup>(21)</sup>, in the light of the following two points.

The first is related to the concept of what Adamany describes as symbolic legitimacy.

Symbolic legitimacy, as understood by Black, Dahl and Bickel<sup>(22)</sup>, would appear to consist in inspiring the people with res-

pect for the judges who exercise legal power and traditional authority, so that the people will accept court decisions and policy-making. The general confidence that the people place in, and the understanding that they show for, the judges in the belief that they administer justice fairly are also the basis of argument that Nakamura uses in his case for the "legitimacy of justice" when he identifies it with qualifications and grounds for demanding that the parties to the cases being tried and the general public accept the Court's decisions.

The idea that the people should respect and place confidence in the judges is precisely what constitutes the symbolism of justice. It must not be overlooked that the ideology which insists on the symbolism of the Constitution and the Supreme Court has been linked with the fetishism of a uniquely American principle of rule ever since 1919, nor the importance of this fact underestimated. It makes a big difference whether the symbolism of the Supreme Court is linked in the old court style with the absolutist concept of ownership or in the new court style with the liberalism of social progress. But it can also be argued that there is little difference between the two when viewed in the sense that both are constitutional corollaries of the American approach to rule.

If considered in terms of the assumption that the essential element of legitimacy should be derived not from respect for the Supreme Court and public confidence, but from popular acceptance of the substance of policies formulated by the courts, the "legitimacy of justice" can be taken as a concept qualitatively different from that of Nakamura. When considered in the light of the existence of the American civil rights movement that supported the Warren Court (1953-69), there is no denying that the legitimacy of the judicial review system can perhaps no longer be supported by appeal to the concept of symbolism alone. Adamany's essay can be taken, in one sense, as pointing out this fact.

The second point I would like to make is related to what Adamany describes as the capability to bestow legitimacy that the Supreme Court may have at the time of realigning elections. <sup>(23)</sup>

In an attempt to attain a new perception of constitutional lit-

igation in the United States, he looked at four of realigning elections over a period of some 130 years. Whatever the merits of this as a means of looking at the development of constitutional phenomena in the United States, it seems to be an indispensable means in the attempt to verify essentially important functions of the judicial review system.<sup>(24)</sup>

Realigning elections coming about as a result of the combination of a change in the voters' loyalty to political parties with the creation of a new majority party are a political phenomenon that has never been known in postwar Japan. What happened in postwar Japan was the establishment of a new majority party "up top," so to speak, through the fusion of conservative parties, with the supporters of those parties remaining faithful to the resulting merger. If so, it is probable Nakamura has good reason for not using Adamany's approach in his case for the "legitimacy" of judicial review. But it can be said that Nakamura, in his case for the "legitimacy of justice," dealt only with symbolic legitimacy, not substantial legitimacy. It is not that a difference arose between Nakamura and Adamany because of any question as to whether there was realigning election or not.

Can we conclude that there will be no phenomenon at all in Japan in the future that may correspond to what Adamany terms "realigning election"? A vast social change is taking place as we are at a turning point now, and the people's political consciousness and values are in a fluid state.

Is it a valid proposition, as a theoretical model for the legitimacy of judicial review, to say that the Supreme Court has no competency for assuring legitimacy in realigning elections? If this proposition can be established, what are the requirements for its being true? This question, which was not within Nakamura's purview, seems to offer a number of suggestions when consideration is given to future questions concerning the legitimacy of judicial review in Japan.

## Conclusion

In Autumn, 1947, when the Supreme Court came into being,

the late Prof. Hajime Kaneko spoke about the jurisprudence of a democratic-constitutional state and its political philosophy. According to Kaneko, the jurisprudence of a democratic-constitutional state gives the court with the right of judicial review authority to rule on acts of government, making justice (the judiciary) in this sense superior to the State, and this is endorsed by appeal to the following concepts.

The first is the concept that natural rights are based on a social contract. The second is the concept of a supreme law and a rigid Constitution, which have enshrined natural rights in positive law. The third is the concept that judicial review is the guardian of the Constitution.

Kaneko also said that the political philosophy of a democratic-constitutional state is harmony, compromise and liberalism. He continued that democracy and liberalism are twins born from the womb of individualism, but are in many ways incompatible. Kaneko said democracy tends to ignore personality in furtherance of the ideal of equality of all individuals and to treat with the individual as only one unit, while liberalism aims at the full development of the personality of each person, and demands freedom in order that this may be attained. However, to confront dictatorship and anarchism, which are the common enemy of democracy and liberalism, they must compromise and be harmonized.

Viewed in the light of this philosophy of a democratic-constitutional state, the characteristics of the judicial ideologies of the judges whose ideas have been treated in this paper, may be summarized as follows.

The first is the idea of a valid legal philosophy on which both the Constitution and judicial review are based. Kohtaroh Tanaka asserted that the Constitution should be considered as a law because it can be said to be the embodiment of a superior Constitution, or the law of nature. The ideology of the law of nature is not limited to what is called the concept of the law of nature, which prevailed in the 17 and 18 centuries; a similar ideology has spread widely everywhere in the world from ancient times till the present through the Middle Ages. It is also said that the concept of the law of na-

ture permeates the common law of Great Britain and the U.S. and the Basic Law (Grundgesetz) of postwar West Germany. Herein we can see the viewpoint of regarding a law a revelation of God or a sacred commandment. Therefore, this view is clearly distinguished from legal positivism, which regards law as the expression of people's will.

Kisaburoh Yokota favors a viewpoint of legal positivism strongly affected by the pure theory of law, saying that law is the expression of the people's will and that legal positivism should be defended. But he maintained that the people's will be embodied by the representatives elected by the people.

As is seen in the above lines, both judges attempted to explain the reason why the Constitution must be regarded as a law. However, their explanations are not sufficient to explain the reason why judicial review came into being. The following propositions must be accepted if their assertions are to be accepted: the Constitution is a rule that a court is able to interpret or apply; judicial interpretation of a standing law by a court amounts to a final one as far as the case in question is concerned. Neither scholar looked in detail at whether these propositions hold good.

It goes without saying that all questions of the legitimacy of judicial review revolve around one fundamental question: Why is Constitution the supreme law? The concept of the law of nature set out by Tanaka was a explicit attempt to argue this question, but Yokota did not attempt any positive demonstration relating to the concept of sovereignty vested in the people, which provides the basis for law as the expression of the will of the people.

Jiroh Nakamura looked at the question of legitimacy of judicial review in a democracy much more theoretically and consciously than Tanaka and Yokota.

This can be clearly seen in his consideration of the question of what elements are necessary for a "legitimate trial" in judicial review.

But he refrains from stating his position on what provides the basis for the Constitution as the supreme law, the concept of the law of nature, or the law of positivism, and only says that it is pos-



sible to harmonize value absolutism (the theory of the law of nature) and value relativism (the theory of legal realism).

The second concept is the idea of a political philosophy of judicial review.

Tanaka defines the essence of democracy, as well as of pacifism, as the concept of the "rule of law".

Democracy, Tanaka says, is a concept opposed to totalitarianism, which does not recognize private ownership and the freedom of belief, and pacifism is a concept totally opposed to world domination by Communism, and Tanaka justifies the use of force in a war of defense and collective security. He also says that to oppose totalitarianism and Communism is to serve the ideal of the rule of law.

The essence of the concept of "democracy" advanced by Yokota is the superiority of the legislature, i.e. the emphasis is put on democracy by majority decision. In his argument, emphasis is placed on the idea of democracy as decision by majority, rather than the fact that democracy is to some extent in opposition to liberalism. Yokota puts emphasis on the concept of procedure (rule by the law adopted by the parliament) rather than the substantial concept of democracy (respect for fundamental human rights).

Nakamura does not deal with the subject of antagonism and compromise of democracy, and liberalism in the Constitution and judicial review. When he speaks about the authority of justice, Nakamura considers that within a certain rule of order, the point at issue is the question of means and methods maintaining and strengthening the authority of justice, rather than the question of the source of its authority. He does not inquire into the strained relationship between democracy and liberalism in the existing rule of order, or the political philosophy of a ruling system.

It is more than 30 years since the present Constitution came into being. The law of nature philosophy emphasizing the concept of the "rule of law" was strongly advanced by Tanaka in the 1950s, and legal positivism stressing the concept of "democracy" was put forward by Yokota in the 1960's. I feel it is jurisprudentially inter-

esting that legal ideologies of the Japanese Constitution and judicial review were propounded one after another, but neither the legal ideology of Tanaka nor that of Yokota really takes account of the United States controversy regarding the concept of the legitimacy of judicial review.

It can be said that Nakamura did consider the legitimacy of judicial review. He did this when he gave grounds for arguments for judicial passivism in Japan. The concept of symbolic legitimacy of justice constitutes part of the discussion of legitimacy. But the matters of the "legality of the justice and its justification", advanced mainly by Nakamura was the question in relation to the concept of the legitimacy of the Constitution and judicial review. But Nakamura, perhaps 'prudently', does not really make his position on jurisprudence and political philosophy clear when he argues about the question of "legitimacy of justice and its justification."

#### NOTES

- (1) Hajime Kaneko, "SHIHOH SEIDO (Judicial System)", in SHIN KEN-POH NO KENKYUH (*Study of New Constitution*) ed. by KOKKA GAK-KAI (1947), p. 229 ff.
- (2) See recently published two books on the Japanese judicial review system written in English: Yoshiyuki Noda, *Introduction to Japanese Law* (University of Tokyo Press, 1976); Hideo Tanaka (ed.), *The Japanese Legal System* — Introductory Cases and Materials (University of Tokyo Press, 1976).
- (3) There has been a controversy between the capitalist and socialist camps, from early in the postwar era, as to the question of the meaning of the "rule of law" in our times. Comparative studies of the "rule of law" based on English and American law and "constitutional government" based on Continental law are also controversial. The literature on the "rule of law" referring to English and American law includes: Kenzo Takayanagi, SHIHOHKEN NO YUH-I (*Judicial Supremacy*) (1948); Masami Itoh, HOH NO SHIHAI (*The Rule of Law*) (1954); Toshimasa Sugimura, HOH NO SHIHAI TO GYOHSEIHOH (*The Rule of Law and Administrative Law*) (1970); and Rikizoh Uchida, "IGIRISU NIOKERU HOH NO SHIHAI NITSUITE — MINSHUSHAKAI NIOKERU SHIHOH NO ARIKATA JOSETSU", ("The 'Rule of Law' in England — An Introduction to the Ways of the Judicature in a Democratic Society") *Hohritsu*

*Jihoh*, Vol. 22, No. 11; Vol. 23, No. 3 and Vol. 24, No. 10.

- (4) The literature on the change in basic thinking on constitutional thinking in Japan from the German theory of constitutional government to the English and American concept of the "rule of law" includes: Nobuyoshi Ashibe, *KENPOH SOSYOH NO RIRON (The Theory of Constitutional Litigation)* (1973), pp. 11–12; Nobunari Ukai, "HOH NO SHIHAI" ("The Rule of Law"), and Satoshi Takada, "KINDAI NIOKERU 'HOH NO SHIHAI' RIRON TO 'HOHCHIKOKKA' RIRON" "The 'Rule of Law' Theory and the 'Constitutional State' Theory in Modern Times" (the last two in the journal of the Japan Public Law Society *Kohhoh Kenkyu*, No. 20).
- (5) A character sketch of Kohtaroh Tanaka is given in Takeo Suzuki, *KOHTAROH TANAKA: HITO TO GYOHSEKI (Kohtaroh Tanaka, the Men and the Achievement)*, (Yuhikaku, 1977), which shows his background and carries a list of his publications.
- (6) Tanaka, *HOH NO SHIHAI TO SAIBAN (The Rule of Law and Justice)* (1960), p. 213 ff.
- (7) *Ibid.*, p. 3 ff.
- (8) Tanaka, "HOH NO SHIHAI TO SHIZENHOH" ("The 'Rule of Law' and Natural Law") *ibid.*, p. 258 ff.
- (9) Here Tanaka quotes A. L. Goodhart, *English and the Moral Law* (1953).
- (10) W. A. Tumanow, *Bürgerliche Rechts-Ideologie* (1975), S. 271.
- (11) Makoto Shimizu, "'HOH NO SHIHAI' NO SHOHKYOKUTEKI-SOKUMEN – KOKUSAIHOHRITSUKAKYOHKAI NO KATSUDOH O MEGUTTE" ("The Negative Aspect of the 'Rule of Law' – In Connection with Activities of the International Commission of Jurists,") *Hohritsu Jihoh*, Vol. 33, No. 4, p. 17 ff; Masayasu Hasegawa, *HOH NO SHIHAI TO A·A·HOHRITSUKAKAIGI – 'HOH NO SHIHAI' OMEGURU KOKUSAI-TEKI JOHKYOH* (The 'Rule of Law' and the Afro-Asian Lawyers' Conference – The International Situation as Regards the 'Rule of Law,') *Hohritsu Jihoh*, Vol. 35, No. 6, p. 37 ff.
- (12) Written criticizing Tanaka is Takasuke Kobayashi, "TANAKA KOHTAROH RON – WAGAKUNINIOKERU TENKEITEKI HOSHU IDEOROHGU NO SHISOH JYOHKYOH" ("Kohtaroh Tanaka – The Thought of a Typical Conservative Ideologue in Japan") *Hohritsu Jihoh*, Vol. 33, No. 1, p. 9 ff. The literature written assessing Tanaka positively includes Shigeru Inoue, "HOHRITANKYUH NO TETSUGAKU (TANAKA KOHTAROH HAKUSHI TSUITOH) "The Philosophy of Jurisprudential Pursuit (In Memory of Dr. Kohtaroh Tanaka)," *Hotetsugaku Nenpoh* (1973), and the same author's "TANAKA KOHTAROH HAKUSHI NO HOHTETSUGAKU" ("Dr. Kohtaroh Tanaka's Philosophy

of Law ('Kohtaroh Tanaka Personality and Achievement')" (1977).

- (13) A "selective bibliography" is carried at the end of YOKOTA SENSEI KANREKIKINEN: GENDAIKOKUSAIHOH NO KADAI (*In Celebration of Dr. Yokota's 60th Birthday: The Task in Modern International Law*) (1958). Books published later include UMI NO KOKUSAIHOH (JYOH) (*The International Law of the Sea*) (Vol. I) (1959), GAIKOH KANKEI NO KOKUSAIHOH (*The International Law of Diplomatic Relations*) (1963) and KOKUSAISHIHOH SAIBAN NO HONSHITSU (*The Essence of International Justice*) (1976).
- (14) Three articles were published in *Horitsu Jihoh*, Vol. 33, No. 1, shortly after Kisaburoh Yokota took office as Chief Justice of the Supreme Court. Takeji Tsunetoh in his article "Kisaburoh Yokota — His Legal Ideology" offers an analysis of the process by which Yokota builds his theory of law on the basis of Kelsen's pure theory of law. The results of Yokota's study of international law are introduced in Hajime Terasawa's "Kisaburoh Yokota — His Study of International Law, Part I — (Yokota's Prewar Research Activities)" and in Yuichi Takano's article on the same subject "Part II — (Yokota's) Postwar Research Activities."
- (15) Nobuyoshi Ashibe, KENPOHSOSHOH NO RIRON (*The Theory of Constitutional Litigation*) (1973), pp. 40–41.
- (16) Tsunetoh in the aforecited article writes on Yokota's thinking on democracy as follows:  

"The doctor's penetrating and convincing criticism of the Emperor system is perhaps a concrete expression of his enthusiasm for the defence of democracy. In making a comprehensive study of that, we need to pay attention to the following two points.

"The first is that, in his case for democracy, Dr. Yokota, unlike Kelsen, bases it not on the idea of freedom, but on the concept of equality (Kisaburoh Yokota, "Democracy and International Law" in MINSHU-SHUGI NO HOHRITSUGENRI (*Democracy and it's Principles of Law*), Yuhhikaku, 1949, p.174). The second is that attention must be paid to the doctor's relatively mechanical view of the majority rule (Ibid., pp. 168–9). At the same time, it is also a fact that the doctor makes little reference to the minority's rights, the need for a compromise between majority and minority and other matters on which Kelsen puts emphasis ("The Principles of International Democratic Politics," *Sekai*, No. 1, January 1946, and "The Logic of a World State," *Sekai*, No. 31, July 1948).
- (17) Jiroh Nakamura, SAIBAN NO KAKKANSEI O MEGUTTE (*On the Objectivity of Justice*) (1970), p. 227 ff.
- (18) Among studies of the judges published with regard to this question is an article by Toshimaro Kajoh, "The Intepretation of Constitutions and Discretion," *Jurisuto*, No. 638, p. 205 (1977). Following the lead of

Dwarking in the matter of how judges ought to interpret the law, the author argues for thinking on the lines of the "theory of fundamental consideration."

- (19) Concerning the "morality of judges in avoiding suspicions of bias," it is argued that they should "refrain from letting outsiders know of a strong commitment to the position of a particular value or from any speech and behavior that may make them suspect such a commitment." This, in itself, is quite natural. But sometimes suggested that, for example, judges' belonging to the "Association of Young Jurists" might, therefore, be something that detracts from the "legitimacy of justice" (Page 207).
- (20) "Legitimacy is the foundation of such governmental power as is exercised both with a consciousness on the government's part that it has a right to govern and with some recognition by the governed of that right." (D. Sternberger, "Legitimacy," *International Encyclopedia of Social Sciences*, (Reprinted Ed., 1972), Vol. 9, p. 244.)

With regard to present-day arguments regarding the legitimacy of rule, one cannot overlook M. Weber, *Wirtschaft und Gesellschaft* (1922) and C. Schmitt, *Legalität und Legitimität* (1932). Weber was the first to discover possibilities of the universal application of the concept of legitimacy. Thus, he was the first to use this term in an effort to classify and compare large numbers of sociological phenomena. In his *Wirtschaft und Gesellschaft* which makes clear the plural character of legitimacy from the phenomena studies, he abstracts faith and submission to provide a basis for legitimacy in any type of legitimate rule. For Weber, legitimacy comes under three pure categories: (1) traditional, (2) charismatic and (3) rational. But little room was left in his system for civil government in the proper sense of the word. Democratic legitimacy can only exist where charismatic legitimacy does not exist.

The question of democratic legitimacy suddenly began to be discussed in the late period of the Weimar Republic. Schmitt's controversial essay, *Legalität und Legitimität* was a contribution to this discussion. The distinction between legality and legitimacy brings us back to the work of the Frenchman, M. de Bonald, but in the view of Schmitt, any State following the pattern of parliamentary legislation can have no real legitimacy at all. For 51 percent of the parliamentary vote is enough to make laws and give legality. The reason why the remaining 49 percent accepts the decisions of the majority has never been adequately explained into question.

Schmitt thought that plebiscite-like elements in the Weimar Constitution were what brought about legitimacy. These elements, he said, would provide a basis for a revised constitution. The Schmitt essay was not

only a reflection of the absence of basic agreement that characterized the Weimar Republic, but was also responsible for reinforcing the absence of agreement.

Neither Weber's version of rationality and legality nor a plebiscite-like legitimacy for a democratic system, which is the Schmitt-style concept, could give an adequate answer to the question as to what it is that forms the nucleus of democratic legitimacy (Sternberger, *Supra*, p. 247).

Although the optimism about the "good life" of West European liberal democracy ruled supreme in the 1950's, it gave way to pessimism in the 1970's. Jurgen Habermas maintains that late capitalism is characterized by a chain of crises connected internally throughout the whole gamut existence (J. Habermas, *Legitimation Crisis*, 1975; *Legitimationsprobleme im Spätkapitalismus*, Suhrkamp Verlag, 3. Aufl., 1975). The political system is no longer capable of solving the tasks imposed on it by late capitalism. The State is in an impossible predicament. This is because the collapse of pluralism has set interest groups pressing conflicting demands on the State as they are no longer able to resolve the conflict of their opposing interests without State intervention. What is termed a "crisis of meaning" is also prevailing. This arises from the fact that the old symbols had in eliciting loyalty to society. This results, according to Habermas, in a serious legitimacy crisis for late capitalism (A. Wolfe, *The Limits of Legitimacy*, 1977, pp. 251-2).

- (21) D. Adamany, "Legitimacy, Realigning Elections, and the Supreme Court," *Wis. L. Rev.*, 1973, p. 790.

While Adamany has a number of essays on political science, his observations on judicial affairs are contained in: "The Party Variable in Judges' Voting: Conceptual Notes and a Case Study," *Am. Pol. Sci. Rev.*, 1969, Vol. 63, p. 57; "Electing State Judges" (written with P. Dubois), *Wis. L. Rev.*, 1976, p. 731.

David Adamany, professor of political science at the University of Madison, Wisconsin, received the degrees of J. D. from Harvard in 1961 and PhD. from the University of Madison, Wisconsin, in 1967.

- (22) Dahl, "Decision-Making In A Democracy: The Supreme Court As A National Policy-Maker," *J. Pub. L.*, 1957, Vol. 6, p. 279; C. Black, *The People and the Court* (1960); A. Bickel, *The Least Dangerous Branch* (1962).
- (23) Adamany, p. 820. The following are events illustrating the characteristics of what Adamany describes as the four political realignment periods:

In 1800, the Republican Thomas Jefferson defeated his Federalist rival to become President. The Republicans won the majority in both houses. In 1803, the Marbury vs. Madison decision was made (Adamany,

pp. 825–827).

In 1828, the Jacksonians (who called themselves the Democrats in 1832) won a Presidential election victory over the Adams-Clay group (known as the Whigs from 1832). This marked the beginning of the epoch of Jacksonian Democracy (Adamany, pp. 827–831).

In 1860, the Republicans defeated the Democrats, electing Lincoln as President. Earlier, in 1857, a decision was given on the Dred Scott case. The Civil War broke out in 1861 (Adamany, pp. 831–836).

In 1932, amid the circumstances of the great depression that prevailed under the Republican administration of President Hoover, Roosevelt of the Democratic Party won the Presidential election. The following year, the early New Deal legislation (Emergency Banking Act, Agricultural Adjustment Act (AAA), National Industrial Recovery Act (NIRA), Tennessee Valley Authority (TVA) Act, etc.) was enacted. In 1935, the Supreme Court found the NIRA to be unconstitutional in a decision that survived till the “constitutional revolution” in 1937 (Adamany, pp. 836–841).

- (24) Being most insistent on the need to consider the legitimacy of Supreme Court policy-making during periods of political realignment does not amount to any flat denial of the meaningfulness of examining the policy-making function of the Supreme Court under various concrete conditions during other periods of time. Among the studies devoted to those periods are: Nobuyoshi Ashibe, *KENPOHSOSHOH NO GENDAITEKITENKAI* (*The Contemporary Deployment of Constitutional Litigation*) (1981), pp. 143–7 and Nariaki Tanaka, *SAIBAN OMEGURU HOH TO SEIJI* (*The Law and Government and Their Relationship to Justice*) (1979).